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JUDICIAL REVIEW OF EXECUTIVE ORDERS' RATIONALITY

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INTRODUCTION

In considering a request to enjoin President Trump's first travel ban,[1] Judge Robart asked the government's lawyer whether the travel ban had a rational basis.[2] Judge Robart's decision restraining the travel ban's implementation, however, did not reach the question of whether the extremely deferential rational basis test governs judicial review of the President's order for reasonableness.[3] On the other hand, the Ninth Circuit's decisions affirming injunctions against the second and third travel bans apply a less deferential level of scrutiny congruent with the arbitrary and capricious test governing review of administrative agency decisions.[4]

The Supreme Court ultimately reversed the decision enjoining the third travel ban without resolving the question of whether a rational basis standard or an arbitrary and capricious standard should govern judicial review of executive orders outside the national security context.[5] The Court addressed the reasonableness of the third travel ban both in the context of statutory claims and a claim of unconstitutional religious discrimination.[6] In the statutory context, the Court did not resolve the standard of review issue, but strongly suggested that it should be extremely deferential because President Trump claimed that national security

[1] *See* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

[2] *See* Videotape of Oral Argument, Washington v. Trump, No. 17-cv-00141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), http://www.uscourts.gov/cameras-courts/state-washington-vs-donald-j-trump-et-al [https://perma.cc/M5RE-F67F] [hereinafter Robart Video].

[3] *Trump*, 2017 WL 462040; *cf.* Trump v. Int'l Refugee Assistance Project, 857 F.3d 554, 596 (4th Cir. 2017) (en banc) (examining reasonableness of order in assessing whether it had purpose of discriminating against religion); Robart Video, *supra* note 2 (showing Judge Robart asking whether order had "factual basis," which rational basis test does not require).

[4] *See* Hawaii v. Trump, 859 F.3d 741, 770-74 (9th Cir. 2017) (per curiam), *vacated as moot* 138 S. Ct. 377 (2017) (questioning President's conclusion that admitting nationals of countries mentioned in second travel ban would be detrimental to U.S. interests); Hawaii v. Trump, 878 F. 3d 662, 692-94 (9th Cir. 2017) (same); *see also* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 302 (4th Cir. 2018) (en banc) (Gregory, J., concurring) (finding nationality based restriction is not "reasonable").

[5] *Cf.* Trump v. Hawaii, 138 S.Ct. 2392, 2420 (2018) (assuming that rational basis standard of review applies to immigration decisions based on national security claims in evaluating religious discrimination claim).

[6] *See id.* at 2409, 2420-22.

justified the executive order.[7] In the context of the religious discrimination claim, the Court applied rational basis review.[8] It relied on the foreign affairs and national security context to justify a departure from the more intensive review usually employed to cases of religious discrimination.[9] Thus, the question of what standard of review to employ in assessing the reasonableness of executive orders outside the national security context remains open.

The standard of review used to assess the reasonableness of government actions varies and often reflects constitutional considerations. In evaluating the reasonableness of legislation, the Court applies the rational basis test. That test authorizes legislatures to make policy decisions without a specific factual basis or rationale, if the Court can imagine a rational basis for the decision.

When judges assess the reasonableness of administrative agency rulemaking, they take a less deferential approach, applying an arbitrary and capricious standard. That standard requires a factual basis and a rationale relating the facts to the policy decision made.

This Article asks whether under the Constitution courts should treat the President like other executive branch actors or like other elected policymakers when he takes a quasi-legislative action through an executive order.[10] It asks whether the minimalist rational basis test should apply to such executive orders, or instead the more demanding arbitrary and capricious standard. In order to make this question manageable, this Article explores this question in the context of executive orders enacted pursuant to legislation, which includes most executive orders.[11]

Perhaps surprisingly, this question has generated almost no commentary and little case law.[12] The Supreme Court has not conducted reasonableness review

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[7] *See id.* at 2409 (finding "searching inquiry" into order's reasonableness inappropriate in context of "international affairs and national security" given breadth of statutory mandate).

[8] *See id.* at 2419-20 (assuming that Court may apply "rational basis review" to order).

[9] *See id.* at 2420 n.5 (justifying its departure from standards governing establishment clause claims because of "national security and foreign affairs context").

[10] I use the term "executive order" to include any written presidential statement that seeks to establish a rule. *See* Am. Fed'n of Gov't Emp. v. Carmen, 669 F.2d 815, 820 n.27 (D.C. Cir. 1981) (authorizing judicial review of presidential checkmark on position paper and indicating that nothing hinges on the form of President's decision); *cf.* Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2045-46 & 2045 nn.64-65 (2015) (confining her study to presidential executive orders, memoranda, proclamations, and describing differences among these).

[11] *See* Allen Scott Kaden, Note, *Judicial Review of Executive Action in Domestic Affairs*, 80 COLUM. L. REV. 1535, 1538 (1980) (noting that "most commonly" presidents rely on statutory authority in issuing executive orders); Steven Ostrow, Note, *Enforcing Executive Orders*, 55 GEO. WASH. REV. 659, 660 (1987) (noting that most executive orders are issued under specific statutory delegations of authority).

[12] *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 431 (1935) (striking down executive order because it lacks findings and stated rationale); *cf.* Letter Carriers v. Austin, 418 U.S. 264, 273

of an executive order in a purely statutory context in decades.[13] The lower courts, which do conduct such reviews, do not address the standard of review question and indeed almost never acknowledge that they assess an executive order's reasonableness when they do so.[14] A rich literature addresses questions about the scope of the President's powers under Article II.[15] But commentators have only recently begun to notice the lack of a comprehensive framework for judicial review of executive orders in the cases undertaking such review.[16] I have found no articles devoted solely to the question of what standard should apply to reasonableness review of executive orders and no article addressing the question at

n.5 (1974) (opining that executive order on federal labor management relations was "reasonable"); Udall v. Tallman, 380 U.S. 1, 23 (1965) (addressing reasonableness of agency's construction of executive order).

[13] *Cf. Trump,* 138 S.Ct. at 2419-2423 (reviewing an executive order under the rational basis test in the context of a constitutional claim of religious discrimination).

[14] *E.g.*, Hawaii v. Trump, 859 F.3d 741, 770-74 (9th Cir. 2017) (per curiam), *vacated as moot* 138 S. Ct. 377 (2017) (examining reasonableness of President's determination that national security concerns justified travel ban, but stating that order has "insufficient finding" that ban was in national interest); Hawaii v. Trump, 878 F.3d 662, 693 (9th Cir. 2017) (questioning reasonableness of third travel ban based on failure to find that nationality alone of those banned poses threat to national security); *see, e.g.*, UAW-Labor Emp't & Training Corp. v. Chao, 325 F.3d 360, 362, 366-67 (D.C. Cir. 2003) (finding President's assertion that posting notices about workers' rights to avoid full participation in unions would enhance productivity "attenuated" but upholding posting requirement anyway); Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136-37 (D.C. Cir. 2002) (declining to evaluate reasonableness of national monument designations when record reveals facts supporting designations and complaint alleges no contrary facts); *Carmen*, 669 F.2d at 821 (agreeing with executive order's conclusion that phasing out free parking for federal employees would help government use its property "economically"); Am. Fed'n of Labor & Cong. of Indus. Org. v. Kahn, 618 F.2d 784, 792-93 (D.C. Cir. 1979) (en banc) (upholding requirement that federal contractors comply with voluntary wage and price guidelines because of reasonableness of conclusion that compliance would lower federal procurement costs); Chamber of Commerce of U.S. v. Napolitano, 648 F.Supp.2d 726, 738 (D. Md. 2009) (finding conclusion that contractors using best employment eligibility systems are more efficient because they avoid immigration enforcement actions to be reasonable); *cf.* Am. Fed'n of Gov't Emp. v. Brown, 481 F. Supp. 711, 716 n.6 (D.D.C. 1979) (characterizing decision to cap federal wages in light of inflation as reasonable).

[15] *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996); HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1999); ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2011); PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS DEMOCRACY (2009); Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

[16] *See* Newland, *supra* note 10, at 2035 (describing judicial review of executive orders as "disordered"); *cf.* Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 542 (2005) (arguing that framework governing claims that agencies have violated statutes should apply to executive orders).

all in the years since the Court exempted presidential action from review under the Administrative Procedure Act ("APA") in 1992.[17]

Prior to the APA, reasonableness review of executive orders took place primarily under the Fifth Amendment's Due Process Clause.[18] With the Supreme Court's rejection of APA review of presidential decisions in 1992, the question of what authority governs the selection of a standard of review to assess allegations of presidential unreasonableness opened up. This Article grounds reasonableness review in the clause of the Constitution requiring the President to "take Care that the Laws be faithfully executed" [19] considered in light of due process, the nondelegation doctrine, and Article III.

This Article does not discuss the question of what sorts of liberty infringements justify departures from the rational basis test.[20] The Court has long held that higher levels of scrutiny apply to laws creating suspect classifications, such as laws discriminating on the basis of race, or burdening fundamental constitutional rights. But this Article asks whether the rational basis test should apply in the same way to executive orders that do not trigger special heightened scrutiny as it would to legislation also not triggering heightened scrutiny.

The standard of review matters given the growth in presidential policymaking. President Trump has relied upon executive orders to affect sweeping policy changes.[21] While many of the challenges to these orders rely on more specific statutory and constitutional arguments, the question of rationality remains potentially relevant to all of his orders and offers a narrower ground for decision than the statutory and constitutional arguments. Furthermore, President Trump is not the first President to use executive orders to distinctively shape policy and he will not be the last. Before joining the Supreme Court, Justice Kagan showed that strong presidential control of the executive branch has become the norm, and very recent scholarship affirms her findings.[22] Given Congressional dys-

[17] Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (exempting President from APA); *cf.* Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 50-61 (1982) (developing suggestions for reasonableness review of executive orders).

[18] *See infra* Part I (discussing *Lochner*-era history of reasonableness review concerning executive orders).

[19] U.S. CONST. art. II, § 3.

[20] *See generally* Richard Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1285-91 (2007) (discussing debate about "preferred rights"); *cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015) (holding that same-sex partners have right to marry under Equal Protection Clause).

[21] *See, e.g.*, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (requiring local police to aid immigration enforcement); Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (requiring agencies to offset cost of new rules by repealing old ones).

[22] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246-48 (2001) (suggesting that President controls executive branch more tightly than many had supposed); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 685 (2016) (stat-

function and the growth of populism excited by the prospects of a strong President with distinctive policy views (such as Donald Trump or Bernie Sanders), we can expect a lot of executive orders in the future, some of which may raise serious questions of reasonableness.[23]

Part I of this Article recovers the forgotten history of reasonableness review of executive orders in the *Lochner* era.[24] The Court read the Due Process Clauses of the Fifth and Fourteenth Amendments as authorizing judicial review of all executive and legislative action for reasonableness. The Court embraced what amounted to arbitrary and capricious review of presidential and sometimes administrative agency decisions both as a method of assessing reasonableness and as a way of avoiding violations of the nondelegation doctrine—which forbids delegation of legislative authority to the executive branch.[25] The Court, however, sometimes reviewed both legislative and administrative agency action in a much more activist fashion to protect economic liberty rights that the Supreme Court read into the Constitution. This "Lochnerian" activist approach always engendered controversy and fell out of favor during the New Deal.

Part II explains that the law regarding reasonableness review split into two branches in the 1930s and 1940s. On the one hand, the Supreme Court articulated a very deferential rational basis test for adjudicating the validity of economic legislation. On the other hand, first the Court and then Congress embraced arbitrary and capricious review of administrative rulemaking. The arbitrary and capricious standard now demands a more robust justification for agency rulemaking than suffices for justifying economic legislation as a matter of substantive due process.

Part III addresses the question this split between reasonableness review of most executive action and of legislation leaves open: which approach to reviewing an executive order's reasonableness best serves constitutional values? This Part argues that arbitrary and capricious review best serves constitutional values. Courts should generally require a factual and reasoned basis for executive orders promulgated pursuant to statutes.

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ing that presidential control of administration has deepened since publication of Kagan's article).

[23] *See* Kagan, *supra* note 22, at 2309-15 (explaining that public expectations for presidential accomplishment combined with congressional dysfunction increase demand for presidential control of policy).

[24] *See* WILLIAM C. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937, at 152 (1998).

[25] *See* JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 4 (1978) (noting that from 1900 to 1930, many state governments created administrative agencies to regulate "banking, bridges, canals, ferries, grain elevators, insurance, railroad freight rates, and warehouses"); WIECEK, *supra* note 24, at 134-35 (explaining that Court used its assumed power to review legislation's reasonableness to review rate setting decisions' reasonableness).

I. REASONABLENESS REVIEW DURING THE *LOCHNER* ERA

The Fifth and Fourteenth Amendments forbid deprivations of life, liberty, or property without due process of law.[26] During the *Lochner* era, the Supreme Court developed a robust *substantive* due process jurisprudence requiring that all deprivations of life, liberty, or property be reasonable. This substantive due process doctrine authorized extensive judicial review of both economic legislation and administrative decisions, including executive orders.

A. *Arbitrary and Capricious Review of Executive Orders*

The Supreme Court affirmed that the arbitrary and capricious test's core elements apply to the President in *Panama Refining Co. v. Ryan*,[27] which adjudicated the validity of an executive order on oil shipments under the National Industrial Recovery Act ("NIRA").[28] The *Panama Refining* Court famously struck down this executive order on the ground that NIRA's "hot oil" provision violated the nondelegation doctrine—which prohibits delegation of legislative authority to the President.[29] But the Court also struck down the executive order because the President, contrary to historical practice, did not provide any findings or rationale to support the order.[30] Furthermore, the Court affirmed that due process of law required a stated rationale and factual findings when the President implemented a statute just as it would if an administrative agency implemented a statute.[31] As explained in the introduction, review of a rationale and factual basis constitutes the core of arbitrary and capricious review.

The Supreme Court also clarified the scope of review of executive orders by stating that a court must reverse a President's order absent such findings.[32] The *Panama Refining* Court justified this by pointing out that statutory limits "would be ineffectual" in limiting the President's discretion absent such findings.[33] Absent some demonstration of compliance with statutory policy, the Court explained, the President would exercise "uncontrolled legislative power."[34] Thus,

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[26] U.S. CONST. amend. V, cl. 3; U.S. CONST. amend. XIV, § 1, cl. 3.

[27] 293 U.S. 388 (1935).

[28] *Id.* at 410-11 (analyzing executive orders under National Industrial Recovery Act of 1933 (NIRA), ch. 90, 48 stat. 195, *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

[29] *See id.* at 406, 414-31 (explaining why "hot oil" provision violates nondelegation doctrine).

[30] *See id.* at 431 (characterizing lack of findings and rationale as "another objection" to executive order's "validity").

[31] *See id.* at 431-33 (affirming that requirements for findings and stated rationale constitute "constitutional principles" applicable to President and administrative agencies alike).

[32] *See id.* at 431 (characterizing presidential findings about "basis for his action" as "necessary to sustain that action").

[33] *See id.*

[34] *See id.* at 431-32.

both due process and the nondelegation doctrine justified arbitrary and capricious review of executive orders. Subsequent nondelegation doctrine cases call the Court's decision striking down NIRA's hot oil provision into doubt, but have not questioned its holding as to the inadequacy of President Roosevelt's justification for his executive order under this provision.[35]

The other major case of this period reviewing executive orders, *Highland v. Russell Car & Snowplow Co.*,[36] also shows that the arbitrary and capricious test applies to executive orders.[37] The Court reviewed the reasonableness of executive orders establishing wartime price controls under the Lever Act.[38] Because the government needed price controls to help prosecute World War I, the Court required a clear showing of arbitrariness.[39] Even though the price controls had defeated an apparently valid breach of contract claim, the *Highland* Court held the executive orders "not so clearly unreasonable and arbitrary as to require them to be held repugnant to the Due Process Clause of the Fifth Amendment."[40] Thus, the *Lochner*-era Court applied reasonableness review focused on whether an action was arbitrary to a wartime executive order.

The most colorful case alleging that a chief executive violated the Constitution's reasonableness requirement because of arbitrary and capricious conduct arose from a complaint against the Texas Railroad Commission, which became, in part, a complaint against the Governor of Texas.[41] The Texas Railroad Commission had limited oil production under a state statute designed to conserve oil.[42] When a federal district court issued a temporary injunction against the order under the Fourteenth Amendment's Due Process Clause, the Governor responded by declaring a "state of insurrection" and directing the Texas National

[35] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (characterizing *Panama Refining* as one of only two cases invalidating statute under nondelegation doctrine and suggesting that doctrine now functions only as aid to statutory construction); *cf.* Dalton v. Specter, 511 U.S. 462, 473 n.5 (1994) (plurality opinion) (incorrectly suggesting that *Panama Refining* only addressed nondelegation doctrine).

[36] 279 U.S. 253 (1929)

[37] *Id.* at 262.

[38] *Id.* at 257-262 (upholding Lever Act and executive order issued under it as "not . . . clearly unreasonable").

[39] *See id.* at 262 (noting President's wide discretion in choosing means of carrying out war and applying "strong presumption of validity" requiring clear showing of arbitrariness).

