REASONABLENESS REVIEW OF EXECUTIVE ORDERS

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December, 2017

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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 decision affirming an injunction of the Second Travel Ban (Travel Ban 2.0) applies a less deferential level of scrutiny congruent with the arbitrary and capricious test governing review of administrative agency decisions. [4]

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.[5] 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 most executive orders are.[6]

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[1] Exec. Order No. 13769, Protecting the Nation from Foreign Terrorist Entry into the United States. 82 Fed. Reg. 8977 (January 27, 2017).

[2] *See* Videotape of Oral Argument, Washington v. Trump, (W.D. Wa. February 3, 2017), http://www.uscourts.gov/cameras-courts/state-washington-vs-donald-j-trump-et-al. [hereinafter Robart Video].

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

[4] *See* Hawaii v. Trump, 859 F.3d 741, 770-74 (9th Cir. 2017) (*per curiam*) (questioning the President's conclusion that admitting nationals of the countries mentioned in Travel Ban 2.0 would be detrimental to U.S. interests); *see also* State v. Trump, 2017 WL 4639560, *9 n. 14 (D. Hawaii) (holding that specific findings must support an executive order under the Immigration and Nationalization Act).

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

[6] 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); Note, *Enforcing Executive Orders*, 55 GEO. WASH. REV. 659, 660 (1987) (noting that most executive orders are issued under specific statutory delegations of authority).

Perhaps surprisingly, this question has generated almost no commentary and little case law.[7] The Supreme Court has not conducted reasonableness review of an executive order in decades. 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.[8] A rich literature addresses questions about the scope of the President's powers under Article II. 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.[9] 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 all in the years since the Court exempted presidential action from review under the Administrative Procedure Act (APA) in 1992.[10]

Prior to the APA, reasonableness review of executive orders took place primarily under the Fifth Amendment's Due Process Clause. 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 govern 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" 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.[11] 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

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[7] *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 431 (1935) (striking down an executive order because it lacks findings and a stated rationale); *cf.* Udall v. Tallman, 380 U.S. 1, 23 (1965) (addressing the reasonableness of an agency's construction of an executive order); Letter Carriers v. Austin, 418 U.S. 264, 273 n. 5 (1974) (opining that an executive order on federal labor management relations was "reasonable").

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

[9] *See* Newland, *supra* note 5, 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 the framework governing claims that agencies have violated statutes should apply to executive orders).

[10] Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (exempting the President from the 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).

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

burdening fundamental constitutional rights. For example, the Fourth Circuit's decision upholding an order enjoining Travel Ban 2.0 does not discuss the standard of review governing the order's reasonableness, because it concludes that the Travel Ban discriminates on the basis of religion.[12] 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.[13] 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.[14] Given Congressional dysfunction and the growth of populism excited by the prospects of a strong President with distinctive policy views (such as Donald Trump and Bernie Sanders), we can expect a lot of executive orders in the future, some of which may raise serious questions of reasonableness.[15] So, the question of what sort of reasonableness review applies to executive orders matters a lot.

This article's first part recovers the forgotten history of reasonableness review of executive orders in the Lochner-era.[16] 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.[17] 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.

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[12] Trump v. Int'l Refugee Assistance Project, 857 F.3d 554 (4th Cir. 2017) (en banc).

[13] *See, e.g.,* Exec. Order No. 13768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (January 25, 2017) (requiring local police to aid immigration enforcement); Exec. Order No. 13771, Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9339 (February 3, 2017) (requiring agencies to offset the cost of new rules by repealing old ones).

[14] *See* Elena Kagan, *Presidential Administration,* 114 HARV. L. REV. 2245, 2246-48 (2001) (suggesting that the President controls the executive branch more tightly than many had supposed); Kathryn A. Watts, *Controlling Presidential Control,* 114 MICH. L. REV. 683, 685 (2016) (stating that presidential control of administration has deepened since the publication of Kagan's article).

[15] *See* Kagan, *supra* note 14, at 2309-15 (explaining that public expectations for presidential accomplishment combined with congressional dysfunction increase demand for presidential control of policy).

[16] *See* William C. Wiecek, The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937 152 (1998) (dating the Lochner period as 1886 to 1937).