[40] *Id.* at 258, 262.

[41] *See* Sterling v. Constantin, 287 U.S. 378, 388 (1932) (noting that complaint alleged that Governor's executive orders were "arbitrary and capricious").

[42] *See id.* at 387, 389 (showing that Commission order had limited oil production pursuant to this statute).

Guard to impose stricter limits on oil production than the Commission had required.[43] In *Sterling v. Constantin*,[44] the Supreme Court, finding no evidence of an uprising, sustained the district court's injunction, thereby subjecting the Governor's rate-setting to the effects of the district court's arbitrary and capricious review.[45]

Arbitrary and capricious review of executive orders followed logically from cases reviewing non-presidential actions, since the Court applied the same reasonableness test to all government actions—including presidential, agency, and legislative actions—under the Due Process Clause.[46] Especially when upholding decisions, the *Lochner*-era Court would frequently equate reasonableness with a lack of arbitrariness and capriciousness.[47] In the twentieth century, the Court often identified the arbitrary and capricious test with the idea that an administrative decision must have some evidentiary support in a record—a key requirement of the modern test.[48] And the Court also identified the arbitrary and capricious test with the need to detect administrative evasion of statutes—a need

[43] *See* Constantin v. Smith, 57 F.2d 227, 229 (E.D. Tex. 1932) (stating that Commission had established limit of one hundred sixty-five barrels of oil per well, but that Governor had reduced this limit to one hundred barrels).

[44] 287 U.S. 378 (1932).

[45] *Id*. at 403-04 (finding no "military necessity" and affirming District Court's injunction).

[46] *See* Champion Lumber Co. v. Fisher, 227 U.S. 445, 448-49 (1913) (stating that "arbitrary power resides nowhere in our system of government") (citation omitted); Sam Kalen, *The Death of Administrative Common Law or the Rise of the Administrative Procedure Act*, 68 RUTGERS L. REV. 605, 638 (2016) (noting that Court's progressives reviewed agency decisions for arbitrariness as matter of due process); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1233-34 (1986) (recognizing that early twentieth century case adopted "the modern administrative law position on judicial review"—that court would defer to *nonarbitrary* agency decisions on fact and policy) (emphasis added).

[47] *See* N.Y. & Queens Gas Co. v. McCall, 245 U.S. 345, 348-49 (1917) (endorsing arbitrary or capricious standard from New York administrative law and declaring it generally equivalent to Supreme Court's due process review of agency action); Kan. City S. Ry. Co. v. United States, 231 U.S. 423, 425, 437 (1913) (equating unreasonableness and arbitrariness); Dent v. West Virginia, 129 U.S. 114, 124 (1889) (describing Due Process Clause's purpose as preventing arbitrary and capricious legislation); *see also, e.g.*, Schidinger v. Chicago, 226 U.S. 578, 590 (1913) (ordinance requiring standard bread sizes does not offend due process because it is not "arbitrary or capricious"); Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910) (holding that taxes based on "neither capricious nor arbitrary" distinctions comport with equal protection); American Sugar-Ref. Co. v. Louisiana, 179 U.S. 89, 92 (1900) (recognizing that taxes may not be based on arbitrary or capricious considerations under Equal Protection Clause); New York & N.E. R.R. Co. v. Town of Bristol, 151 U.S. 556, 571 (1894) (holding that order to remove grade crossing does not offend due process because it is not arbitrary and capricious); *cf. In re* Del. R.R. Tax, 85 U.S. 206, 231 (1873) (holding that setting tax rate and valuation method lies within legislative discretion no matter how arbitrary and capricious).

[48] *See* St. Joseph Stockyards v. United States, 298 U.S. 38, 51 (1936) (stating that due process requires evidence and non-arbitrary decisions from legislature's agents); *see, e.g.*,

underlying the *Panama Refining* Court's requirement of an explanation based on statutorily relevant factors.[49] *Panama Refining* referred to the administrative law requirement of findings and held that as a matter of constitutional principle this requirement must apply to the President.[50]

B. *Lochnerism: A More Activist Approach*

The *Lochner*-era Court, however, frequently employed a much more aggressive approach to judicial review of both executive and legislative action for reasonableness. This more aggressive approach became known as "Lochnerism."

The *Lochner* case from which this era takes its name illustrates this more activist approach. In *Lochner v. New York*,[51] the Supreme Court reviewed a New York statute limiting bakers' working hours under the Due Process Clause.[52] While we might think of such legislation today as posing no constitutional issue, the *Lochner* Court had an extremely broad conception of liberty and property interests that might trigger judicial scrutiny. The Court viewed a restriction on work hours as infringing on freedom of contract, since it precludes contracts for longer hours.[53] It saw this restriction on contractual freedom as an intrusion on

Tagg Bros. v. United States, 280 U.S 420, 442 (1930) (upholding order fixing prices for stockyard marketing agencies because some evidence supports it); N. Pac. Ry. Co. v. Dep't of Pub. Works, 268 U.S. 39, 44-45 (1925) (holding ratemaking order arbitrary for lack of supporting evidence under the Due Process Clause); *McCall*, 245 U.S. at 351 (holding ratemaking order not arbitrary and capricious because supported by substantial evidence); *Kansas City S. Ry. Co.*, 231 U.S. at 452 (holding that existence of some evidence supporting administrative decision refutes charge that it is arbitrary); Interstate Commerce Comm'n v. Louisville & Nashville R.R. Co., 227 U.S. 88, 100 (1913) (holding administrative order not arbitrary because supported by "substantial, thought conflicting evidence"); Interstate Commerce Comm'n v. Union Pac. R.R., 222 U.S. 541, 547-50 (1912) (holding that rate cannot be so arbitrary as to contravene evidence, but upholding it because based on "substantial evidence").

[49] *See Kan. City S. Ry. Co.*, 231 U.S. at 440 (suggesting that decision may be arbitrary because it "transcends" authority delegated in statute); *Louisville & Nashville R.R. Co.*, 227 U.S. at 92 (stating that order based on findings enjoying no evidentiary support is "contrary to law"); Ness v. Fisher, 223 U.S. 683, 691 (1912) (holding denial of application for timber on federal land not "arbitrary or capricious" because it was based on reasonable construction of authorizing legislation); *Union Pac. R.R.*, 222 U.S. at 547 (stating that court may invalidate order so unreasonable as to lie substantively outside law); *Dent*, 129 U.S. at 123-24 (equating due process with requirement that decisions must obey "law of the land"). *See generally* Norfolk & W. Ry. Co. v. United States, 287 U.S. 134, 143 (1932) (explaining order would be set aside if "so arbitrary" as to "amount to an abuse of power").

[50] *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 431-33 (1935) (characterizing this requirement as part of nondelegation doctrine).

[51] 198 U.S. 45 (1905).

[52] *Id.* at 52 (explaining that case arises from conviction of bakery owner for requiring employee to work more than sixty hours per week).

[53] *See id.* at 52-53 (noting that even if employee prefers to work more than sixty hours, statute forbids it and therefore interferes with his liberty to contract freely).

the liberty interests of both the bakers and their employers.[54] The *Lochner* Court's expansive view of constitutionally-protected liberty and property interests made substantially all economic legislation subject to judicial review under the Due Process Clauses.[55]

While practically all legislation impinged on liberty or property rights in the Court's view, not all infringements offended the Constitution. The *Lochner* Court struck down limits on bakers' hours because it considered these limits *unreasonable* liberty infringements.[56] By contrast, it had upheld similar limits on miners' hours because it viewed them as reasonable and hence within the State's police power.[57] Thus, legislation's constitutional validity during the *Lochner* era depended on whether judges found it reasonable.[58]

Lochnerian reasonableness review required judges to make legislative policy judgments. In *Lochner* itself, the Court questioned the idea that working long hours harmed bakers' health.[59] It also considered the line drawing inherent in choosing the number of permitted work hours arbitrary.[60]

Reasonableness review also applied to statutes that delegated significant rulemaking authority to administrative agencies. The second most prominent exemplar of Lochnerism, *Adkins v. Children's Hospital*,[61] illustrates how concern about arbitrary administration could influence the Court's conclusion about an underlying statute's reasonableness. In *Adkins*, the Court reviewed a statute authorizing an appointed board to establish minimum wages for women.[62] The *Adkins* Court, relying heavily upon *Lochner,* characterized the law authorizing minimum wages as an arbitrary interference with liberty of contract.[63] It bolstered its reasoning by attacking the line drawing inherent in the board's establishment of minimum wages for various occupations as arbitrary, based on the

[54] *See id.* at 52-54.

[55] *See id.* at 75 (Holmes, J., dissenting) (noting that state laws frequently interfere with "liberty," citing examples of Sunday laws, usury laws, lottery prohibitions, and school laws); *see also* Nebbia v. New York, 291 U.S. 502, 525 (1933) (stating that all regulation "to some extent abridge[s] . . . liberty or affect[s] property").

[56] *See Lochner*, 198 U.S. at 57 (finding New York statute unconstitutional because "there is no reasonable ground for" interfering with liberty of contract in bakers' case).

[57] *See id.* at 54 (discussing prior decision upholding statute limiting miners to eight-hour days) (citing Holden v. Hardy, 169 U.S. 366 (1898)).

[58] Chi., Burlington & Quincy Ry. Co. v. McGuire, 219 U.S. 549, 567 (1911) ("Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.").

[59] *See Lochner*, 198 U.S. at 58-59 (finding no threat to baker's health from long hours).

[60] *See id.* at 62 (finding suggestion that ten hours of work per day is acceptable but ten and a half or eleven hours per day endangers health is "arbitrary").

[61] 261 U.S. 525 (1923).

[62] *See id.* at 539-40 (explaining that federal statute required three-member board to establish minimum wages for women).

[63] *See id.* at 548-50, 554-62.

impossibility of writing rules that fit every circumstance well.[64] Thus, concerns about arbitrary rulemaking influenced decisions about the reasonableness of statutes authorizing rulemaking.

Even when the Court upheld statutes authorizing administrative agencies to regulate the economy, the Court sometimes applied very aggressive reasonableness review to the resulting agency decisions. Many of these more aggressive reviews of executive branch actions arose from proceedings in which administrative agencies regulated the rates that public utilities and railroads could charge. The leading case, *Smyth v. Ames*,[65] features detailed fact-finding by the Supreme Court.[66] The Court also established detailed rules of its own invention for what constituted reasonable rates.[67]

Thus, during the *Lochner* era a unified framework for reasonableness review governed judicial review of both legislation and executive branch decisions. This does not mean the cases proved consistent.[68] As commentators have pointed out, the *Lochner*-era Court frequently upheld legislation and administrative actions by formally applying the same "reasonableness" test, but applying it in a less demanding way.[69] Administrative law cases upholding presidential and agency decisions often did so because they applied an arbitrary and capricious test or something similar, thereby affording the executive branch some deference.

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[64] *See id.* at 555-57 (finding statutory standard impractical because adequate wage for women should vary with her family circumstances and economic habits).

[65] 169 U.S. 466 (1898).

[66] *Id.* at 528-39 (settling factual controversies based on record). *See generally* ROSCOE POUND, ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE, AND SIGNIFICANCE 29 (1942) (explaining general theory under which 19th century courts considered it appropriate to find facts themselves in reviewing agency proceedings).

[67] *See* WIECEK, *supra* note 24, at 135 (noting that Court "arrogated to itself the power to resolve technical accounting issues" at heart of rate setting); Rabin, *supra* note 46, at 1212 (explaining that de novo review of ratemaking "provided ample room for a[n] . . . activist judiciary to narrow . . . administrative discretion"); *see, e.g.*, Bd. of Pub. Util. Comm'rs v. N.Y. Tel., 271 U.S. 23, 28-32 (1926) (insisting that all accounts be balanced over one year to avoid confiscatory rates); Norfolk & W. Ry. Co. v. Conley, 236 U.S. 605, 609-14 (1915) (insisting that reasonable rates must provide for decent profit on each line of business considered separately); *Smyth*, 169 U.S. at 539-47 (requiring reasonableness to be determined based solely on expenses and earnings within regulating state but then suggesting "fair value" of property used test).

[68] *See generally* Rabin, *supra* note 46, at 1234-36 (finding era's jurisprudence "riddled with inconsistency").

[69] *See* WIECEK, *supra* note 24, at 158 (pointing out that *Lochner*-era Court struck down fifty-three of seven hundred and ninety state police power regulations and taxes that came before Court between 1889 and 1918); *cf.* Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453, 466-67 (1998) (stating that Court struck down twice as many rate-setting decisions between 1902 and 1932 as it upheld, but upheld twice as many laws requiring firms to conduct burdensome activities during same period).

Lochnerian reasonableness review of legislation brought the Court into disrepute. Justice Holmes's dissent in *Lochner* charged the Court with ideological decision-making.[70] And many commentators agree that the Court's reasonableness decisions simply enacted the justices' prejudices into law.[71]

In *Adkins*, Justice Holmes argued in dissent that political economy considerations suggested the need for a less activist approach to substantive due process. In particular, he argued that legislative approval of minimum wages for women indicated that "many intelligent persons" had found the law reasonable.[72] In that context, he argued, the Constitution did not preclude enactment of legislation on the ground that a judge might disagree with that judgment.[73] Thus, Holmes's argument to move away from Lochnerism relied heavily on the nature of collective judgment in a legislative process.

II. THE SPLIT: REASONABLENESS REVIEW AND THE NEW DEAL

Holmes's view that a court ought not invalidate legislation based on the judges' disagreement with legislators about a new law's reasonableness eventually won out.[74] While the Court never fully repudiated review of legislation for rationality, it moved to an extremely deferential approach where the inquiry focuses on whether legislation has a "rational basis." In the 1940s, the Court and then Congress (in the APA) repudiated Lochnerian review of administrative decisions by adopting an arbitrary and capricious test for quasi-legislative actions.[75]

This Part begins with an account of the development of the rational basis test and continues with an elaboration of its constitutional justification. It then discusses the development of the arbitrary and capricious test and the constitutional concerns that motivated it. It closes by briefly summarizing the difference between the two tests.

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[70] *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (accusing Court of basing its decision on unpopular economic theory).

[71] *See* Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 881 (2005) (noting that for decades scholars agreed that Lochnerism stemmed from "reactionary judiciary's commitment[s] to . . . laissez faire economics"); Susan Bandes, Erie *and the History of the One True Federalism*, 110 YALE L.J. 829, 833 n.21 (2001) (book review) (noting identification of *Lochner* with problem of judges enacting their prejudices into law).

[72] Adkins v. Children's Hosp., 261 U.S. 525, 568 (1923) (Holmes, J., dissenting) (suggesting that when "so many intelligent persons" found minimum wages for women "effective" and "worth the price," it should be considered reasonable).

[73] *See id.* at 570 (objecting to judges' beliefs about whether law serves "public good" operating as "criterion of constitutionality").

[74] *See, e.g.*, Olsen v. Nebraska, 313 U.S. 236, 246-47 (1941) (declining to consider various policy arguments against price controls as violative of due process and endorsing Holmes's view that Court may not read its policy views into Constitution).

[75] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 n.9 (1983) (rejecting argument that deference owed agency rulemaking under arbitrary and capricious test is equivalent to deference paid legislation under Due Process Clause).

A. *The Rational Basis Test*

The Great Depression made the need for economic legislation acute and the activist *Lochner*-era approach untenable.[76] After the Supreme Court invalidated some New Deal legislation, President Franklin Roosevelt announced a plan to expand the number of Justices on the Court in order to change its politics.[77] This court-packing plan excited intense opposition and Congress did not adopt it, but the Court did change its tune.[78]

In *West Coast Hotel Co. v. Parish*,[79] the New Deal Court repudiated Lochnerism.[80] Confronted with a demand to invalidate a minimum wage law similar to the law struck down in *Adkins*,[81] the Court overruled *Adkins* and upheld the statute.[82]

The *Parish* Court held that liberty of contract did not protect regulated parties from reasonable regulations for the benefit of the community.[83] The Court also repudiated the intensive review for arbitrariness that characterized *Adkins*. The *Adkins* Court had found the statute before it arbitrary in part because it focused on establishing a wage adequate to support the employee without taking into account the value of the services rendered.[84] Even though the statute at issue in *Parish* did not direct the Commission establishing minimum wages under the statute to consider the value of services rendered, the *Parish* Court assumed that the Commission did take that value into account, because its processes provided for employer input.[85] Thus, the Court saw broad public participation in administrative processes as a reason not to employ strict scrutiny of the arbitrariness of a statute based on the difficulties of administrative line drawing. The *Parish* Court, however, went on to assume that sets of facts may exist that would justify not directing a Commission to explicitly consider the value of services rendered. Citing *Adkins*'s dissents, the *Parish* Court noted that increased wages may

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[76] *See* FREEDMAN, *supra* note 25, at 5 (noting that New Deal created many administrative agencies to address "the devastating consequences of a major depression").

[77] STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 132 (2018) (discussing Roosevelt's attempt to pack Court).

[78] *See id.* at 132-33 (discussing bipartisan opposition to court-packing and how Supreme Court helped defeat plan by "reversing" itself to uphold New Deal legislation).

[79] 300 U.S. 379 (1937).

[80] *Id.* at 397.

[81] *See id.* at 386 (noting that statute under review authorizes setting minimum wages for women).

[82] *See id.* at 400 (overruling *Adkins* and upholding Washington's minimum wage statute).

[83] *See id.* at 392 (describing liberty as not providing "immunity from reasonable regulations . . . imposed in the interests of the community") (citation omitted).

[84] *See id.* at 396 (discussing *Adkins*'s reliance on statutory standard's failure to take "the value of services rendered" into account).

[85] *See id.* at 387, 396 (assuming that value of services performed was taken into account because of participation by "representatives of the employers, employees and the public").

simply reduce profits rather than put employers out of business.[86] That assumption would make a failure to consider the value of services rendered reasonable. Thus, the Court assumed that a set of facts would exist that makes the statute reasonable, because an unarticulated rationale could be imagined to support the statute's approach.

The *Parish* Court announced a deferential standard quite different from that employed in cases like *Lochner* and *Adkins*. It held that "the legislature is entitled to its judgment" even if its policy's wisdom is "debatable" and effect "uncertain."[87] Using language now associated with judicial review of administrative agency rulemaking, the Court declared that it would only invalidate legislation if it was "arbitrary or capricious."[88]

One year later, the Court announced the modern "rational basis" test in *United States v. Carolene Products*,[89] declaring that a statute might be found to violate due process only if it lacks a rational basis.[90] In elaborating this rational basis test, the *Carolene Products* Court formalized the approach already employed in *Parish* of assuming the existence of facts tending to support the statute's rationality. The *Carolene Products* Court announced that even in the absence of legislative findings and committee reports showing facts justifying the legislation, "the existence of facts supporting the legislative judgment is to be presumed."[91] Implicitly relying on the political economy reasoning of the Holmes dissent in *Adkins*, the Court stated that it would generally assume that a legislative judgment "rests upon some rational basis within the knowledge and experience of the legislators."[92] Thus, the *Carolene Products* Court accepted the idea that the collective judgment of legislators implies that a factual basis likely supports a legislative enactment.

Note that *Carolene Products* does not repudiate the idea that legislation should have an adequate rationale and factual basis. Instead, it used what one might call a "collective judgment" rationale to justify assuming that the rational basis exists even absent evidence of rationality in the legislative history.

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[86] *See id.* at 397 (quoting Holmes as stating that companies will not employ women when they cannot afford them and Taft as suggesting that statute will usually force companies to part with some of their profits rather than impose great hardship).

[87] *See id.* at 399.

[88] *See id.*; *see also* Nebbia v. New York, 291 U.S. 502, 525 (1933) (holding that due process only demands "that the law shall not be unreasonable, arbitrary, or capricious" and adopts means bearing a substantial relationship to its ends); Tax Comm'rs v. Jackson, 283 U.S. 527, 537 (1930) (finding that if legislative classification is "neither capricious nor arbitrary" it generally does not offend Equal Protection Clause).

[89] 304 U.S. 144 (1937).

[90] *Id.* at 152 (suggesting that law may be invalid if it lacks rational basis).

[91] *See id.*

[92] *See id.*

In *Ferguson v. Skrupa*,[93] the Court linked the Holmes political economy concerns to the constitutional order.[94] It identified the rational basis test with "a return to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, *who are elected to pass laws*."[95] Thus, the *Skrupa* Court articulated two constitutional justifications for the deference to legislators, which the Court embraced in the 1930s when it created the rational basis test. First, legislatures are elected. And second, the federal and state constitutions assign them the right to pass laws. These functional and democratic rationales justify the extreme deference to the collective judgment of legislatures embodied in the rational basis test.[96]

B. *The Constitutional Justification for Deferential Review of Legislation*

Carolene Products and *Skrupa* suggest constitutional rationales for the rational basis test, which governs judicial review of legislation. *Carolene Products,* building on Holmes's *Adkins* dissent, offers the collective judgment rationale—that adoption of law by legislative bodies embodies the judgment of many serious people and indicates that the law is likely rational, regardless of what a judge, with his own specific ideologies or beliefs, may think. *Skrupa* offers a functional rationale—that the constitutional assignment of the legislative function to legislatures requires rational-basis level deference. And finally, *Skrupa* provides a democratic rationale for the rational basis test—that the election of legislators justifies its extremely deferential approach to judicial review of legislation. None of these cases, however, specifically explain why these separation of powers rationales justify a test that assumes the existence of facts and a rational explanation for a policy choice even when a legislative history offers none—the features of rational basis review that distinguish it from arbitrary and capricious review.

1. The Collective Judgment Rationale

The collective judgment rationale offers the most straightforward justification for the rational basis test. The Constitution only allows legislation to pass when the Senate, the House, and the President agree on its desirability, or when a supermajority of both houses overcomes a presidential veto.[97] This ensures that people from various regions of the country with differing outlooks support the legislation.

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[93] 372 U.S. 726 (1962).

[94] *Id.* at 729-30.

[95] *Id.* at 730 (emphasis added).

[96] *Cf.* R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 173 n.8 (1980) (noting that Court has incorporated rational basis review under Equal Protection Clause into Fifth Amendment's Due Process Clause); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (employing similarly deferential approach under Equal Protection Clause).

[97] *See* INS v. Chadha, 462 U.S. 919, 945-46 (1983).

Plausible rationales will likely exist for all legislation adopted by such a large group of diverse representatives. Because legislators may support legislation for varying reasons, agreement on a single rationale may not occur or may not appear in the legislative record.[98] Alternatively, the legislative history may state a rationale, but a different rationale may well have motivated many of the legislators supporting the statute's enactment.[99] The participation of so many people with such broad responsibilities makes passage of legislation very difficult and a demand for a convincing single stated rationale inappropriate.[100]

The collective judgment rationale also helps explain the lack of demand for factual support in the rational basis test. Congress at times does create a legislative record of facts gleaned from expert testimony about the state of the world.[101] But as a collective body, each member may be aware of different facts that might justify a vote for or against legislation, which legislative staff cannot, as a practical matter, assemble in one place. Furthermore, legislation addresses questions so broad that the relevant facts will usually be very incompletely known and might vary across the country.

2. The Functional Rationale

Skrupa's functional rationale helps justify the rational basis test in light of the problems of collective judgment about broad questions in the context of incompletely known facts. The Constitution authorizes national legislatures to make these broad judgments, not judges.[102] In the legislative context, the risk that a judge with the authority to robustly review legislation for reasonableness would substitute her view of reasonable legislation for that of the legislators assigned that job has proven too high. Faced with an incomplete factual record and either no stated or an apparently unpersuasive rationale, a judge, accustomed to the sort of narrow thinking inherent in adjudication, may too readily deem legislation reflecting varying but rational responses to incompletely known facts arbi-

[98] *Cf. Fritz*, 449 U.S. at 180-81 (1980) (Steven, J., concurring) (suggesting that purpose is sometimes unknown because legislation frequently involves compromises among multiple competing purposes).

[99] *Cf. id.* at 179 (majority opinion) (finding plausible justification for legislation, Court concludes the question of whether the legislature actually relied on this justification is "constitutionally irrelevant").

[100] *Cf. id.* (noting that Court does not require Congress to articulate rationale for legislation).

[101] *See* Eric Berger, *When Facts Don't Matter*, BYU L. REV. 525, 532, 537 (2018) (discussing Congress's use of experts in particular pieces of legislation); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislation Fact-Finding*, 84 IND. L.J. 1, 6-13 (2009) (explaining how courts traditionally grant deference to legislative facts including empirical fact-finding conducted by legislators).

[102] Ferguson v. Skrupa, 372 U.S. 726, 729 (1962) ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.").

trary and therefore invalidate it. The rational basis test recognizes that this danger has proven so acute that judges should generally presume the existence of factual support and a reasoned rationale if they can imagine that they exist. The Constitution demands a test robustly guarding against the danger of judicial usurpation, because Article I assigns the legislative function to Congress.[103]

3. The Democratic Rationale

The democratic rationale complements the collective judgment and structural rationales by recognizing that election legitimizes legislators' value choices. The Constitution reflects a delegation of authority from the people to an elected legislature.[104] People will elect legislators who have views congruent with their own. It follows that legislators must remain free to make decisions reflecting their constituents' values.

Minimum wage legislation illustrates the role of value choices, as judgments about minimum wage legislation often vary based on value choices. Supporters of minimum wages tend to value public welfare and opponents tend to value employers' economic liberty.[105] If elected legislators want to short change welfare to perfect economic liberty or limit economic liberty to enhance welfare, the Constitution permits that choice. Legislators may deem some facts that seem important from one perspective unimportant based on a value choice. While the Constitution does not condone wholly irrational legislation, its provisions providing for the election of legislator legitimates legislative value choices. Legislators play a legitimate role in deciding what values to embody in legislation and beliefs about the world necessarily come into play when making legislative judgments under conditions of uncertainty. Robust rationality review carries too great a risk of judges unconsciously substituting their values for those of elected officials in responding to complex legislative judgments often reflecting a compromise among competing values.

C. *Arbitrary and Capricious Review of Administrative Decisions*

In the early 1940s, the Court substituted a more modern administrative law approach for the judicial activism and formalism associated with constitutional reasonableness review under *Smyth*.[106] Disclaiming the intensive review found

[103] U.S. CONST. art. I, § 2; *Ferguson*, 372 U.S. at 729-32 (explaining how courts historically endangered constitutional balance by substituting their judgment for legislators' judgment about particular issue).

[104] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427, 1433-34 (1987) (arguing sovereignty lies with people who delegated powers to government).

[105] Editorial, *The Case for a Higher Minimum Wage*., N.Y. TIMES, Feb. 9, 2014, at SR10 (characterizing minimum wage as "a battlefield in a larger political fight". . . over government's role in the economy, over raw versus regulated capitalism, over corporate power versus public needs.").

[106] *See* Fed. Power Comm'n v. Hope Gas Co., 320 U.S. 591, 602 (1944) (stating that Commission's "expert judgment" carries "presumption of validity"); Fed. Power Comm'n v. Nat.

in *Smyth* and its progeny, these cases interpreted the requirement for reasonable rates as only requiring that non-confiscatory rates not be arbitrary.[107]

In 1946, Congress codified this deferential approach to judicial review in the APA. In particular, it authorized courts to "set aside" agency decisions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[108] The Senate Committee Report accompanying the bill shows that these requirements for judicial review of agency decisions come from the *Lochner* era due process cases, but the report cites cases taking a much more deferential approach than *Smyth*.[109]

The APA's drafters may have intended review based on a minimal record, for the APA only requires a "concise general statement" of a rule's "basis and purpose."[110] The courts, however, have made the arbitrary and capricious standard much more demanding than the rational basis test, partly because the Supreme Court found greater demands necessary to check evasion of the law.[111]

In *Citizens to Preserve Overton Park v. Volpe*,[112] a citizens group contended that the Secretary of Transportation (the "Secretary") evaded a statutory prohibition on creating highways in public parks if there is a "feasible and prudent" alternative.[113] The Secretary approved a highway through Memphis's Overton Park, claiming an authority to make general legislative decisions by balancing

Gas Pipeline, 315 U.S. 575, 586 (1942) ("The Constitution does not bind rate-making bodies to the service of any single formula . . . .").

[107] *Nat. Gas Pipeline*, 315 U.S. at 585-86 (suggesting that rate may not be confiscatory, but that if rate "produces no arbitrary result, our inquiry is at an end").

[108] The Administrative Procedure Act, Pub. L. No. 79-404, ch. 324, §10(e), 60 Stat. 237, 243 (codified at 5 U.S.C. § 706(2)(a)).

[109] S. DOC. NO. 79-248, at 39 (1946) (noting that judicial review provisions reflect courts' decisions under Due Process Clauses); Joanna Gresinger, *Law in Action: The Attorney General Committee on Administrative Procedure*, 20 J. POL'Y & HIST. 379, 406 (2008) (noting that APA did not change standards of judicial review, which were developed under the Due Process Clause); Rabin, *supra* note 46, at 1266 (characterizing APA as articulating agency "due process" by adopting preexisting "common law judicial review principles").

[110] 5 U.S.C. § 553(c) (2012); *see* Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185-86 (1935) (holding that rebuttable presumption of factual support applies to administrative rulemaking, even without factual findings); *cf.* Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look,"* 92 NOTRE DAME L. REV. 331, 333 (2016) (claiming that in 1946 a rule would be upheld if court could "conceive[]" a "plausible . . . set of facts" to justify them).

[111] *See* Rabin, *supra* note 46, at 1302 (characterizing *Citizens to Preserve Overton Park v. Volpe* as abandoning deferential approach to APA review after New Deal); Shapiro & Murphy, *supra* note 110, at 332 (characterizing Supreme Court's "refusal to allow judicial . . . control over rulemaking" as "hilarious," because courts "essentially rewrote the statutory procedure for" administrative rulemaking "in the late 1960s and 70s").

[112] 401 U.S. 402 (1971).

[113] *Id.* at 405-06.

all of the competing considerations.[114] The Court rejected this legislative approach and insisted that the Secretary must protect parkland unless alternative routes pose unique problems.[115]

This interpretation left the Court with a problem of how to structure judicial review to make sure that the Secretary followed the statute's pro-park policy.[116] It insisted on a reasonable basis for concluding that there are no feasible alternative routes.[117] Accordingly, the Court required that the Secretary base his judgment on "relevant factors"—meaning the feasibility factors made relevant by the statute.[118] Since the Court had only a "sketchy" record before it, the Court remanded with instructions that the district court consider the full record before the administrative agency and take testimony from the relevant administrative officials if the record did not reveal the decision's basis.[119] This remand decision pressured agencies to develop a robust record even though the APA's terms do not explicitly require findings or a record.[120] Thus, the need to adequately review potential evasion of the law generated a judicial demand for a record demonstrating that a decision has an adequate factual basis in light of the factors a statute makes relevant to a decision.

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,[121] the leading case on arbitrary and capricious review, even more clearly shows that the Court shaped arbitrary and capricious review to check evasion of the law.[122] The rule reviewed in that case purported to implement the National Traffic and Motor Vehicle Safety Act of 1966 (the "Act").[123] As its name suggests, the Act mandated regulatory actions improving vehicle safety.[124]

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[114] *See id.* at 411 (explaining that Secretary read statute as authorizing "wide-ranging balancing").

[115] *See id.* at 411-13 (explaining that cost considerations always favor destroying parks so statutory presumption to avoid their destruction shows intent to protect them unless "alternative routes present unique problems").

[116] *See* FREEDMAN, *supra* note 25, at 247 (noting that courts created requirement to state basis for decision in part to facilitate judicial review).

[117] *See Overton Park*, 401 U.S. at 416 (tasking reviewing court with responsibility for finding reasonable belief that no feasible alternative exists).

[118] *See id.*

[119] *See id.* at 419-20; 422-23 (Blackmun, J., concurring) (explaining why record before Court was sketchy); *see also* Peter L. Strauss, *Citizens to Preserve Overton Park v. Volpe*, *in* ADMINISTRATIVE LAW STORIES 259, 320 (Peter L. Strauss ed., 2006) (indicating that there was "no record in judicial sense").

[120] *See Overton Park*, 401 U.S. at 417-19.

[121] 463 U.S. 29 (1983).

[122] *Id.* at 34.

[123] 15 U.S.C. §§ 1381-1391 (Supp. IV 1980) (amending 33 U.S.C. § 1381 (1976)).

[124] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 33-34 (1982) (noting that statute's purpose was to reduce deaths from traffic accidents and that it directed Secretary to adopt practical standards furthering that objective).

President Reagan came into office in 1980 and famously supported deregulation.[125] He did not, however, propose to repeal or amend the Act, presumably because the public would not support an open rejection of the statute's policy of making vehicles safer.

Prior to Reagan's election, the Secretary promulgated a rule demanding installation of "passive restraints," such as airbags, in new motor vehicles.[126] President Reagan's new Transportation Secretary, however, rescinded this passive restraint rule.[127]

Since the Act required protection of public safety, an open decision to revoke the passive restraint rule because of general opposition to regulation would have been contrary to law. So, the agency repudiated its prior factual conclusion (under a different administration) that airbags would deliver substantial safety benefits in light of increasing use of automatic seatbelts.[128] The Court held that the agency had failed to provide factual support or a reasoned explanation for this result.[129]

Absent application of the arbitrary and capricious standard, the Court could not have corrected the agency's evasion of the requirement to protect public safety. Since the agency claimed that airbags produced no substantial safety benefit, its ruling complied with the statute on its face. The Court could only detect the failure to protect public safety by looking at a factual record and the adequacy of the agency's proffered explanation for its rescission of the rule demanding passive restraints.