[17] *See generally* ID. at 134-35 (explaining that the Court used its assumed power to review legislation's reasonableness to review rate setting decisions' reasonableness); 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").

Part two 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.

The final part 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.

I. REASONABLENESS REVIEW DURING THE *LOCHNER* ERA.

The Fifth and Fourteenth Amendments forbid deprivations of life, liberty, or property without due process of law. 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 unanimously affirmed that the arbitrary and capricious test's core elements apply to the President in *Panama Refining Company v. Ryan,* which adjudicated the validity of an executive order on oil shipments under the National Industrial Recovery Act (NIRA).[18] The *Panama Refining* Court famously struck down this executive order on the ground that the NIRA's "hot oil" provision violated the nondelegation doctrine—which prohibits delegation of legislative authority to the President.[19] 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.[20] 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.[21] As explained in the introduction, review of a rationale and factual basis constitute 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.[22] The *Panama Refining* Court justified this by pointing that statutory limits "would be ineffectual" in limiting the President's discretion absent such findings.[23] Absent some demonstration of compliance with statutory policy, the Court

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[18] Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).
[19] *See id.* at 406, 414-431 (explaining why the "hot oil" provision violates the nondelegation doctrine).
[20] *See id.* at 431 (characterizing the lack of findings and rationale as "another objection" to the executive order's "validity").
[21] *See id.* at 431-33 (affirming that the requirements for findings and a stated rationale constitute "constitutional principles" applicable to the President and administrative agencies alike).
[22] *See id.* at 431 (characterizing presidential findings about the "basis for his action" as "necessary to sustain that action").
[23] See id.

explained, the President would exercise "uncontrolled legislative power."[24] Thus, both due process and the nondelegation doctrine justified arbitrary and capricious review of executive orders.

Justice Cardozo dissented from the Court's conclusion that the hot oil provision violated the nondelegation doctrine, but agreed with the majority that due process requires application of an arbitrary and capricious test to an executive order.[25] Cardozo explains that an executive order "may not stand if it is . . . an arbitrary fiat that overleaps the bounds of judgment."[26] Furthermore, like the majority he suggested that an executive order must have a factual basis, affirming that if nothing in the oil industry's condition shows a link between the executive order and the statute's policies, the executive order would be deemed arbitrary.[27] He also insisted that an executive order must be based on relevant factors, pointing out that if the President sought to justify the order as maintaining the gold standard or "peace in Europe"—neither of which are policies of the NIRA—it would be invalid.[28] Justice Cardozo, however, did not agree with the Court's view that the President must make findings to support his order and therefore dissented from its conclusion that this executive order was invalid on due process grounds.[29] Instead, he would uphold the order, absent some showing by its opponents that it lacked a factual basis or pursued some statutorily irrelevant policy.[30]

Thus, the entire Court agreed that the arbitrary and capricious test applies to executive orders. And furthermore, the majority agreed that the Constitution requires that courts invalidate executive orders lacking factual findings and a rationale showing that the order carries out statutory policies. 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.[31]

The other major case of this period reviewing executive orders, *Highland v. Russell Car & Snowplow Co.,* also shows that the arbitrary and capricious test applies to executive orders. It reviews the reasonableness of executive orders establishing wartime price controls under the Lever Act.[32] Because price controls were needed to help prosecute World War I, the Court required a clear showing of arbitrariness.[33] 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

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

[25] *See id.* at 434 (claiming that the hot oil provision embodies a "reasonably clear" standard to guide presidential discretion as required by the nondelegation doctrine).

[26] See *id.*

[27] See *id.*

[28] See *id.*

[29] *See id.* at 444-46 (disclaiming a requirement that a President support his order with findings).

[30] *See id.* at 446-47 (explaining that those subject to an executive order can defeat "usurpation" of authority by showing no factual predicate for an order or pursuit of a statutorily irrelevant objective).

[31] *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 a statute under the nondelegation doctrine and suggesting that the doctrine now functions only as an 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 the nondelegation doctrine).

[32] 279 U.S. 253, 257-262 (1929) (upholding the Lever Act and the executive order issued under it as "not . . . clearly unreasonable").

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

Amendment."[34] 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.[35] The Texas Railroad Commission had limited oil production under a state statute designed to conserve oil.[36] 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 Guard to impose stricter limits on oil production than the Commission had required.[37] In *Sterling v. Constantin,* 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.[38]

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.[39] Especially when upholding decisions, the *Lochner* Court would frequently equate reasonableness with a lack of arbitrariness and capriciousness.[40] In the 20th 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.[41] And the

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[34] *See id.* at 258, 262.

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

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

[37] *See* Constantin v. Smith, 57 F.2d 227, 229 (E.D. Tex.1932) (stating that the Commission had established a limit of 165 barrels of oil per well, but that the Governor had reduced this limit to 100 barrels).

[38] *See Sterling,* 287 U.S. at 403-04 (finding no "military necessity" and affirming the District Court's injunction).

[39] *See* Champion Lumber Co. v. Fisher, 227 U.S. 445, 448-449 (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 the Court's progressives reviewed agency decisions for arbitrariness as a matter of due process); Robert L. Rabin, *Federal Regulation in Historical Perspective,* 38 STAN. L. REV. 1189, 1233-34 (1986) (recognizing that an early twentieth century case adopted "the modern administrative law position on judicial review"—that the court would defer to *nonarbitrary* agency decisions on fact and policy) (emphasis added).

[40] *See* N.Y. & Queens Gas Co. v. McCall, 245 U.S. 345, 348-49 (1917) (endorsing the arbitrary or capricious standard from New York administrative law and declaring it generally equivalent to the Supreme Court's due process review of agency action); Kansas City S. Ry. Co. v. United States, 231 U.S. 423, 437, 425 (1913) (equating unreasonableness and arbitrariness); Dent v. West Virginia, 129 U.S. 114, 124 (1889) (describing the Due Process Clause's purpose as preventing arbitrary and capricious legislation); *see, 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 the Equal Protection Clause)*;* New York & N.E. R.R. Co. v. Town of Bristol, 151 U.S. 556, 571 (1894) (holding that an order to remove a grade crossing does not offend due process because order it is not arbitrary and capricious); *cf.* In re Del. R.R. Tax, 85 U.S. 206,231 (1873) (holding that setting a tax rate and valuation method lies within legislative discretion no matter how arbitrary and capricious).

[41] *See* St. Joseph Stockyards v. U.S., 298 U.S. 38, 51 (1936) (stating that due process requires evidence and non-arbitrary decisions from the legislature's agents); *see, e.g.,* N. Pac. Ry. Co. v. Dep't of Pub. Works, 268 U.S. 39, 44-

Court also identified the arbitrary and capricious test with the need to detect administrative evasion of statutes—a need underlying the *Panama Refining* Court's requirement of an explanation based on statutorily relevant factors.[42] *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.[43]

B. *Lochnerism: A More Activist Approach*

The Lochner 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.[44] In *Lochner,* the Supreme Court reviewed a New York statute limiting bakers' working hours under the Due Process Clause.[45] 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 would preclude contracts for longer hours.[46] It saw this restriction on contractual freedom as an intrusion on the liberty interests of both the bakers and their employers.[47] 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.[48]

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

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

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

[44] Lochner v. New York, 198 U.S. 45 (1905).

[45] *See id.* at 52 (explaining that the case arises from the conviction of a bakery owner for requiring an employee to work more than 60 hours a week).

[46] *See id.* at 52-53 (noting that even if the employee prefers to work more than 60 hours the statute forbids it and therefore interferes with his liberty to contract freely).

[47] *See id.* at 52-54 (portraying this case as interfering with the contractual liberty of the baker and the bakery owner).

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

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.[49] By contrast, it had upheld similar limits on miners' hours because it viewed them as reasonable and hence within the state's police power.[50] Thus, legislation's constitutional validity during the *Lochner*-era depended on whether a court found it reasonable.[51]

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.[52] It also considered the line drawing inherent in choosing the number of permitted work hours arbitrary.[53]

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,*[54] 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.[55] The *Adkins* Court, relying heavily upon *Lochner,* characterized the law authorizing minimum wages as an arbitrary interference with liberty of contract.[56] 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 impossibility of writing rules that fit every circumstance well.[57] 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,* features detailed fact-finding by the Supreme

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

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

[51] Chicago B. & Q.R. 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").