While *State Farm* prohibits a court from substituting its policy views for those of an agency whose work it reviews, it demands some factual support.[130] The *State Farm* Court required an administrative agency to "examine relevant data" and to "articulate" a "rational connection between the facts found" and the agency's policy choice.[131]

Review of an agency's rationale has at least two aims under *State Farm*. First, it seeks to check decisions that should be deemed unreasonable because of a lack of factual support. For that reason, a court may reject an agency decision when the agency fails to consider an important aspect of the problem it resolves.[132] Furthermore, it may reject rules made in the teeth of so much contrary evidence

[125] *See* Mashaw, *supra* note 119, at 334.

[126] *See State Farm*, 463 U.S. at 37 (stating that Secretary Brock Adams promulgated requirement for "passive restraints"—airbags or automatic seatbelts—in 1977).

[127] *Id*. at 38 ("In February 1981, however, Secretary of Transportation Andrew Lewis . . . rescinded the passive restraint requirement . . . .").

[128] *See id*. at 38-39 (discussing agency conclusion that airbags no longer provided "significant safety benefits" because of installation of automatic seatbelts).

[129] *See id*. at 48 (citation omitted).

[130] *See id*. at 43.

[131] *Id*. (citation omitted).

[132] *See id*.

as to make the decision implausible.[133] Second, review of an agency rationale seeks to force the agency to conform to policy choices embodied in the legislation authorizing the agency to act. For this reason, an agency must rely on factors that Congress intended the agency to consider, not on other factors.[134] While courts must defer to agency factual findings enjoying some support in the record even if contrary evidence exists as well, it does require some sort of articulated connection between facts and a policy decision.[135]

Administrative law scholars distinguish arbitrary and capricious review from contrary-to-law review to ensure that agency decisions conform to the substantive law governing their actions under the APA. "Contrary to law" review focuses on statutory interpretation rather than the relationship between the record and the agency's reasoning. This Article focuses on reasonableness review, not on the question of how one figures out whether a statute authorizes an executive order.

Yet, reasonableness review overlaps with review of claims that a decision is contrary to law. This overlap occurs primarily because of the Court's demand that the agency consider only those factors made relevant by the underlying statute and that the rationale for the decision connect it to the statute's policies. Both *State Farm* and *Overton Park* show that the Supreme Court has created new law to address defects in fact finding and reasoning in part to check evasion or misunderstanding of statutory policies.[136]

D. *Contrasting Reasonableness Review of Legislation with that of Agency Decisions*

As should be apparent already, courts provide legislatures with greater deference in reviewing their decisions under the rational basis test than they provide federal agencies in reviewing their decisions under the arbitrary and capricious

[133] *See id.* (characterizing as arbitrary and capricious decisions "counter to the evidence" or "so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

[134] *Id.* (characterizing as arbitrary and capricious decisions made on basis of "factors which Congress ha[d] not intended it to consider"); *accord* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1371 (2016) (emphasizing that both *State Farm* and *Overton Park* demand a focus on factors "*authorizing statute*" makes relevant).

[135] *See* Dickson v. Zurko, 527 U.S. 150, 162 (1999) (describing deference given to agency fact-finding); Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look"*, 92 NOTRE DAME L. REV. 331, 333 (2016) (discussing hard look review's requirement that agencies articulate a connection between policy and findings of fact).

[136] *See* Rabin, *supra* note 46, at 1308-09 (explaining that courts interpreted APA creatively because deference would surrender function of judicial review); Strauss, *supra* note 119, at 322 (suggesting that question of whether Secretary had correctly understood statute emerged as "central" issue in litigation).

test. In both cases, courts have repudiated Lochnerism and sought to avoid substituting judges' policy decisions for those of the bodies making the decisions under review. But the similarity ends there.

In the case of administrative agencies, the courts expect the agencies to consider relevant factual information and therefore indirectly demand a record. The Supreme Court, however, does not require legislatures to consider facts and does not demand a legislative record (even though it has indicated that such a record can be helpful in the context of evaluating legislation's validity under the Commerce Clause).[137] An administrative agency must articulate a rationale linking its review of facts to its decision, but a legislature need do no such thing. If an agency's decision enjoys too little support from the data in the record, the Court will reverse it. If legislative findings and records provide no factual support for a legislative decision, the Court will "presume" the existence of facts supporting the legislative judgment. Finally, if an administrative agency fails to provide a reasoned basis for its decision, the Court will not supply one.[138] If a legislature provides no reasoned basis for its decision, the court will supply one.

Separation of powers concerns lie behind the Court's decisions creating a dichotomy between rational basis review of legislation and arbitrary and capricious review of agency decisions. The Court's concern about judges inappropriately displacing legitimate legislative value choices generates an extremely deferential test, because the Constitution authorizes legislators to make collective legislative decisions reflecting the values of those who elect them. Collective democratic action makes irrationality unlikely and the danger of a court finding irrationality in the messy results of democratic compromise very dangerous to the Constitutional role of legislators. On the other hand, the Court has made a judgment that it needs arbitrary and capricious review—a more intensive standard—to detect executive branch evasion of the law. While Congress ratified the arbitrary and capricious test in the APA, the Supreme Court created it, and then elaborated it, in order to keep the executive branch within legislative bounds and preserve the rule of law. The Court recognizes a judicial responsibility to oversee execution of the law to prevent free-wheeling policy-making unconstrained by legislative decisions.

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[137] *See* William W. Buzbee & Robert A. Shapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 90 (2001) (arguing that legislative records "simply do[] not exist"); *cf.* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 330 (2001) (claiming that Supreme Court has become increasingly aggressive in striking down federal statutes for lack of factual support under First Amendment, section five of Fourteenth Amendment, and Commerce Clause).

[138] *See State Farm Mut. Ins. Co.*, 463 U.S. at 43 (stating that reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given"); Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (prohibiting post-hoc rationalizations for agency rules); SEC v. Chenery Corp., 318 U.S. 80, 94-95 (1943) (requiring that judicial review focus on rationale agency announces when making decision).

III. THE MISSING PIECE: ASSESSING EXECUTIVE ORDERS' REASONABLENESS AFTER THE NEW DEAL

As noted at the outset, the modern substantive due process cases apply to legislation and the APA applies to administrative agencies. This suggests that the question of what standard of review applies to challenges to executive orders might be open.

This Part aims to resolve this standard of review question. It explains how the Court opened up the question by rejecting APA review of executive orders. It next shows that the Constitution nevertheless requires some sort of reasonableness review of statutory executive orders. This Part then asks about the implications of the separation of powers, the nondelegation doctrine, and due process for the appropriate standard of judicial review for executive orders, concluding that the President executes law and that therefore arbitrary and capricious review must govern his statutory executive orders. Finally, this Part addresses likely objections to this conclusion based on concerns about separation of powers and the problematic experience with arbitrary and capricious review of administrative agencies.

A. *Exempting the President from APA Review*

Because the APA applies to "each authority" of the federal government, most scholars writing after the demise of Lochnerism assumed that the APA's arbitrary and capricious standard would apply to executive orders implementing federal statutes.[139] The Supreme Court, however, rejected the application of the APA to the President in *Franklin v. Massachusetts*.[140] The Court reached this result by manufacturing a plain statement rule and applying it to the question of whether the APA governs presidential action.[141] Since Congress did not specifically mention the President in the APA, the Court held that the APA does not apply to the President.[142] The *Franklin* Court employed this skewed method of statutory interpretation to the APA because, in its view, separation of powers requires a presumption against judicial review of presidential decisions.[143]

Franklin, however, did not end judicial review of executive orders. As Jonathan Siegel has explained at length, so-called non-statutory review—review pur-

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[139] *See, e.g.*, Raoul Berger, *Administrative Arbitrariness, A Synthesis*, 78 YALE L.J. 965, 997 (1969) (stating that APA applies to President); Kenneth Culp Davis, *Administrative Arbitrariness–A Postscript*, 114 U. PA. L. REV. 823, 832 (1966) (same).

[140] 505 U.S. 788, 796 (1992) ("We hold that . . . the President is not an agency within the meaning of the [APA].").

[141] *See id.* at 800-01 (requiring "express statement" from Congress before subjecting President to APA review).

[142] *See id.* (holding that "textual silence" is not enough to justify holding President subject to APA review).

[143] *See id.* at 800 (finding "textual silence" insufficient "out of respect for the separation of powers").

suant to the common-law writ of mandamus and other remedial customs predating the APA—remains available.[144] But *Franklin* complicates judicial review by raising questions about whether a litigant can obtain judicial review of executive orders by suing the President directly.[145]

Most actions seeking review of presidential action obtain it by suing somebody charged with carrying out presidential orders, including *Marbury v. Madison*[146] (a suit against the Secretary of State to challenge President Jefferson's decision to withhold Marbury's commission) and *Youngstown Sheet & Tube Co. v. Sawyer*[147] (a suit against the Secretary of Commerce to challenge President Truman's order to seize steel mills).[148] Even APA review remains available as a

[144] *See* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1613 (1997); *see also* WALTER GELLHORN, CLARK BYSE & PETER L. STRAUSS, ADMINISTRATIVE LAW: CASES AND COMMENTS 923-37 (7th ed. 1979) (reviewing problems arising under various nonstatutory review mechanisms).

[145] *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 605 (4th Cir. 2017) (enjoining enforcement of travel ban but refusing to direct order to President himself because Supreme Court has warned that injunction against President should only issue in rare circumstances).

[146] 5 U.S. (1 Cranch) 137 (1803).

[147] 343 U.S. 579 (1952).

[148] *See* Swan v. Clinton, 100 F.3d 973, 979 (D.C. Cir. 1996) (describing cases where a presidential transgression cannot be remedied through order directed at another official as "rare"); *see, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 754 n.36 (1982) (noting that President was not formally named as party in *Youngstown*); *Youngstown*, 343 U.S. at 583, 589 (invalidating executive order and enjoining Secretary of Commerce from enforcing executive order); UAW-Labor Emp't & Training Corp. v. Chao, 325 F. 3d 360, 362 (D.C. Cir. 2003) (suing Secretary of Labor and others to seek review of executive order). In *Marbury*, the references to President Jefferson's involvement in the conduct challenged were oblique, but in context, the case supports the idea that a writ of mandamus lies even to correct presidential legal violations. *Cf.* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 234 (1922) (noting that Jefferson ordered Madison not to deliver Marbury's commission). Although the Court ultimately dismissed the case for lack of jurisdiction, it stated that Marbury has a right to the commission that Secretary of State Madison had not delivered. *See Marbury*, 5 U.S. (1 Cranch) at 173-74 (declaring that Marbury has vested right in his commission and that mandamus lies against Secretary of State to vindicate that right). The *Marbury* Court made it fairly clear that the President's status did not immunize those carrying out his orders from an order that they carry out the law in defiance of the President. *See* Siegel, *supra* note 144, at 1627 (explaining that defendant could not rely on presidential orders as defense for his illegal conduct). Justice Marshall suggested that not even the King of England could violate the rights of his subjects. *See Marbury*, 5 U.S. (1 Cranch) at 165 (stating that King must employ officers to injure his subjects, who remain subject to legal correction). Marshall then explained that the law presumes that the President has not ordered the illegal acts of his subordinates in order to provide a legal remedy for a violation of a legal right. *See id.* at 171. In any event, the President may not extinguish the legal rights of individuals to the law's benefit by executive fiat. *See id.* at 167 (stating that not even President can extinguish officeholder's rights).

remedy against administrative actions carrying out executive orders.[149] Siegel explains that the courts use judicial review of officers' actions to remedy the government's legal violations because of the "remedial imperative"—the requirement that a remedy exist for a rights violation.[150] This imperative, of course, extends to judicial review of claims that an officer acted in violation of a statute.[151] And the district courts have occasionally issued orders to the President.[152]

But a subsequent case reaffirming the unavailability of APA review—*Dalton v. Specter*[153]—signals some Justices' skepticism about reasonableness review of presidential action.[154] This opinion holds that the military base closure statute, under which review was sought, committed base closure decisions to the President's discretion without any policy guidance to ground judicial review.[155] *Dalton* comports with APA precedent holding an action unreviewable when there is

[149] *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 283-87 (4th Cir. 2018) (en banc) (finding that APA review is available to check implementation of travel ban enacted through executive order); *see also* Kendall v. United States, 37 U.S. (1 Pet.) 524, 612-13 (1838) (noting that President's responsibility to "take care that the law be faithfully executed" does not empower him to forbid lower government officials from properly executing law).

[150] *See* Siegel, *supra* note 144, at 1627 (describing "*remedial imperative*" as "need to provide a remedy for every invasion of a right"(emphasis in original)); *see, e.g.*, Ex Parte Young, 209 U.S. 123, 159 (1908) (holding that suit against official for violating Constitution does not offend sovereign immunity, because state official violating Constitution is not acting on behalf of State in its governmental capacity).

[151] *See* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015) (acknowledging long history of nonstatutory review of executive officers' actions); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949) (explaining that suits for official action exceeding powers granted in statute lie notwithstanding sovereign immunity, because actions are *ultra vires*); *Int'l Refugee Assistance Project*, 883 F.3d at 287 (holding that court has "inherent authority" to review executive order); Chamber of Commerce v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (holding that court may review conduct under executive order through action against those executing it); *see also* United States v. Lee, 106 U.S. 196, 220 (1882) (noting that "highest" government officers are "bound to obey" law).

[152] *See* Siegel, *supra* note 144, at 1679.

[153] 511 U.S. 462 (1994).

[154] *Id.* at 470.

[155] *See id.* at 465-66, 477 (plurality opinion) (explaining that statute required President to accept or reject package of base closure recommendations in their entirety and therefore Congress did not intend to authorize judicial review of decision about one single base). Five Justices concurred to emphasize the holding's narrowness. *See id.* at 478-84 (Souter, J., concurring) (explaining why statute expresses intention to preclude judicial review of President's decision to accept list of military bases for closure); *id.* at 477 (Blackmun, J., concurring) (joining concurring opinion because base closure statute precludes judicial review of President's decision).

no law to apply.[156] Some of the broad language in Justice Rehnquist's plurality opinion, however, suggests that reasonableness review of presidential action needs explicit defense.[157] And *Franklin* suggests that the Court imagines that separation of powers concerns argue against robust judicial review of presidential actions.

Commentators agree that non-statutory review has traditionally included reasonableness review.[158] But the writ of mandamus and other forms of action do

[156] *See* Heckler v. Chaney, 470 U.S. 821, 830 (1985) (explaining that administrative actions are only exempt from APA review when there is no law to apply); *Reich*, 74 F.3d at 1331 (interpreting *Dalton* as rejecting judicial review only when President acts under statute that contains "no limitations on the President's exercise of . . . authority").

[157] *See Dalton*, 511 U.S. at 474 (stating that judicial review does not lie "when the statute in question commits the decision to the" President's discretion). Justice Rehnquist's statement cannot mean that all exercises of discretion are unreviewable, but rather must mean that some statutes grant such open-ended authority as to manifest an intention to preclude judicial review. *Cf.* Brief for Administrative Law Professors as Amici Curiae Supporting Petitioner at 9, Ochoa v. Holder, 564 U.S. 1037 (2011) (No. 10-920) (noting that APA's exemption of "action committed to agency discretion by law" from judicial review cannot exempt all actions involving discretion from judicial review because APA authorizes review for "abuse of discretion"). Justice Rehnquist cites a statement in a *Lochner*-era case, *Dakota Central Telephone Co. v. South Dakota* ("*Dakota Central*"), 250 U.S. 163 (1919), that an abuse of discretion claim is unreviewable. *Id.* at 184 (stating that "abuse of discretion" claim is "beyond the reach of judicial power"). Although the *Dakota Central* Court made this statement in the context of a challenge to a presidential decision, the Court justified it by reference to a rule that courts may not correct any alleged abuse of discretion by "legislative or executive departments." *Id.* This broad statement, which is not limited to presidential actions, cannot be taken at face value given the intensity of *Lochner*-era reasonableness review of legislation and administrative actions. The *Dakota Central* Court adjudicated the validity of the federal seizure of a telephone company under a wartime statute authorizing the federal government to take possession of telephone systems if necessary for national security. *See id.* at 181 (quotation omitted) (outlining Congress's joint resolution, 40 Stat. 904, ch. 154). The Court, in essence, read the statute as precluding judicial review. *Cf.* United States v. Bush & Co., 310 U.S. 371, 379 n.5 (1940) (precluding judicial review of some presidential decisions under Tariff Act when it only authorizes review of "questions of law"). The other case Rehnquist cites, *Chicago & Southern Airlines v. Waterman S.S. Corp.* ("*Waterman*"), 333 U.S. 103 (1948), treated presidential decisions to license international air carriers as a political question because of the President's foreign affairs power. *Id.* at 111; *see* Baker v. Carr, 369 U.S. 186, 282-83 (1962) (citing *Waterman* as exemplar of political question doctrine).

[158] 28 U.S.C. § 1361 (2012) (authorizing district courts to issue writs of mandamus to compel "officer or employee of the United States" to perform duty); GELLHORN, BYSE & STRAUSS, *supra* note 144, at 923 (noting that writ of mandamus may check arbitrary or capricious action); Bruff, *supra* note 17, at 21 (noting that nonstatutory review includes review to ascertain rationality); Siegel, *supra* note 144, at 1684 n.305 (explaining that notwithstanding language in early opinions suggesting that discretionary acts escape judicial review, executive action can be reviewed for "abuse of discretion"); Note, *Mandamus in Administrative Actions: Current Approaches*, 1973 DUKE L.J. 207, 209-11, 211 n.23 (1973) (noting split of judicial

not themselves establish a constitutional basis for choosing a specific approach to reasonableness review. The next subsections undertake the constitutional inquiry needed to identify a test congruent with the pertinent constitutional values.