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

[53] *See id.* at 82 (finding a suggestion that 10 hours of work a day is alright but 10 and a half or 11 hours a day endangers health "arbitrary").

[54] 261 U.S. 525 (1923).

[55] *See id.* at 539-540 (explaining that a federal statute required a three-member board to establish minimum wages for women).

[56] *See id.* at 548-550, 554-62 (extensively quoting *Lochner* before finding that the statute unreasonably restrains liberty of contract).

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

Court.[58] The Court also established detailed rules of its own invention for what constituted reasonable rates.[59]

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 that the cases proved consistent.[60] 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.[61] 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.

Lochnerian reasonableness review of legislation brought the Court into disrepute. Justice Holmes' dissent in *Lochner* charged the Court with ideological decisionmaking.[62] And many commentators claim that the Court's reasonableness decisions simply enacted the judges' prejudices into law.[63]

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.[64] In that context, he argued, the Constitution did not preclude enactment of legislation on the ground that a judge might disagree with that judgment.[65] Thus, Holmes' argument to move away from Lochnerism relied heavily on the nature of collective judgment in a legislative process.

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[58] 169 U.S. 466, 528-39 (1898) (settling factual controversies based on the record); *see generally* ROSCOE POUND, ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE, AND SIGNIFICANCE 29 (1942) (explaining the general theory under which 19th century courts considered it appropriate to find facts themselves in reviewing agency proceedings).

[59] *See* WIECEK, *supra* note 16, at 135 (noting that the Court "arrogated to itself the power to resolve technical accounting issues" at the heart of rate setting); Rabin, *supra* note 39, 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. v. Conley, 236 U.S. 605 (1915) (insisting that reasonable rates must provide for a decent profit on each line of business considered separately); *Smyth,* 169 U.S. at 539-547 (requiring reasonableness to be determined based solely on expenses and earnings within the regulating state but then suggesting a "fair value" of property used test).

[60] *See generally* Rabin, *supra* note 39, at 1234-36 (finding the era's jurisprudence "riddled with inconsistency").

[61] *See* WIECEK, *supra* note 16*,* at 158 (pointing out that the Lochner-era Court struck down 53 of the 790 state police power regulations and taxes that came before the 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 the 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 the same period).

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

[63] *See* Susan Bandes, Erie *and the History of the One True Federalism,* 110 YALE L. J. 829, 833 n. 21 (2001) (book review) (noting the identification of Lochner with the problem of judges enacting their prejudices into law); 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 a "reactionary judiciary's commitment[s] to . . . laissez faire economics").

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

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

II. THE SPLIT: REASONABLENESS REVIEW AND THE NEW DEAL.

Holmes' view that a court ought not invalidate legislation based on the judges' disagreement with legislators about a new law's reasonableness eventually won out.[66] 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, first 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.[67]

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.

A. *The Rational Basis Test.*

The Great Depression made the need for economic legislation acute and the activist *Lochner*-era approach untenable.[68] 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. This court packing plan excited intense opposition and Congress did not adopt it, but the Court did change its tune.

In *West Coast Hotel Co. v. Parish*,[69] the New Deal Court repudiated Lochnerism. Confronted with a demand to invalidate a minimum wage law similar to the law struck down in *Adkins,*[70] the Court overruled *Adkins* and upheld the statute.[71]

The *Parish* Court held that liberty of contract did not protect regulated parties from reasonable regulations for the benefit of the community.[72] 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.[73] Even though the statute at issue in *Parish* did not direct the Industrial Welfare Commission establishing minimum wages under the statute to consider the value of services rendered, the *Parish* Court assumed that the

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[66] *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' view that the Court may not read its policy views into the Constitution).

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

[68] *See* FREEDMAN, *supra* note 17, at 5 (noting that the New Deal created many administrative agencies to address "the devastating consequences of a major depression").

[69] 300 U.S. 379 (1937).

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

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

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

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

Commission did take that value into account, because its processes provided for employer input.[74] 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 states of facts may exist that would justify not directing a Commission to explicitly consider the value of services rendered. Citing *Adkins* dissents, the *Parish* Court noted that increased wages may simply reduce profits rather than put employers out of business.[75] That assumption would make a failure to consider the value of services rendered reasonable. Thus, the Court assumed that a state 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."[76] 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."[77]

One year later, the Court announced the modern "rational basis" test in *U.S. v. Carolene Products,* declaring that a statute might be found to violate due process only if it lacks a rational basis.[78] 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."[79] 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."[80] 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.

In *Ferguson v. Skrupa,* the Court linked the Holmes political economy concerns to the constitutional order.[81] It identified the rational basis test with "a return to the original constitutional

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

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

[76] *See id.* at 399.

[77] *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 a legislative classification is "neither capricious nor arbitrary" it generally does not offend the Equal Protection Clause).

[78] 304 U.S. 144, 152 (1937) (suggesting that a law may be invalid if it lacks a rational basis).

[79] See id.

[80] See id.

[81] 372 U.S. 726 (1962).

proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, *who are elected to pass laws."*[82] Thus, the *Ferguson* Court articulated two constitutional justifications for the deference to legislators that 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.[83]

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' *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 explains 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.[84] This ensures that people from various regions of the country with differing outlooks support the legislation.

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.[85] 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. [86] 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.[87]

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

[82] *Id.* at 730 (emphasis added).
[83] *Cf.* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (employing a similarly deferential approach under the Equal Protection Clause); R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 173 n. 8 (1980) (noting that the Court has incorporated rational basis review under the Equal Protection Clause into the Fifth Amendment's Due Process Clause).
[84] *See* INS v. Chadha, 462 U.S. 919, 945-46 (1983).
[85] *Cf. Fritz*, 449 U.S. at 180-81 (1980) (Steven, J., concurring) (suggesting that purpose is sometimes unknown because legislation frequently involves comprises among multiple competing purposes).
[86] *Cf. id.* at 179 (majority opinion) (if the Court finds a plausible justification for legislation the question of whether the legislature actually relied on this justification is "constitutionally irrelevant").
[87] *Cf. id.* (noting that the Court does not require Congress to articulate a rationale for legislation).

expert testimony about the state of the world. 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 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. 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 arbitrary 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.

3. *The Democratic Rationale*—The democratic rationale complements the collective judgment and structural rationales by recognizing that election legitimates legislators' value choices. The Constitution reflects a delegation of authority from the People to an elected legislature. 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. 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 legislators does legitimate 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 just 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.[88] Disclaiming the intensive review found in *Smyth* and its progeny, these cases interpreted the requirement for reasonable rates as only requiring that non-confiscatory rates not be arbitrary.[89]

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."[90] 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*.[91]

The APA's drafters may have intended review based on a minimal record, for the APA only requires a "concise statement" of a rule's "basis and purpose."[92] 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.[93]

In *Citizens to Preserve Overton Park v. Volpe,* a citizens group contended that the Secretary of Transportation (Secretary) evaded a statutory prohibition on creating highways in public parks if there is a "feasible and prudent" alternative.[94] The Secretary approved a highway through Memphis' Overton Park, claiming an authority to make general legislative decisions by balancing all of the competing considerations.[95] The Court rejected this legislative approach and insisted that the Secretary must protect parkland unless alternative routes pose unique problems.[96]

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[88] *See* Fed. Power Comm'n v. Nat. Gas Pipeline, 315 U.S. 575, 586 (1942) (stating that "[t]he Constitution does not bind rate-making bodies to the service of any single formula"); Fed. Power Comm'n v. Hope Gas Co., 320 U.S. 591, 602 (1944) (stating that the Commission's "expert judgment" carries a "presumption of validity").

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

[90] The Administrative Procedure Act, Pub. L. 404, June 11, 1946, ch. 324, § 10(e), 60 Stat. 237, 243, codified at 5 U.S.C. § 706(2)(a).