B. *Constitutional Basis for Reasonableness Review of Executive Orders*

Now that *Franklin* has removed presidential action from the ambit of judicial review under the APA, one must ask about the constitutional basis for reasonableness review. To address that question, this Section analyzes the President's role in the constitutional scheme and the constitutional basis for judicial review of the reasonableness of executive orders.

1. Presidential Policymaking and the Duty to Faithfully Execute the Law

The Constitution seeks to establish a rule of law and lodges the law-making function in an elected Congress. The Constitution establishes a "finely wrought . . . procedure" to enact legislation—requiring passage of a bill by both houses of Congress and presentment to the President.[159] The Supreme Court has held that this procedure constitutes the exclusive means of making law and that the President may not make law by himself.[160] This procedure makes laws difficult to pass and repeal, and tends to ensure the stability that a rule of law implies. The Founders viewed this rule of law as a substitute for the arbitrary decision-making the American colonists had suffered when the British King established policies by decree.[161]

The Constitution requires the President to "take Care that the Laws be faithfully executed."[162] This "Take Care Clause" means that the President must faithfully execute the law when he promulgates an executive order. While the Framers understood that the exercise of discretion necessarily attends the execution of the law, the modern notion of a President distinctively shaping policy to match the "preferences" of a political party or a group of voters was foreign to the Framers.[163] Instead, they believed in an ideal of "disinterested leadership" and hoped to avoid the creation of "faction."[164]

The principal domestic policymaking role envisioned for the President involved the power to veto unwise legislation. The Constitution, however, limits

authority about whether mandamus can lie to remedy abuse of discretion, but noting that commentators unanimously claim that it does).

[159] INS v. Chadha, 462 U.S. 919, 951 (1983).

[160] *See id.* (characterizing bicameralism and presentment as "single" procedure for exercising legislative power); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588-89 (1952) (stating Congress, not President, must make law).

[161] *See Youngstown*, 343 U.S. at 589 (alluding to "fears of power" that led Founders to give Congress power to make laws).

[162] U.S. CONST. art. II, § 3.

[163] *See* GLENN A. PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 141 (1993).

[164] *See* GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 165 (2002).

the presidential power to block legislation by allowing Congress to override a veto with a two-thirds vote.[165] The Constitution envisions the President faithfully executing law he disagrees with, because the duty to faithfully execute the law includes the duty to execute laws enacted in defiance of a veto. So strong was this ideal of congressional policy control at the founding that George Washington refused to veto domestic legislation he disagreed with.[166]

At the same time, the Constitution makes the President a nationally elected official and gives him the executive power.[167] Still, the constant reference to the President as the "Chief Magistrate" in the Federalist Papers suggests a more modest conception of the President's role than we have today.[168]

In order to ensure that the executive branch faithfully executes the law and does not make policy on its own, the Founders denied the President sole control over the executive branch of government.[169] The Constitution requires Senate approval of "officers of the United States," an approach designed to secure appointment of officials dedicated to the rule of law rather than obedience to the President.[170] Furthermore, Alexander Hamilton, a proponent of executive power, expressed the opinion that removal of an "officer of the United States" would require approval of the Senate, a conclusion consistent with the Constitution expressly providing only one procedure for removal of officers—impeachment.[171] Although the modern understanding of separation of powers has evolved to allow Congress to specify other means of removing officers, Hamilton's view expressed to those ratifying the Constitution provides further evidence that the adopters sought a stable rule of law based on legislative supremacy and disinterested leadership, not wild swings in policy every four years.[172]

In the years since George Washington, the President has assumed a much greater role in shaping policy. Congressional delegation of substantial powers to

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[165] U.S. CONST. art. I, § 7, cl. 2.

[166] *See* PHELPS, *supra* note 163, at 139-42, 150-54 (describing Washington's use of veto as only focused on foreign policy and correcting unconstitutional actions).

[167] *See* U.S. CONST. art. II, § 1 (vesting "executive Power . . . in a President" and outlining procedure for national election of President).

[168] *See* THE FEDERALIST NO. 69 (Alexander Hamilton) (discussing President of United States as Chief Magistrate of union); *see also* United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d) (comparing President to "first magistrate" of state and therefore finding him amenable to service of subpoena).

[169] *See* David M. Driesen, *Toward a Duty-based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 87-92 (2009) (reviewing constitutional provisions giving Congress some control over executive branch).

[170] *See* THE FEDERALIST NO. 77, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that Constitution subjects President to legislative control with respect to appointments).

[171] *See id.* at 459 (stating that "[t]he consent of [the Senate] would be necessary to displace as well as to appoint").

[172] *See* THE FEDERALIST NO. 70 (Alexander Hamilton) (supporting "steady administration" of laws).

the President has fueled this growth. These delegations of authority usually require subsidiary policy judgments.

A debate has ensued about who gets to make these policy decisions. The Supreme Court has held that Congress generally can control who makes key policy decisions through the terms of its delegations, as long as the President appoints and the Senate approves officers with broad independent authority.[173] Justice Scalia, however, argued for a unitary executive theory under which the President must control all executive branch decision-making in an emphatic dissent.[174] While the Supreme Court never adopted the unitary executive theory, a number of prominent scholars have championed it.[175] But both proponents and opponents of the unitary executive theory agree that the President must faithfully execute the law when he acts pursuant to legislative authority. This suggests that the standard of review should aim to properly enforce the duty to faithfully execute the law.

2. Due Process and Article III

The Due Process Clause continues to provide a basis for reasonableness review of executive orders. *Highland*, *Sterling*, and *Panama Refining* remain good law and rely on the Due Process Clause as the basis for reasonableness review of executive orders. The notion that the Constitution authorizes even nominal due process review of legislation's reasonableness whilst exempting executive orders from all reasonableness review makes no sense.

The Due Process Clause offers a firmer basis for review of presidential actions than it does for review of legislation. Recent scholarship suggests that the original meaning of the Fifth Amendment's Due Process Clause did not provide a

[173] *See* Morrison v. Olson, 487 U.S. 654, 696 (1988) (upholding assignment of prosecutorial duties to "independent counsel"); *cf.* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 495-96 (2010) (striking down statute not allowing President to remove member of Oversight Board for cause when those with removal authority could not be removed at will).

[174] *See Morrison,* 487 U.S. at 705, 724 n.4 (Scalia, J., dissenting).

[175] *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550 (1994) (supporting unitary executive theory); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1839 (1996) ("There may well be compelling reasons for the unitary executive . . . ."); Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond,* 93 MINN. L. REV. 1454, 1462 n.36 (2009) (endorsing unitary executive theory by declaring independent counsel statute "inconsistent with foundational principles of separation of powers"); Brett M. Kavanaugh, *The President and the Independent Counsel,* 86 GEO. L. REV. 2133, 2147 n.47, 2160-61 (1988) (suggesting doubt about Supreme Court's holding that somebody other than President may appoint special counsel and using unitary executive rationale to argue that President should be immune from lawsuits while in office); *but cf.* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994) (contesting unitary executive theory).

basis for substantive review of legislation for reasonableness.[176] But the original understanding did encompass the notion that official action must conform to the law.[177] Executive actions taken without legal authority likely offended the original understanding of the Fifth Amendment's Due Process Clause, even though the relevant early authority generally focuses on judicial actions.

Article III authorizes judicial review of cases "arising under . . . the Laws of the United States" in part to ensure that all government officials obey statutes.[178] The courts have accordingly adapted judicial review to ensure that the President faithfully executes the law, even in defiance of his own interests and those of his party, from early on. In *Marbury*, the Supreme Court claimed the authority to check a President's decision to refuse delivery of a commission to an appointee of the outgoing Federalist administration.[179] It stated that the Court has a duty to "say what the law is" and provide a remedy should the executive branch violate the law.[180] And it tied this judicial enforcement of the duty to faithfully execute law to the necessity of maintaining a rule of law.[181] Similarly, in *Youngstown*, the Supreme Court overturned a Presidential executive order to seize the steel mills in order to maintain production vital to our war effort in Korea.[182] The Court relied heavily on notions of legislative supremacy and the rule of law.[183] Justice Jackson's concurrence in that case heavily influenced subsequent cases on implied powers, which lie beyond this Article's scope, but did not undermine the majority's view that Presidents must follow statutes where no valid implied power claim exists.[184]

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[176] *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 454 (2010) (claiming that original understanding of Fifth Amendment's Due Process Clause did not view it as a constraint on legislatures, except perhaps with respect to their adoption of rules governing judicial procedure).

[177] *See id.* at 420-21, 457 n.21 (explaining that public meaning of Due Process Clause followed "positivist" conception defined as idea that executive and judicial officials can only deprive individuals of life, liberty, or property when acting in accordance with previously enacted law); *see also* Dent v. West Virginia, 129 U.S. 114, 123-24 (1889) (equating Due Process Clause with idea that actions must conform to "law of the land").

[178] U.S. CONST. art. III, § 2.

[179] *See* Michael W. McConnell, *The Story of* Marbury v. Madison: *Making Defeat Look Like Victory*, *in* CONSTITUTIONAL LAW STORIES 13, 13-18 (Michael C. Dorf ed., 2004) (explaining that Jefferson, incoming Republican President, blocked delivery of Marbury's commission, which Federalist Adams administration had approved).

[180] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[181] *See* James E. Pfander, Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1518-19 (2001).

[182] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583, 588-89 (1952).

[183] *Id.* at 587-89 (rejecting presidential steel mill seizure because no legislation authorized it).

[184] *See* Dames & Moore v. Regan, 453 U.S. 654, 674 (1981) (applying Jackson concurrence in case where it found that Congress had approved of President's action); *Youngstown*, 343 U.S. at 634-55 (Jackson, J., concurring) (suggesting that presidents may have implied

Absent some sort of reasonableness review, Presidents can evade statutes by claiming to be following statutory policies without doing so. Faithful law execution requires reasonable decisions conforming to a statute.[185] The term "faithful" implies something more than facially compliant. The term connotes service to something beyond one's own preferences—in this case to the policy decisions of previous lawmakers. Thus, the Take Care Clause viewed through the lens of due process and the judicial role under Article III requires reasonableness review of presidential action.

C. *What Standard Is Necessary to Ensure a President's Faithful Execution of the Law?*

Panama Refining especially confirms that due process and the nondelegation doctrine require application of the arbitrary and capricious test to executive orders.[186] Congressional embrace of the arbitrary and capricious test in the APA does nothing to undermine this conclusion. Congress never affirmatively decided to change the Court's decision to subject executive orders to arbitrary and capricious review.

One might argue, however, that the modern due process cases show that the deferential rational basis test must apply to reasonableness challenges to executive orders, since they establish the modern meaning of substantive due process. But the modern cases generally justify the rational basis tests, as we have seen, in the context of legislation.[187] And the rationales depend on the collective judgment, constitutional authority, and democratic legitimacy of legislatures. Hence, the modern due process cases do not establish a standard of review for presidential decisions.

The question of whether the President should receive the same degree of deference afforded the legislature under the rational basis test requires an analysis of whether the separation of powers rationale supporting application of the rational basis test to legislation justifies its application to the President. This requires consideration of the functional, collective judgment, and democratic rationales in the context of presidential law execution.

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powers where Congress approves or says nothing about his actions); *cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (citing *Youngstown* majority opinion for proposition that Constitution does not give President a "blank check" even in war).

[185] *See* PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 12 (2016) (stating that rule of law requires that officials may only use its coercive power when using "reasonable interpretations of preexisting . . . rules").

[186] *See supra* notes 28-35 and accompanying text.

[187] The Supreme Court did apply a rational basis test to an executive order in *Trump v. Hawaii*, 138 S.Ct. 2392, 2419-20 (2018). But the Court relied on the national security context to justify this application, as we have seen. *See id.* at 2420 n.5. The Court did not convincingly explain why this test is appropriate. *See id.* at 2419-20 (discussing need to give President flexibility to respond to "changing world conditions" but not explaining how abdicating meaningful review can be squared with rule of law under rational basis test).

1. The Functional Rationale

The functional rationale for the rational basis test does not apply to the President, even when he engages in quasi-legislative rulemaking. The President, like an administrative agency, executes the law.[188] The nondelegation doctrine cases suggest that arbitrary and capricious review must be in place to keep presidents within statutory bounds and the legislature within constitutional bounds. The Court has allowed broad delegations of authority to the President in large part because of the impossibility of Congress "find[ing] for itself" all of the facts to determine how a policy objective should be pursued.[189] This suggests that the President must find facts to justify his decisions implementing statutes and that a judicial practice of validating presidential decisions based on imagined facts would subvert the basis for accepting delegations of statutory authority to the President.

The nondelegation cases insist on a standard of review adequate to allow a tribunal to ascertain whether the executive branch is obeying the will of Congress and staying within a defined field.[190] The Court has approved broad delegations based on the conclusion that the statutory objectives show which factors are relevant so that a tribunal can see if the executive branch has properly implemented a statute's policy.[191] Demanding a reasoned justification based on relevant factors, as *Panama Refining* affirms, keeps the President from slipping the boundaries of a statutory policy and acting based on irrelevant policy preferences.[192]

Allowing the President to claim compliance with a policy in a statute without review adequate to detect evasion of legislative intent defeats the safeguards justifying acceptance of broad delegated authority as constitutional. The relevant factors analysis in the nondelegation cases strongly suggests that the President

[188] *Cf*. Bruff, *supra* note 17, at 51 (grounding requirement for judicial review of presidential action in need to ensure that his actions serve "*particular* ends sought by the statute") (emphasis in original).

[189] *See, e.g.*, Yakus v. United States, 321 U.S. 414, 424 (1944) (suggesting it would be impossible for Congress to find facts necessary to apply general policies to particular circumstances and that this justifies allowing broad delegation); Field v. Clark, 143 U.S. 649, 681-94 (1892) (employing fact-finding rationale to uphold delegation of tariff making authority to President, relying on similar delegations going back to 1794).

[190] *See* Am. Power & Light Co. v. SEC, 329 U.S. 90, 104-05 (1946) (linking approval of delegation of authority to outlaw unduly complicated or unfair corporate structures to ability to "test the application of the policy" in court); *Yakus*, 321 U.S. at 424-26 (requiring adequate definition in statute so that tribunal can determine whether executive branch has acted within field's contours).

[191] *See* Opp Cotton Mills, Inc. v. Admin. of the Wage & Hour Div. of the Dep't of Labor, 312 U.S. 126, 143-45 (1941) (articulating ability to identify factors relevant to statutory purpose as basis for finding delegation of authority to set minimum wage constitutional).

[192] *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 431-33, 446 (1935) (dissenting and majority opinion) (explaining that if President justified executive order based on policies not embraced in statute, court would invalidate it).

must base his decision on relevant factors and that judicial review must be structured to ferret out decisions made on statutorily irrelevant factors. *State Farm* and *Overton Park* reflect a judgment that detecting evasion of the law requires a demand for an explanation and some factual record.[193] Allowing the President to justify a decision by assuming that some policy rationale must exist and imagining that factual support exists would allow him to dictate policies at odds with the legislation authorizing his actions.

The Court has also accepted vagaries in delegation because it recognizes the need for exercising expertise in properly carrying out the law.[194] The arbitrary and capricious test serves the function of making sure that the executive branch has made an expert judgment, which usually constitutes an essential element of faithful law execution.

Even when the President promulgates rules that a legislature might have enacted, he implements law. So, for example, Congress might adopt speed limits for interstate highways, or it might delegate that task to the President. The nondelegation doctrine requires that when the legislature delegates a quasi-legislative task to another branch of government, it provide an intelligible principle to guide the other actor.[195] The legislature might, for example, require that the President establish the maximum safe speed limit. When the President promulgates a speed limit, he must implement the maximum-safe-speed-limit principle embodied in the statute.

Even a general standard, like the requirement to regulate broadcasting in the public interest, limits the policies the government may reasonably adopt at least in extreme cases.[196] For example, it would preclude granting licenses to benefit a particular private interest.[197]

Generally, an intelligible principle embodies a legislative value choice.[198] The court reviewing a decision implementing a legislative value choice therefore has a narrower task in assessing the reasonableness of the decision than it faces in evaluating the reasonableness of legislation. Most obviously, it does not assess the question of whether the legislative value choice is reasonable in light of the

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[193] *See supra* note 136 and accompanying text (discussing how Court made new law with *State Farm* and *Overton Park* to address defects in fact-finding process).

[194] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 379 (1989) (stating delegation is especially appropriate when expertise is needed); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 400 (1940) (accepting somewhat vague definition of jurisdictional term in statute because it provides sufficiently precise guidance for factual determinations by experts).

[195] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (restating and applying intelligible principle test); *Mistretta*, 488 U.S. at 372 (same).