[91] Administrative Procedure Act, Leg. Hist., 79th Cong., 1944-46 39 (July 26, 1946) (noting that the judicial review provisions reflect the courts' decisions under the 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 the APA did not change standards of judicial review, which were developed under the Due Process Clause); Rabin, *supra* note 39, at 1266 (characterizing the APA as articulating agency "due process" by adopting preexisting "common law judicial review principles").

[92] 5 U.S.C. §553(c). *See* Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185-86 (1935) (holding that a 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 the court could "conceive of" a "plausible . . . set of facts" to justify it).

[93] *See* Rabin, *supra* note 39, at 1302 (characterizing *Overton Park* as abandoning a deferential approach to APA review after the New Deal); Shapiro & Murphy, *supra* note 92, at 332 (characterizing the Supreme Court's "refusal to allow judicial . . . control of rulemaking" as "hilarious," because the courts "essentially rewrote the statutory procedure for" administrative "rulemaking in the late 1960s and 70s").

[94] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 405-06 (1971) (explaining that a citizens group accused the Secretary of violating a mandate to avoid putting highways in parks if a "feasible and prudent" alternative exists).

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

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

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.[97] It insisted on a reasonable basis for concluding that there are no feasible alternative routes.[98] Accordingly, the Court required that the Secretary base his judgment on "relevant factors"—meaning the feasibility factors made relevant by the statute.[99] 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.[100] This remand decision pressured agencies to develop a robust record, even though the APA's terms do not explicitly require findings or a record.[101] 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 Ass'n v. State Farm Mutual Automobile Insurance Co., 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.[102] The rule reviewed in that case purported to implement the National Traffic and Motor Vehicle Safety Act of 1966 (Act).[103] As its name suggests, the Act mandated regulatory actions improving vehicle safety.[104] President Reagan came into office in 1980 and famously supported deregulation.[105] 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.[106] President Reagan's new Transportation Secretary, however, rescinded this passive restraint rule.[107]

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.[108] The Court

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[97] *See generally,* FREEDMAN, *supra* note 17, at 247 (noting that courts created the requirement to state the basis for a decision in part to facilitate judicial review).

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

[99] *See id.* at 416.

[100] *See id.* at 419-20 (majority opinion) (explain that the full record was not before the Court and remanding to consider it or supplement with testimony); 422-23 (Blackman, J., concurring) (explaining why the record before the 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 the judicial sense").

[101] *See Overton Park,* 401 U.S. at 417-19 (explaining the lack of a requirement for findings)

[102] 463 U.S. 29 (1983).

[103] 15 U.S.C. §§ 1381 *et seq.* (1976 and Supp. IV 1980).

[104] *See State Farm,* 463 U.S. at 33-34 (noting that the statute's purpose was to reduce deaths from traffic accidents and that it directed the Secretary to adopt practical standards furthering that objective).

[105] See Jerry L. Mashaw, *The Story of* Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.: *Law, Science, and Politics in the Administrative State*, in ADMINISTRATIVE LAW STORIES, *supra* note 100, at 334 (noting the Reagan team's commitment to deregulation).

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

[107] *See id.* at 38.

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

held that the agency had failed to provide factual support or a reasoned explanation for this result.[109]

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.[110] *State Farm* Court requires an administrative agency to "examine relevant data" and to "articulate" a "rational relationship between the facts found" and the agency's policy choice.[111]

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 altogether.[112] Furthermore, it may reject rules made in the teeth of so much contrary evidence as to make the decision implausible.[113] 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.[114] 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.

Administrative law scholars distinguish arbitrary and capricious review from review to make sure 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. A portion of the Ninth Circuit's Travel Ban 2.0 decision illustrates this point.[115] President Trump claimed that a provision of Immigration and Nationalization Act (INA) empowering the President to suspend the entry of any group of aliens authorizes his travel bans.[116] Those challenging the travel bans pointed out that another provision of the INA prohibits nationality-based limits on immigrant visas.[117] The challengers' argument that the prohibition of nationality-based visa restrictions limits the President's authority to suspend

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[109] *See id.* at 48 (noting that no findings or analysis supports the agency's conclusion) (citation omitted).

[110] *See id.* at 43 (stating that while "a court" may not "substitute its judgment for that of the agency," the agency must "examine the relevant data").

[111] *See id.* (requiring examination of "relevant data" and articulation of a "rational connection between the facts found and the choice made") (internal quotation and citation omitted).

[112] *See id.* (noting that a "rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem").

[113] *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").

[114] *See id.* (characterizing as arbitrary and capricious decisions made on the basis of "factors which Congress had 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 the factors the "authorizing statute" makes relevant).

[115] *See* Hawaii v. Trump, 847 F.3d 741 (9th Cir. 2017).

[116] *See id.* at 769-70 (citing 8 U.S.C. §1182(f)).

[117] *See id.* at 776 (citing 8 U.S.C. §1152(a)(1)(A)).

entry of groups of aliens raises a claim about whether Travel Ban 2.0 is contrary to law.[118] It is not an argument about whether his decision is reasonable in the abstract; it is an argument about whether his decision runs afoul of the policy decisions embodied in legislation, in this case the INA. On the other hand, even if the President has authority under the statute (and under the Constitution) to ban aliens from particular countries, the decision to target this particular group of countries might still be unreasonable under the arbitrary and capricious test. 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.[119]

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

As should be apparent already, the 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 test. In both cases, the courts have repudiated Lochnerism and seek 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).[120] 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.[121] If a legislature provides no reasoned basis for its decision, the court will supply one.

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[118] *See id.* at 779 (concluding that Trump's order likely exceeded his authority under the INA); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 580 (4th Cir. 2017) (characterizing this claim as a statutory claim).

[119] *See* STRAUSS, *supra* note 100, at 322 (suggesting that the question of whether the Secretary had correctly understood the statute emerged as a "central" issue in the litigation); Rabin, *supra* note 39, at 1308-09 (explaining that the courts interpreted the APA creatively because deference would surrender the function of judicial review).

[120] William W. Buzbee & Robert A. Shapiro, *Legislative Record Review,* 54 STAN. L. REV. 87 (2001); *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 the Supreme Court has become increasingly aggressive in striking down federal statutes for lack of factual support under the First Amendment, section five of the Fourteenth Amendment, and the Commerce Clause).

[121] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1982) (stating that a reviewing Court "may not supply a reasoned basis for the agency's decision that the agency itself has not given"); Citizens to Preserve 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, 95 (1943) (requiring that judicial review focus on the rationale the agency announces when making a decision).

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 law execution to prevent free-wheeling policy making unconstrained by legislative decisions.

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 capricious standard would apply to executive orders implementing federal statutes.[122] The Supreme Court, however, rejected application of the APA to the President in *Franklin v. Massachusetts.*[123] The Court reached this result by manufacturing a plain statement rule and applying it to the question of whether the APA governs presidential action.[124] Since Congress did not specifically mention the President in the APA, the Court held that the APA does not apply to the President.[125] The *Franklin*

[122] *See* Raoul Berger, *Administrative Arbitrariness, A Synthesis*, 78 YALE L. J. 967, 997 (1969) (stating that the APA applies to the President); Kenneth Culp Davis, *Administrative Arbitrariness–A Postscript,* 114 U. PA. L. REV. 823, 832 (1966) (same).
[123] 505 U.S. 788, 796 (1992).
[124] *See id.* at 800-01(requiring an "express statement" from Congress before subjecting the President to APA review).
[125] *See id.* (holding that "textual silence" is not enough to justify holding the President subject to APA review).

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.[126]

Franklin, however, did not end judicial review of executive orders. As Jonathan Siegel has explained at length, so-called non-statutory review—review pursuant to the common-law writ of mandamus and other remedial customs predating the APA—remains available.[127] But *Franklin* complicates judicial review by raising questions about whether a litigant can obtain judicial review of executive orders by suing the President directly.