[196] *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 225-226 (1943) (upholding public interest standard under nondelegtion doctrine).

[197] *See id.* at 216 (noting that public interest test requires the government to FCC to serve "listening public['s]" interest in "effective use of radio" and therefore does not confer "unlimited power").

[198] *See* Yakus v. United States, 321 U.S. 414, 424 (1944) (characterizing determination of policy as essential part of legislative function).

state of the whole country. The court instead reviews the question of whether the decision reasonably implements the legislative policy choice.

This narrower task makes it possible to provide some factual support for a decision and a single rationale. A conscientious President faithfully executing the maximum safe speed limit law would want to have government experts collect data on vehicle accident rates at various speed limits in figuring out what the maximum safe speed limit is. And he should be able to provide a reasoned explanation for the speed limit chosen. Deferential review of that explanation remains important, as a decision about how many accidents to tolerate cannot be airtight.[199] But a single explanation should be possible.

The insistence upon a factual record and a rationale in the highway example can expose failure to faithfully implement the law. If the record discloses consideration of noise levels or the rationale does not focus on safety, that may indicate that the President did not follow the law but substituted his own policy views for the view Congress had agreed upon. To argue instead that the President may pursue his own views of sound policy regardless of the specific legislative policy distorts the constitutional structure by giving the President a general lawmaking authority.

The arbitrary and capricious test must apply to executive orders, in part, because it applies to agency action. When the President decides to shape the law's implementation, he often may do so by influencing agency rulemaking or by promulgating an executive order. The standard of review should not vary with the choice made. The nondelegation cases affirm that review based on relevant factors forms an essential safeguard against delegating legislative authority whether the President or an administrative agency exercises delegated authority.[200]

2. The Collective Judgment Rationale

The collective judgment rationale does not justify extreme deference to presidential decisions.[201] The President is a single person, and his decisions may reflect his own predilections.

Furthermore, because he is only a single person, no general barrier exists to stating the rationale and factual basis for a decision. His decisions need not re-

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[199] *Cf.* Gersen & Vermeule, *supra* note 134, at 1385-87 (citation omitted) (explaining why under conditions of uncertainty, agency must make "rationally arbitrary" decision among feasible set of justifiable choices).

[200] *See, e.g.*, Panama Ref. Co. v. Ryan, 293 U.S. 388, 431-33 (1935) (explaining that Constitution requires both President and administrative agency to demonstrate through findings that their actions comport with statute delegating authority); *see also id.* at 420 (explaining that nondelegation doctrine applies fully to President, just as it would to administrative agency).

[201] *See supra* Section I.B.1 (discussing collective judgment rationale for executive orders).

flect a welter of compromises based on disparate facts and rationales. The President clearly is a unitary executive in the sense that when he makes a decision it can be his own decision.

Wide consultation prior to a presidential decision, however, may temper the conclusion that the collective judgment rationale has no applicability to presidential decisions. Presidential decisions usually involve consideration of data and expert opinion from multiple government agencies.[202] To the extent that his decision-making reflects wide consultation within the government, it becomes very unlikely that the President will overlook an important aspect of the problem before him and relevant data. This conclusion suggests that this aspect of arbitrary and capricious review may not be needed when the President consults widely. On the other hand, the Court has created a requirement that judicial review of agency rulemaking correct important oversights, even though public participation requirements make agencies even less likely than the President to overlook important aspects of a problem.[203] To the extent this judgment is sound, no good reason exists to make a different judgment with respect to the President. In any case, the collective judgment rationale does not justify failing to demand some factual basis and a rationale, since the final decision-maker is a single person.

The travel ban cases, however, illustrate that occasionally presidents do not consult with experts within the government. President Trump promulgated his first travel ban without consulting the Immigration and Naturalization Service or fully consulting the Department of Justice.[204] While such cases are unusual, a failure to consult with government experts creates a high risk that concerns motivating a hard look at a decision under the arbitrary and capricious standard are justified—concerns that the President failed to consider relevant data and important aspects of the problem he seeks to address. This would make the conclusion that, at a minimum, the courts should demand a stated rationale and some factual support for a decision even stronger.

3. The Democratic Rationale

The President enjoys great democratic legitimacy as the only official elected on a national basis other than the Vice President. His election seems to suggest that the courts should apply the extremely deferential standard of review afforded legislation to executive orders issued pursuant to that legislation.

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[202] *See* Bruff, *supra* note 17, at 14-17 (describing normal process of presidential decision-making in some detail).

[203] The Administrative Procedure Act of 1946, 5 U.S.C. § 553 (2012).

[204] *See* Hawaii v. Trump, 859 F.3d 741, 756 (9th Cir. 2017) (per curiam) (noting that President promulgated the first travel ban "without interagency review"); OFFICE OF THE INSPECTOR GEN., DEPT. OF HOMELAND SECURITY, OIG-18-37, DHS IMPLEMENTATION OF EXECUTIVE ORDER #13769 "PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES" 5 (2018) (stating that Department of Homeland Security had no opportunity to provide expert input into drafting of travel ban).

The President's election does suggest that the courts should avoid second-guessing discretionary policy judgments entrusted to him. This consideration lies behind the political question doctrine—the idea in *Marbury* and elaborated in *Baker v. Carr*[205] that some questions require purely political decisions with which courts must not interfere.[206] At the same time, ordinary questions under most statutes require exercise of reasoned discretion under law.[207]

But the President's status as an elected official can undermine the rule of law absent sufficiently robust judicial review. The presidential duty to faithfully execute the law requires him to implement statutes reflecting previous Congresses' value choices, almost always with the approval of a former occupant of the oval office. He may disagree with those value choices and therefore seek to undermine the law by pretending to follow the letter of the law while making decisions antithetical to its goals. His status as an elected official may make this danger even more acute than it is for administrative agencies. He may feel that he has a mandate to change the law because the people elected him.[208]

The risk that a President will use his power not just to make a bad decision, but to wholly subvert an entire body of law, greatly exceeds the risk that the head of an administrative agency will do that on her own.[209] Agencies cannot act beyond a limited domain. Presidents, however, have sometimes issued directives aimed at changing the administration of whole bodies of law.[210] Indeed, a President convinced of his own infallibility and unwilling to allow the constitutional order to restrain his policymaking can undermine the rule of law through a series of executive orders.

We have lost democracies in many countries when Presidents have evaded the law in some domains and then, insufficiently checked by the courts or legislature, have gradually changed or evaded laws fundamental to democracy, like

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[205] 369 U.S. 186 (1962).

[206] *Id.* at 217 (describing considerations that make questions political rather than legal); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (declaring that some questions are political ones that cannot be reviewed in court).

[207] *See* Nickerson v. Nickerson, 127 U.S. 668, 675-76 (1888) (distinguishing "arbitrary or capricious discretion, dependent upon the mere pleasure of the judge" from "sound and reasonable discretion").

[208] *See* Kagan, *supra* note 22, at 2349-50 (explaining that presidents tend to "push the envelope" in interpreting statutes more than agencies do).

[209] *See* Kaden, *supra* note 11, at 1545 (claiming that delegations to President "pose the most difficult threat to separation of powers").

[210] *See, e.g.*, Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (subverting mandates of numerous agencies by requiring repeal of regulations to offset costs of any new ones); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1062-63 (1986) (suggesting that Executive Order 12,291 aims to frustrate and dismantle regulatory schemes put in place by Congress).

laws protecting free speech and open and fair elections.[211] And a President moving in that direction may well disguise his intentions by claiming to act under a statute, when he has very different motives than fulfilling the statutory purpose. So, having some form of arbitrariness review in the judicial arsenal remains important, even if courts rarely need to use it to invalidate executive orders as unreasonable. Having a robust judicial check for presidential action is much more important than for administrative agencies, now checked by the arbitrary and capricious test. As Justice Marshall said in another context, our Constitution is designed to "be adapted to the various *crises* of human affairs."[212]

Accordingly, the President's status as an elected official, when considered in light of his responsibility to faithfully execute the law, suggests that judicial review of presidential decisions must check decisions that undermine the law. The need to check decisions undermining the law requires that courts demand an articulation of the reason that the law supports a particular decision and some sort of factual basis—the core of arbitrary and capricious review.

D. *Possible Objections*

This Section considers two possible objections to the argument that courts should review executive orders under an arbitrary and capricious test. One is a broad-based separation of powers concern about an unelected judiciary overseeing an elected President that one may detect in *Franklin* and other cases loosening judicial oversight of presidential action. This Section rejects this conclusion, at least as a general matter, as contrary to original intent, dangerous to democracy, and overly optimistic about political oversight mechanisms. The other concern comes from critics of arbitrary and capricious review of administrative agency rulemaking. They have argued that arbitrary and capricious review has tended to paralyze administration. Some also object to arbitrary and capricious review as ideological. This Section shows that these problems will not prove as acute in the context of presidential decision-making as in the administrative agency context and also makes some suggestions about how to soften arbitrary and capricious review to ameliorate these concerns.[213]

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[211] *See* David Segal, *Turkey Wages War on "Enemies" in Business*, N.Y. TIMES, July 23, 2017, at A12 (explaining that Turkey's President Erdogan has seized companies owned by people he sees as enemies, imprisoned opponents, and throttled free press, making a former democracy authoritarian); *see also* Rick Lyman, *Poland's Siege on Democracy Targets Courts*, N.Y. TIMES, July 20, 2017, at A10 (discussing rising threats to democracy in Poland).

[212] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis in original).

[213] *Cf.* Siegel, *supra* note 144, at 1704 (noting that *Franklin*'s exemption of President from APA review provides opportunities for judiciary to appropriately "modulate" judicial review of presidential action).

1. Separation of Powers Concerns

The *Franklin* Court exempted the President from the APA "out of respect for the separation of powers and the unique constitutional position of the President."[214] The analysis provided above considers the constitutional role of the President and separation of powers in addressing the proper standard of review when nonstatutory review takes place. But some concerns articulated in separation of powers cases may cut the other way.[215]

While the *Franklin* Court's statement by itself does not explain why separation of powers or the presidential role counsels no APA review, *Franklin* cites a case that provides some clues, *Nixon v. Fitzgerald*,[216] which immunized the President from damage suits not specifically authorized by Congress.[217] *Fitzgerald,* in turn, relies on concerns that the threat of damage suits would distract or deter the President from "fearlessly and impartially" performing his duties under the law.[218] These concerns might suggest that the Court should avoid arbitrary and capricious review when it reviews an allegation that a President has violated a statute.

The analysis presented above reveals the problem with extending this line of reasoning to defeat robust judicial review of executive orders purportedly authorized by statutes. The President's status as an elected official may cause him to "fearlessly" and quite partially ignore his duties under the law while purporting to carry them out. There is a structural tendency of presidents to avoid the Constitution's "finely wrought and exhaustively considered procedure"[219] for legislative change and instead take the short cut of amendment through maladministration.[220]

Concerns about suits deterring the President from carrying out his duties properly make more sense in the context of suits for damages than in the context of suits seeking to simply restrain unreasonable executive action. Proper public

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[214] Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992).

[215] *Cf.* Siegel, *supra* note 144, at 1676 (suggesting there is no serious problem in suing President, just question of mere "delicacy").

[216] 457 U.S. 731 (1992).

[217] *Franklin*, 505 U.S. at 801 (citing *Fitzgerald*, 457 U.S. at 748, n.27) (explaining that *Fitzgerald* Court "would require an explicit statement by Congress before assuming Congress had created a damages action against the President").

[218] *Fitzgerald*, 457 U.S. at 751-52 (citing Ferri v. Ackerman, 444 U.S. 193, 203 (1979)) (arguing that allowing damages suits against President would undermine his ability to perform his duties).

[219] INS v. Chadha, 462 U.S. 919, 951 (1983).

[220] *See* Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on* Marbury v. Madison, *Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 266-67 (2003) (explaining that many Presidents "take the easier route" of not properly enforcing existing law rather than obtain policy change through Congress).

actions may affect a great number of individuals negatively.[221] The fear that those affected may seek damages could conceivably deter a President from taking legal and appropriate actions to address serious problems.

By contrast, a lawsuit seeking to simply deter wrongful presidential actions without seeking damages will only arise when litigants believe that the President has done something improper.[222] Because the Court only allows injured plaintiffs to sue, such lawsuits will come from injured plaintiffs, just as private suits for damages do.[223] But since there is no possibility of damage awards, financial motives will not encourage a proliferation of needless suits.[224]

Such suits also do not greatly distract a President from his duties. Government attorneys will defend the lawsuit, just as they defend lawsuits attacking agency action that may be important to the President.[225]

While other remedies exist to deter presidential misconduct, they provide weak deterrents to evasion of the law.[226] Presidential elections do not ensure fidelity to law. Voters rarely know a lot about law or policy, and they know even less about whether a President properly implements law.[227] While judicial rulings on the legality of presidential actions have a slight chance of having an impact on elections, presidential policies undermining the law have very little chance of influencing the elections without such signals, except perhaps in the case of very blatant and unpopular decisions.[228] To the extent voters know anything about law and policy, they will evaluate presidential decisions based on

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[221] *See Fitzgerald*, 457 U.S. at 752-53 (pointing out that presidential action affects "countless people").

[222] *Cf. id.* at 751 (citing concerns about diversion of presidential "energies by concern with *private* lawsuits" (emphasis added)).

[223] *See* Lujan v. Def. of Wildlife, 504 U.S. 555, 560-61 (1992) (establishing injury-in-fact as prerequisite for standing to bring suit).

[224] *Cf. Fitzgerald*, 457 U.S. at 760 (Burger, J., concurring) (affirming that dismissed employee may litigate question of whether dismissal is lawful in action for backpay).

[225] *See* Siegel, *supra* note 144, at 1674 (noting that President suffers no distraction from his duties in answering "a nonstatutory review suit" because "[g]overnment attorneys would handle the suit"); *see also* United States v. Lee, 106 U.S. 196, 206 (1882) (stating that government is not degraded by having to appear as defendant, "because it is constantly appearing as a party in such courts").

[226] *Cf. Fitzgerald*, 457 U.S. at 757 (citing remedies of impeachment, press scrutiny, congressional oversight, need to win reelection, and President's concern about his historical reputation).

[227] CHRISTOPHER ACHEN & LARRY BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 37 (2016) (stating that voters "know jaw-droppingly little about politics"); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 447-48 (2010) (finding public ignorance about regulation defeats theory that presidential regulatory decisions reflect public's views).

[228] *See* ACHEN & BARTELS, *supra* note 227, at 91-93 (describing theory of "retrospective voting" under which voters choose candidates based on their perception of their own well-

the decisions' congruence with the voters' current values, not their conformity to laws enacted in the past.[229] Most voters, however, evaluate presidential candidates by comparing their rhetoric to their own values and making judgments about their character that do not draw heavily on questions of presidential administration.[230] Furthermore, a President in his second term faces no potential electoral deterrent. In short, the notion that elections deter unlawful conduct when courts do not competently settle claims of illegality proves wildly optimistic.

Impeachment also provides an inadequate remedy for ensuring fidelity to law. The Senate has never removed a sitting President from office, although an impeachment threat in the House caused President Nixon to resign.[231] The House has only impeached a President when the opposing party controlled it, and then only twice in our nation's history.[232] Members of the President's own political party may overlook blatant legal violations because it likes the policies the President supports.

Congressional oversight's value has diminished in recent years to constitutionally inadequate levels. As polarization and special interest influence have increased, members of Congress have become much more interested in advancing their current policy objectives through the oversight process than their prior collective decisions.[233] Kevin Stack has concluded that Congress has not been a

being under previous administration with little understanding of how policies might have shaped or not shaped their condition).

[229] *See id*. at 23-24 (describing "spatial theory" of voting under which ideological preferences shape voting patterns); Larry Bartels, *Partisanship and Voting Behavior*, 44 AM. J. POL. SCI. 35, 35, 44 (2000) (discussing rise in partisan voting patterns over time).

[230] Criddle, *supra* note 227, at 458-60 (noting that voters tend to focus on presidential candidates' "experience and temperament" rather than on their policies); *see, e.g*., Michelle Alexander, *Why Hillary Clinton Doesn't Deserve the Black Vote*, THE NATION (Feb. 10, 2016), https://www.thenation.com/article/hillary-clinton-does-not-deserve-black-peoples-votes/ [https://perma.cc/6R96-KK88] (explaining that black voters preferred Hillary Clinton over Bernie Sanders, even though Sanders's policy proposals better serve their interests); Nate Cohn, *The Upshot: How the Obama Coalition Crumbled, Leaving an Opening for Trump*, N.Y. TIMES (Dec. 23, 2016), https://www.nytimes.com/2016/12/23/upshot/how-the-obama-coalition-crumbled-leaving-an-opening-for-trump.html (explaining that voters who liked Obama's policies supported Trump because they liked his outsider approach).

[231] *See* Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 84-109 (1999) (discussing impeachments of Andrew Johnson and William Clinton and Nixon's resignation in response to impeachment threat).

[232] *See id*. at 87, 97-98 (characterizing House vote to impeach Johnson as "along strict party lines" and to impeach Clinton as "largely partisan").

[233] *See* Kagan, *supra* note 22, at 2259-60, 2350 (suggesting that special interests tend to influence congressional oversight more than interests of "Congress as a whole or the general public" and that Congress may have no interest in following intentions of enacting Congress); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 950-60 (2005) (explaining that members of Congress have not defended congressional prerogatives vigorously in recent years).

"robust monitor of the [P]resident's assertions of statutory authority," as it has overturned only four of the more than 3,500 executive orders issued between 1945 and 1998.[234] In any case, the Constitution requires the President to faithfully execute laws enacted prior to his term in office whether or not a subsequent Congress supports it. Leaving enforcement of this duty to Congress alone conflicts with the constitutional principle that law remains in place until Congress musters majorities in both houses to change it and with the requirement that courts generally enforce statutes under Article III.

Press scrutiny, while of some value, also has significant limitations as a means of deterring presidential evasion of statutory limits. Most legal violations, even ones that may matter a lot to many people, may not garner significant media attention, as such matters have to compete with spectacular crimes, speeches, provocative tweets, battles over new legislation, celebrities' activities, international events, sports, and other matters for attention.[235] Even for illegal executive actions that attract some attention, media reporting tends to focus on the current policy significance of the executive action, not its legality, at least when the actions evade statutes instead of widely understood constitutional norms.[236] Any coverage of legality will likely report both sides of an argument, leaving the public confused about whether an executive order violates the law absent a judicial ruling.[237] While press scrutiny may nonetheless have some value in discouraging unlawful presidential actions, a President skilled in public relations and sufficiently zealous about policy change may find it a weak deterrent in many cases.[238]

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[234] Stack, *supra* note 16, at 541-42.

[235] *See* Michael J. Robinson, *Two Decades of American News Preferences*, PEW RES. CENTER (Aug. 22, 2007), http://www.pewresearch.org/2007/08/22/two-decades-of-american-news-preferences-2/ [https://perma.cc/PRB5-T9UP] (noting that only about twenty-two percent of Americans followed political news closely, compared with thirty-nine percent who followed disasters and thirty-four percent who followed the economy closely).

[236] *See, e.g.*, Lisa Friedman & Brad Plumer, *EPA Announces Bid to Roll Back Emissions Policy*, N.Y. TIMES, Oct. 10, 2017, at A1 (reporting illegal repeal of Clean Power Plan primarily as policy and political move before briefly mentioning that EPA "is still required to regulate greenhouse-gas emissions"); Robert Schiller, *Too Many Regulations? Let's Not Be Hasty*, N.Y. TIMES, Feb. 17, 2017, at BU6 (discussing policy significance of the two-for-one executive order, not its legality).

[237] Derek Koehler, *Can Journalistic "False Balance" Distort Public Perception of Consensus in Expert Opinion*?, 22 J. EXPERIMENTAL PSYCHOL.: APPLIED 24, 25-26 (2016) (discussing problem of false balance in media reporting); *cf.* Steven Mufson, *Trump Wants to Scrap Two Regulations for Each New One Adopted*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/01/30/trump-wants-to-cut-two-regulations-on-businesses-for-every-new-one-imposed/?utm_term=.af2ee2a181a9 (mentioning briefly that one expert thinks order is illegal).

[238] *See* JEFFREY E. COHEN, THE PRESIDENCY IN THE ERA OF 24-HOUR NEWS 183-84 (2008) (discussing how media fragmentation has left public confused about what news to believe);

The President's concern for his historical legacy may not powerfully influence fidelity to the law absent robust judicial review. Historians and other observers tend to remember Presidents for new laws they enacted,[239] wars they conducted,[240] speeches they made,[241] personal misconduct,[242] and even events that happened to occur on their watch,[243] rather than for faithful (or faithless)

Susan Milligan, *The President and the Press*, 53 COLUM. JOURNALISM REV. 22, 23-24 (2015) (discussing presidential manipulation of news).

[239] *See, e.g.*, Hugo L. Black, *Franklin D. Roosevelt*, 6 L. GUILD REV. 396, 397 (1946) (describing President Roosevelt's legacy in terms of passed legislation); Transcript: President Obama Speaks on Civil Rights at LBJ Memorial, WASH. POST (Apr. 10, 2014), https://www.washingtonpost.com/politics/running-transcript-president-obama-speaks-on-civil-rights-at-lbj-memorial/2014/04/10/b10ec34c-c0d5-11e3-b195-dd0c1174052c_story.html?utm_term=.f3c86440141d (stating that we remember President Lyndon B. Johnson for Civil Rights Act); *cf.* Dean Kieth Simonton, *Presidential Greatness: The Historical Consensus and Its Psychological Significance*, 7 POL. PSYCHOL. 259, 259-60 (1986) (stating that "scholars, and laypersons alike have frequently indulged in more global and subjective estimates of presidential 'greatness'" than suggested by their legislative accomplishments and other objective criteria).

[240] *See, e.g.*, ROBERT W. MERRY, WHERE THEY STAND 118-19 (2012) (stating that "Truman and Johnson were undone by wars, at least in part, while Franklin Roosevelt's expeditionary triumph cemented his elevated station in history"); Roberts Hicks, *Why the Civil War Still Matters*, N.Y. TIMES, July 2, 2013, at A25 (listing Lincoln's persistence in prosecuting civil war as major factor cementing his reputation).

[241] *See, e.g.*, Martha Watson, *Ordeal by Fire: The Transformative Rhetoric of Abraham Lincoln*, 3 RHETORIC & PUB. AFF. 33, 33-48 (2000) (describing Lincoln's speeches as important part of his legacy); John Kenneth White, *Ronald Reagan: The Power of Conviction and the Success of His Presidency*, 34, PRESIDENTIAL STUD. Q. 173, 173-174. (2004) (reviewing ROBERT M. EISINGER, THE EVOLUTION OF PRESIDENTIAL POLLING (2003)) (discussing ideas Reagan advanced in his speeches as crucial to his legacy); FRANK FREIDEL AND HUGH SIDEY, THE PRESIDENTS OF THE UNITED STATES OF AMERICA (2006), https://www.whitehouse.gov/1600/presidents/abrahamlincoln [https://perma.cc/58SB-HKZN] (last visited Sept. 27, 2018) (discussing Lincoln's speeches as significant part of his legacy).

[242] *See, e.g.*, IVAN ELAND, RECARVING RUSHMORE: RANKING THE PRESIDENTS ON PEACE, PROSPERITY, AND LIBERTY 527 (updated ed. 2014) (stating that Nixon is "remembered primarily for Watergate").

[243] *See, e.g.*, Jill L. Curry & Irwin L. Morris, *The Contemporary Presidency Explaining Presidential Greatness: The Role of Peace and Prosperity?*, 40 PRESIDENTIAL STUD. Q. 515, 528-29 (2010) (stating that economic performance matters to our evaluation of Presidents); James Lindgren & Steven G. Calabresi, *Rating the Presidents of the United States, 1789-2000: A Survey of Scholars in Political Science, History, and Law*, 18 CONST. COMMENT. 583, 593 (2001) (discussing importance of Soviet Union's fall in discussion of President Reagan's reputation); Ed Hornick, *Historians: Bush Presidency 'Battered,' 'Incompetent,' 'Unlucky'*, CNN (Nov. 6, 2008), http://www.cnn.com/2008/POLITICS/11/06/bush.legacy/index.html [https://perma.cc/R3HN-72T9] (quoting Harvard University Political History Scholar Barbara Kellerman as associating Bush's reputation with 9/11, Hurricane Katrina, and financial crisis).

execution of the statutes they administer.[244] While a concern with history may occasionally motivate a President to faithfully execute a law he does not like, concern for history does not operate as a strong force for ensuring the rule of law.

Judicial review of executive orders for reasonableness under controlling statutes enhances the capacity of electorates, reporters, historians, and Congress to deter legal violations.[245] Judicial rulings on legality perform a political function, by providing information about whether a President obeys the law that most people would find hard to obtain otherwise. Courts have a role to play in preserving a political culture where the rule of law matters, rather than a rule of charismatic decision-making not based on the reflection and consensus building demanded by the procedure of bicameralism and presentment.[246]

2. Problems with Arbitrary and Capricious Review

While the foregoing establishes that reasonably robust judicial review must check presidential maladministration of statutes, it does not address the most powerful argument against arbitrary and capricious review—that it has tended to frustrate the administrative process.[247] For structural reasons, arbitrary and capricious review will prove much less problematic in the context of executive orders than it has in the context of agency rules. Furthermore, the courts can soften arbitrary and capricious review of presidential actions to minimize problems associated with arbitrary and capricious review of administrative rulemaking.[248]

Leading administrative law scholars argue that arbitrary and capricious review of agency action has tended to paralyze administration with unpredictable and onerous demands.[249] The courts have interpreted the arbitrary and capricious

[244] *See* Curry & Morris, *supra* note 243, at 528-29 (characterizing policy performance's role in analysis of presidential greatness as "quite limited"); Gary M. Maranell, *The Evaluation of Presidents: An Extension of the Schlesinger Polls*, 57 J. AM. HIST. 104, 104-13 (1970) (noting that polls rating multiple Presidents tend to leave out faithful execution of statutes as factor).

[245] *Cf.* Siegel, *supra* note 144, at 1690 (noting that disobeying court order may "carry with it a significant political cost").

[246] *See* SHANE, *supra* note 15, at 56-81 (discussing pathologies associated with unilateral presidential decision-making); *cf.* POSNER & VERMEULE, *supra* note 15, at 31-61, 113-22 (advocating substituting political constraints for judicial review based in part on desirability of rapid response to emergencies).

[247] *Cf.* Frank Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1244 (1999) (arguing that entire process of judicial review of agency rulemaking has proven destructive).

[248] *Cf.* Kagan, *supra* note 22, at 2380 (recommending less intrusive judicial review when President shapes agency rule).

[249] *Compare* E. Donald Elliot, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1493-94 (1992) (suggesting that judicial review has contributed to "cumbersome" nature of agency rulemaking), *and* Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A*

standard in ways that force agencies to provide much more than a little evidence and a simply stated rationale as required by the APA.[250] They require a reasoned response to all significant comments and sometimes a very robust explanation.[251] Accordingly, regulated parties can tie the agencies in knots by submitting voluminous comments and lots of data.[252] The agencies must respond to substantially all of these comments and explain why the data provided does not lead them to support the views of the submitters because the agencies cannot predict which information in a voluminous record will prove important to a court.[253] As a result, agencies typically generate an enormous record and explanations for their actions that can run on for hundreds of pages.[254] Hence, the courts' elaboration of the arbitrary and capricious test has converted the potentially simple APA requirement for a statement of basis and purpose into a gauntlet that may frustrate the objectives of the legislation agencies must implement.

Response to Professor Seidenfeld, 75 TEX. L. REV. 525, 557 (1997) (noting that courts are "major contributors to the ossification problem"), *and* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1412 (1992) (hypothesizing that threat of judicial review discourages agencies from updating their rules), *and* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) (arguing that judicial branch is responsible for ossification of administrative rulemaking process), *with* Gersen & Vermeule, *supra* note 134, at 1369 (disputing ossification claim), *and* Mark Seidenfeld, *Demystifing Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 488-89 (1997) (suggesting that changing judicial review may not be desirable response to problem of ossification), *and* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1415 (2012) (questioning whether rulemaking process is truly affected by so-called "ossification").

[250] *Cf.* Administrative Procedure Act, 5 U.S.C. §553(c) (2012) (explaining procedural steps agencies must go through when promulgating rules).

[251] *See* Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin., 741 F.3d 1309, 1312 (D.C. Cir. 2014) (interpreting "arbitrary and capricious" standard as including agency responses to "relevant and significant public comments") (internal quotations omitted); Portland Cement Ass'n v. Ruckelshaus, 486 F.3d 375, 394 (D.C. Cir. 1973) (establishing principle that agencies must respond to material comments); *cf.* Kagan, *supra* note 22, at 2270 (characterizing hard look review as requiring agency "to address all significant issues, take into account all relevant data" and more).

[252] *See* Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1678 (2012) (describing rulemaking process).

[253] *See* Shapiro & Murphy, *supra* note 110, at 333 (characterizing judicial review of rulemaking as "political and unpredictable").

[254] Richard J. Pierce, Jr., *Waiting for* Vermont Yankee *III, IV, and V? A Response to Beerman and Lawson*, 75 GEO. WASH. L. REV. 902, 920 (2007) (noting that agencies now draft two hundred to one thousand page statements to respond to ten thousand to one million pages of comments).

Because the President need not seek public participation in his decisions or respond to any comments submitted, application of arbitrary and capricious review to executive orders will not reproduce the main pathology associated with arbitrary and capricious review of administrative rulemaking under the APA. Thanks to the *Franklin* Court's decision to exempt the President from the APA, the President may enact an executive order without responding to the input of every (or any) concerned citizen.[255] Accordingly, arbitrary and capricious review will not force the development of an enormous record and hundreds of pages of justification.[256]

Scholars have debated the arbitrary and capricious test's success in countering the ideological reversal of agency action associated with Lochnerism.[257] The Supreme Court has upheld agency actions ninety-two percent of the time, thereby suggesting that the intended deference has taken hold.[258] But the agencies' batting average may be worse in the lower courts.[259] Scholars have found evidence of ideological judging under the arbitrary and capricious test, as in other areas of law.[260]

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[255] *See* John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 839 n.10 (1981); *cf*. Siegel, *supra* note 144, at 1704 (noting that subjecting President to APA would make some of his executive orders into rules that would have to be issued in accordance with the APA's rulemaking provisions).

[256] *See* Kagan, *supra* note 22, at 2266-67 (identifying public participation as "principal culprit" in ossification of rulemaking); Shapiro & Murphy, *supra* note 110, at 338-49 (describing how courts created hard look review in part to foster greater public participation and influence).

[257] *See generally* Gersen & Vermeule, *supra* note 134.

[258] *Id*. at 1355.

[259] *See id*. at 1359, 1364-67 (suggesting lower court win rate of approximately sixty-four percent but based on idiosyncratic and limited data set that may give too little weight to rules adopted outside of adjudication process).

[260] *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 768 (2008) (finding that ideological bias influences arbitrary and capricious review); *see also* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2168-72 (1998) (finding that judges' application of *Chevron* doctrine divided along ideological lines, especially when panels consisted entirely of judges from one party); Mark Seidenfeld, *Cognitive Loafing, Social Conformity and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 510 (2002) (finding that hard look judicial review fosters less "biased" agency decision-making); *cf*. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 252-54 (1997) (noting that political scientists have amassed great deal of evidence to support an "attitudinal" model attributing judicial decision-making to judges' political ideology); Donald W. Crowley, *Judicial Review of Administrative Agencies: Does the Type of Agency Matter*, 40 W. POL. Q. 265, 276 (1987) (analyzing ideological influence on Supreme Court administrative law decisions); Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843, 844 tbl.1 (1961) (showing that party affiliation explained results in

Judges must avoid substituting their views for those of the President, just as they seek to avoid doing so with respect to agencies. Because of the President's stature, judges will prove less likely to engage in ideologically motivated displacement of presidential judgment than they would in the case of administrative agencies.[261] Indeed, as former executive branch lawyers, many Supreme Court Justices may err in the opposite direction, failing to respond vigorously enough to an elected President's evasion of the law.[262]

The risk of ideologically motivated reversal should not count as an overwhelming concern not only because it proves less likely in this context, but also because Congress can cure it. We remember the *Lochner* era primarily for decisions invalidating legislation for a reason. The courts completely thwarted democratic processes when they invalidated statutes in cases like *Adkins* and *Lochner*. By contrast, when the courts invalidate an executive order, they do not thwart democracy. Congress can always act to adopt the order if it creates wise (and constitutional) policy.[263] Conversely, a Congressional majority cannot correct an executive order subverting the law, because the President will likely veto the legislation.[264]

Still, the cost of invalidating a President's action improperly is high enough that courts should tailor the arbitrary and capricious test to minimize this cost. Too much judicial interference over time, especially judicial interference based on broad principles created by the Court (as in the *Lochner*-era rate cases) can thwart beneficial presidential action when Congress cannot muster a majority to affirm improperly reversed policies.

This Article aims to establish the constitutional theory supporting some arbitrary and capricious review rather than to develop the particulars of how arbitrary and capricious review should apply to the President. For this reason, this Article has treated arbitrary and capricious review as a fairly simple unitary standard (factual support and a reasoned explanation), even though courts vary

administrative law and other areas in 1955 survey); Richard Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deference of Agency Rulemaking*, 1988 DUKE L.J. 300, 315-16 n.103 (1988); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (finding significant ideological influences on D.C. Circuit's environmental law decisions).

[261] *See* Siegel, *supra* note 144, at 1677 (expecting "generous" standard of review in "many cases").

[262] *See generally About the Court*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/KDX6-PAWB] (last visited Sept. 27, 2018) (showing that many justices were executive branch lawyers).

[263] *See* Stack, *supra* note 16, at 576 (noting that Congress can ratify incorrectly rejected executive order with majority vote).

[264] *Id.* (noting that Congress must overcome veto to reverse illegal executive order ratified by courts).

the intensity of review in particular cases.[265] The *State Farm* case discussed earlier, for example, exemplifies "hard look review" of administrative rulemaking.[266] Harold Bruff's pre-*Franklin* article on judicial review of presidential actions under a statute contains a section devoted to the functional considerations unique to presidential decision-making, making full elaboration unnecessary here.[267]

But the constitutional theory elaborated above does have a few implications that require addressing. Arbitrary and capricious review of presidential decision-making should aim to detect evasion of the legislative purpose.[268] That is, judicial review should aim to detect faithless execution of the law, not simply errors in judgment from Presidents genuinely seeking to implement a statute's objectives.[269] This usually will require less intensive review than we sometimes find in cases reviewing the reasonableness of agency action.[270] But it does require some factual support for a decision and a rationale that links the decision to statutory policies.[271]

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[265] *See* Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 451-52 n.126 (D.C. Cir. 1980) (noting that courts have converted requirement that agencies take hard look at relevant problems to judicial duty to take a hard look at agency's decision); Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970) (stating in dicta that court should reverse if agency has not taken "hard look at the salient problems").

[266] *Cf.* Thomas O. McGarity, *On Making Judges Do the Right Thing*, 44 DUKE L.J. 1104, 1104 (1995) (doubting that *State Farm* test would sufficiently reign in hard look judicial review); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1074 (1995) (arguing that limiting arbitrary and capricious review to *State Farm* test would appropriately soften judicial review); Shapiro & Murphy, *supra* note 110, at 347-48, 358 (suggesting that *State Farm* test softens current hard look review, which has its basis in less justifiable part of decision).

[267] *See* Bruff, *supra* note 17, at 50-61 (recommending flexible arbitrary and capricious review, but referring to it as form of rational basis review).

[268] *See* Thomson v. Consol. Gas Utils. Corp., 300 U.S. 55, 69-70 (1937) (requiring court to find either that no reasonable relationship between agency rule and authorizing statute's purpose or that rule is otherwise arbitrary to justify reversal).

[269] *Cf.* Gersen & Vermeule, *supra* note 134, at 1371 (stating that requirement to consider relevant factors requires focusing on those factors that authorizing statute makes relevant). *But see* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 169 (2010) (finding that agencies win between sixty percent and seventy percent of cases regardless of type of review standard chosen).

[270] *See* Siegel, *supra* note 144, at 1677 (expecting that "standard of review" in reviewing presidential action will be "extremely generous" in many cases).

[271] The views suggested here are broadly consistent with those Justice Kagan expressed as a Harvard Law Professor, albeit in a slightly different context. She argued that the Court should soften hard look review when agencies act pursuant to presidential instructions. *See* Kagan, *supra* note 22, at 2380. She, however, would continue to demand factual support and a rationale. *See id.* at 2381 (stating that President's involvement would not excuse "disregard of contrary evidence" nor failure to consider "obvious regulatory alternatives"). Furthermore,

E. *Implications*

The approach outlined above broadly tracks most post-APA cases reviewing executive orders' reasonableness. But some extreme cases may need rethinking.

The courts usually look for a rationale connecting the executive order examined to the authorizing statute and sometimes look at factual support for decisions. Many of the decisions undertaking reasonableness review of executive orders (without calling it that) arise under the Federal Procurement Act ("FPA").[272] The D.C. Circuit has interpreted the FPA as requiring a rational nexus between executive orders and the statutory purposes of improving the economy and efficiency of government procurement.[273] This test has produced a series of decisions examining the reasonableness of claims that specific executive orders advance these values, i.e. of rationales connecting presidential policymaking decisions to the statutory purposes.[274]

Most of these cases tacitly apply an arbitrary and capricious test. For example, in *American Federation of Labor & Congress of Industrial Organizations v. Kahn*,[275] the entire D.C. Circuit reviewed an executive order requiring federal contractors to adhere to guidelines restraining wages and prices to combat inflation.[276] The district court had invalidated the executive order on the ground that it would give contracts to high bidders in cases where the low bidders did not comply with the wage and price guidelines.[277] The court of appeals reversed, because the policy of restraining prices and wages could reduce procurement cost over time across the federal government, even if it immediately increased the costs of some contracts.[278] The court noted that the government offered some

she only endorses softening hard look review when the President publically takes responsibility for his action. *See id.* at 2382.

[272] *See* Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 486(a) (2012).

[273] *See* Am. Fed. of Labor v. Kahn, 618 F.2d 784, 792 (D.C. Cir. 1979) (en banc) (requiring that executive order accord with FPA's "values of 'economy' and 'efficiency'" and upholding executive order with "close nexus" between these goals and order).

[274] *See, e.g.*, *id.* at 796 (upholding executive order requiring government contractors to comply with wage and price guidelines because guidelines would likely lower the cost of government procurement); Am. Fed. of Gov't Emp. v. Carmen, 669 F.2d 815, 821 (D.C. Cir. 1981) (upholding cancellation of free parking for government employees, because parking charges would improve economics of government property management); Chamber of Commerce v. Napolitano, 648 F. Supp. 2d 726, 736-38 (D. Md. 2009) (upholding executive order requiring employers to verify immigration status of their employees because verification would avoid expense of immigration enforcement actions).

[275] 618 F.2d 784 (D.C. Cir. 1979).

[276] *Id.* at 785 (describing issue as whether FPA authorizes denial of contracts exceeding five million dollars to companies not complying with "voluntary wage and price standard").

[277] *See id.* at 792 (describing district court as "alarmed" at diversion of contracts from low bidders not in compliance with standards to high bidders).

[278] *See id.* at 792-93 (finding no basis for rejecting President's conclusion that restrained costs would more than offset occasional awards to high bidders over time).

factual support for its conclusion by showing that most large companies seem inclined to adopt the voluntary wage and price restraints.[279] In other words, it examined the President's actual rationale, not an imagined rationale, and asked in effect, whether it was arbitrary given the limited factual support available for future predictions.

The dissent even more clearly applied an arbitrary and capricious standard, finding the factual support for this claim in the record insufficient.[280] It reached this conclusion by engaging in something like hard look review of the record.[281] Both opinions tacitly employ an arbitrary and capricious test.

As in arbitrary and capricious review generally, a lack of factual support rarely proves dispositive in cases involving executive orders.[282] But it has figured in judicial review of applications of an executive order requiring affirmative action. In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*,[283] the Third Circuit upheld an executive order requiring affirmative action in federally-funded state construction projects based on record findings that discrimination in employment in the construction industry is especially likely to drive up costs.[284] The Fourth Circuit, however, invalidated the executive order as applied to federal subcontractors underwriting workers compensation insurance in *Liberty Mutual Insurance Co. v. Friedman* ("*Liberty Mutual*").[285] It relied squarely on the lack of factual findings suggesting that affirmative action in the insurance industry has an effect on federal contracting cost.[286] The lack of findings revealed that in the insurance context, the executive order simply advanced a general social policy rather than served the FPA's goal of limiting the cost of government procurement.[287]

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[279] *See id.* at 792, 792 n.46.

[280] *See id.* at 804 (MacKinnon, J., dissenting) (finding "no support in the record" for government's claim that wage and price standards would constrain the overall costs of government contracting).

[281] *See id.* at 804-05.

[282] *See* St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 76 (1936) (Brandeis, J., concurring) (noting that Court never reversed Interstate Commerce Commission for factual error).

[283] 442 F.2d 159 (3d Cir. 1971).

[284] *Id.* at 163, 171 (using detailed findings of special problems in construction industry to justify link to legitimate federal interest in economic use of federal financial assistance to state construction projects).

[285] 639 F.2d 164, 166-67 (4th Cir. 1981) (holding that insurance company underwriting workers' compensation is federal subcontractor under FPA).

[286] *See id.* at 171 (discussing lack of findings on "what percentage of the total price of federal contracts" reflects insurance costs or on history of discrimination in insurance industry); *cf.* Chamber of Commerce v. Napolitano, 648 F. Supp. 2d 726, 738 (D. Md. 2009) (holding that President is not required to make any factual findings).

[287] *Cf. Liberty Mutual*, 639 F.2d at 171 (insisting on nexus between FPA's efficiency goals and "Executive Order social objectives").

The approach advocated here, however, brings into question the rationale employed in some of the more extreme cases. For example, in *UAW-Labor Employment & Training Corp. v. Chao*,[288] the D.C. Circuit tacitly applied rational basis review to allow evasion of the FPA.[289] *Chao* reviewed an executive order that required federal contractors to notify employees of their rights not to join a union or pay costs unrelated to union representation.[290] The President sought to link his anti-union labor policy to the FPA's goals by claiming that informing workers of their rights to avoid full participation in a union enhances productivity.[291] Because the law already requires unions to inform their members of these rights, the court recognized that this rationale seemed "attenuated," but upheld it anyway.[292] In both *Liberty Mutual* and *Chao*, the executive branch sought to evade the statute by implausibly claiming a link between the President's social policies (of affirmative action and weakening unions respectively) and the statutory policy of efficient procurement. The application of an incorrect standard of review in *Chao* allowed the President to get away with it.[293]

The travel ban litigation shows the value of having a constitutional basis for an explicit standard of reasonableness review. The Ninth Circuit's failure to even acknowledge that it was reviewing the order's rationality made the decision's reasoning suspect. The court states that "there is no sufficient finding" that the travel ban serves the "interests of the United States."[294] But the court acknowledges, in the next sentence, that the President found the "unrestricted entry" of aliens from the targeted countries "detrimental to the interests of the United States."[295] Why is that not sufficient? The answer is that this finding and the factual record together provided, in the court's view, an insufficiently robust basis for the decision under the arbitrary and capricious test.[296] A court understanding that the Constitution supports arbitrariness review can better rationalize efforts to detect evasion of the statutory purpose.

Arbitrariness review's structure could have improved the court's reasoning. It demands an adequate rationale linking the Executive Order to the statutory

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[288] 325 F.3d 360 (D.C. Cir. 2003).

[289] *Id.* at 364 (discussing applicable standard of review).

[290] *Id.* at 362 (describing executive order).

[291] *See id.*

[292] *See id.* at 366-67 (characterizing claim of influence on productivity as "attenuated" but upholding it).

[293] For a rare example of a modern court applying extreme *Lochner*-style review to an Executive Order, see *Association Builders & Contractors of Southeast Texas v. Rung*, No. 1:16-CV-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016).

[294] *See* Hawaii v. Trump, 859 F.3d 741, 770 (9th Cir. 2017).

[295] *Id.*

[296] *See id.* at 773 (explaining that order does not provide adequate rationale); *see also* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 269 n.17 (4th Cir. 2018) (en banc) (suggesting that Third Travel Ban was also arbitrary and capricious without using that phrase); Hawaii v. Trump, 878 F.3d 662, 693-94 (9th Cir. 2017) (containing similar reasoning).

purpose. But Travel Ban 2.0 only finds "unrestricted entry" detrimental to our interests. The nationals of these countries do not benefit from unrestricted entry now. They undergo extensive vetting. So, a question arises about whether a problem with hypothetical but non-existent "unrestricted entry" provides a sufficient rationale for an order that stops all entry, which the Court arguably missed.[297]

The Ninth Circuit's insistence on some factual support for the order, however, reinforces factual review's value for detecting evasion of the statutory purpose. The Court noted the lack of evidence of terrorist acts of immigrants from the targeted country.[298] This raises legitimate questions about whether the order rationally serves the national interest as required by the statute, or instead aims to demonize an enemy to enhance the President's standing with a faction of voters.

The Supreme Court's decision to apply a rational basis test to the third travel ban, however, left the Court with no means of detecting whether the third travel ban evaded the statutory requirement to serve the national interest. If the travel ban aimed to serve the interest of Trump's faction or even Russian interests in fostering division in America rather than the national interest, the Court's approach would still allow the judgment to stand.[299] The Court justified disabling itself from detecting evasion of the statutory purpose based on the President's authority to protect national security.[300] This decision, however, does not preclude applying arbitrary and capricious review outside the context of national security determinations.[301]

Seeking to answer every possible question scholars might raise about how the courts should apply the arbitrary and capricious test in the many domains outside of national security where it may still apply would make this analysis unduly complex and obscure the fundamental point: presidential policy-making actions implementing statutes generally need some form of arbitrary and capricious review to detect evasion of the law.

Yet, the theory developed to justify this fundamental point has some further implications that merit brief mention. First, the judicial custom of giving the President extreme deference in foreign affairs and national security matters

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[297] *Cf*. *Hawaii*, 859 F.3d at 771 (noting that travel ban contains "no finding that absent the improved vetting procedures there likely will be harm to our national interests").

[298] *See id*. at 772 (noting that order "does not identify the number of nationals from the six designated countries who have been . . . convicted" of "terrorism-related crimes").

[299] *Cf*. Trump v. Hawaii, 138 S.Ct. 2392, 2445 (2018) (Sotamayor, J., dissenting) (noting that national security officials from both parties argued that travel ban did not serve national security interests).

[300] *See id*. at 2409-10, 2420-21 (applying rational basis review to this order because of Trump's claim that ban protects national security).

[301] *See id*. at 2420 n.5 (suggesting that this standard only applies to decisions implicating national security in context of Establishment Clause challenge).

might need some rethinking in light of this analysis.[302] This Article has suggested that the President's status as an elected official and the primary national figurehead makes him uniquely able to undermine the rule of law and that this problem should figure in how courts review presidential actions.[303] The courts often have good reasons to hesitate to question the President's judgment in matters of national security and foreign affairs, because the President has unique and sometimes secret sources of information in these realms.[304] At the same time, manipulation and creation of national security and foreign affairs concerns provide a terrific tool for heads of state to undermine the rule of law.[305] So, the need to ferret out evasion of legal constraints becomes acute in this context.[306] This may suggest that the courts should not hesitate to intensively review rationales purportedly based on national security or foreign affairs when the decision-making process does not appear to rely on expert judgment based on confidential sources.[307] While resolving this tension lies behind the scope of this article, some applications of the arbitrary and capricious test may implicate this concern.

Yet, this Article justifies arbitrary and capricious review as a means of detecting evasion of statutory purpose.[308] This leaves open the question of whether such review has a role to play when the President acts on his own express or implied constitutional authority.[309] That question merits consideration.

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[302] *Cf. id.* at 2420-21 (applying a deferential rational basis test to evaluation of an Establishment Clause claim in the national security context); *cf. id.* at 2441 (Sotomayor, J., dissenting) (noting that normally heightened scrutiny applies to claims of religious discrimination).

[303] *Cf. id.* at 2445 (Sotomayor, J., dissenting) (characterizing travel ban as sham using national security pretext to claim authority to discriminate against one religion, authority denied federal government under Constitution).

[304] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936) (citing confidential information sources as reason to recognize President as "sole organ" of nation in foreign affairs).

[305] *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 578-79 (2004) (Scalia, J., dissenting) (discussing Founders' concern that country might sacrifice liberty during times of "external danger"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (refusing to construe Commander-in-Chief authority as authorizing unilateral presidential seizure of private property to settle labor disputes).

[306] *See* Sterling v. Constantin, 287 U.S. 378, 398-401 (1932) (recognizing that Court must sometimes second guess claims of military necessity lest civil liberty perish).

[307] *Cf.* Trump, 138 S.Ct. at 2443 (Sotomayor, J., dissenting) (noting that government did not make public review it conducted prior to issuing its third travel, but not noting any claim that confidential information was involved).

[308] *Cf.* Chamber of Commerce v. Reich, 74 F.3d 1322, 1331-32 (D.C. Cir. 1996) (insisting on nonstatutory review of President Clinton's executive order under FPA because President must exercise his authority consistently with statute's structure and purpose).

[309] *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 103-04 (1976) (suggesting that Court might defer more to President than agency in equal protection challenge to using statutory authorities to support exercise of President's authority to make treaties); Siegel, *supra* note 144, at 1678 (discussing possibility that some presidential actions may be unreviewable).

Finally, the analysis offered here may have value in reforming administrative law more generally. It suggests that courts should use arbitrary and capricious review of presidential action to detect evasions of legislative purpose, i.e. the pursuit of presidential policy initiatives through evasion of bicameralism and presentment. Arbitrary and capricious review under the APA often serves broader purposes but has endured harsh criticism as overly intrusive.[310] I hope to consider in a subsequent article whether courts should understand arbitrary and capricious review of agency rulemaking only as a means of detecting evasion of statutory policies or, instead, as a broader check on poor decisions.

CONCLUSION

The demise of Lochnerian due process and the exemption of the President from the APA has opened up a hitherto undetected gap in the law governing presidential policymaking. Courts must fill the gap in a way that affirms the rule of law and ensures that the President faithfully executes the law in accordance with due process of law, Article III, and the judicial promises to review presidential action in the nondelegation doctrine cases.

Courts should accordingly review presidential policymaking actions for rationality under an arbitrary and capricious test that demands some factual support and a rationale connecting the action to the statute purportedly authorizing it. Such an approach supports the rule of law and serves constitutional values.

[310] *See* Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1820-22 (2012) (canvassing functions performed by demanding explicit rationale through arbitrary and capricious test).