Most actions seeking review of presidential action obtain it by suing somebody charged with carrying out presidential orders, including *Marbury v. Madison* (a suit against the Secretary of State to challenge President Jefferson's decision to withhold Marbury's commission) and the *Youngstown Steel Seizure Case* (a suit against the Secretary of Commerce to challenge President Truman's order to seize steel mills).[128] Even APA review remains available as a remedy against administrative actions carrying out executive orders.[129] 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.[130] This imperative, of

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

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

[128] *See* Swan v. Clinton, 100 F.3d 973, 979 (D.C. Cir. 1996) (describing the case where a presidential transgression cannot be remedied through an order directed at another official as "rare"); *see, e.g.,* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952) (enjoining the Secretary of Commerce from enforcing the executive order invalidated in *Youngstown*); Nixon v. Fitzgerald, 457 U.S. 731, 754 n. 36 (1992) (noting that the President was not formally named as a party in *Youngstown*); UAW-Labor Employment & Training Corp. v. Chao, 325 F. 3d 360, 362 (D.C. Cir. 2003) (suing the Secretary of Labor and others to seek review of an 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 making him a Justice of the Peace that Secretary of State Madison had not delivered. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-74 (1803) (declaring that Marbury has a vested right in his commission and that mandamus lies against the Secretary of the 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 127, at 1627 (explaining that the defendant could not rely on presidential orders as a 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. at 165 (stating that the King must, as a practical matter, 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 benefits by executive fiat. *See id.* at 167 (stating that not even the President can extinguish an officeholder's rights, unless the law provides him with a power to remove him).

[129] *See* Kagan, *supra* note 14, at 2350-51; *see generally* Kendall v. United States, 37 U.S. (12 Pet.) 524, 612-13 (1838) (noting that the President's responsibility to "take care that the law be faithfully executed" does not empower him to forbid lower government officials from properly executing the law).

[130] *See Siegel, supra* note 127, at 1627 (describing the "remedial imperative" as the "need to provide a remedy for every invasion of a legal right"); *see, e.g.,* Ex Parte Young, 209 U.S. 123, 159 (1908) (holding that a suit against an official for violating the constitution does not offend sovereign immunity, because a state official violating the Constitution is not acting on behalf of the State in its governmental capacity).

course, extends to judicial review of claims that an officer acted in violation of a statute.[131] And the District Courts have occasionally issued orders to the President.[132]

But a subsequent case reaffirming the unavailability of APA review—*Dalton v. Specter*—signals some Justices' skepticism about reasonableness review of presidential action.[133] 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.[134] *Dalton* comports with APA precedent holding an action unreviewable when there is no law to apply.[135] Some of the broad language in Justice Rehnquist's plurality opinion, however, suggests that reasonableness review of presidential action needs explicit defense.[136] And *Franklin* suggests that the Court imagines that separation of powers concerns argue against robust judicial review of presidential actions.

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[131] *See* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015) (Scalia, J.) (acknowledging the 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 a statute lie notwithstanding sovereign immunity, because the actions are *ultra vires*); Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996); *see also* United States v. Lee, 106 U.S. 196, 220 (1882) (noting that the "highest" government officers are "bound to obey" the law).

[132] *See* Siegel*, supra* note 127, at 1679.

[133] 511 U.S. 462, 470 (1994)

[134] *See id.* at 465-66, 477 (plurality opinion) (explaining that the statute required the President to accept or reject a package of base closure recommendations in their entirety and that therefore Congress did not intend to authorize judicial review of the decision about one single base). Five Justices concurred separately to emphasize the holding's narrowness. *See id.* at 478-84 (Souter, J., concurring) (explaining why the statute expresses an intention to preclude judicial review of the President's decision to accept a list of military bases for closure); *id.* at 474 (Blackmun, J., concurring) (joining the concurring opinion because the base closure statute precludes judicial review of the President's decision).

[135] *See* Heckler v. Cheney, 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 merely rejecting judicial review only when the President acts under a statute that contains "no limitations on the President's exercise of . . . authority").

[136] *See Dalton,* 511 U.S. at 474 (stating that judicial review does not lie "when the statute 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 in Support of Petitioner, Ochoa v. Holder, 2011 WL 663188 (U.S.) (noting that the APA's exemption of "action committed to agency discretion by law" from judicial review cannot exempt all actions involving discretion from judicial review because the APA authorizes review for "abuse of discretion"). Justice Rehnquist cites a statement in a Lochner-era case, *Dakota Cent. Tel. Co. v. South Dakota,* 250 U.S. 163, 184 (1919), that an abuse of discretion claims is unreviewable. Although the *South Dakota* 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 *South Dakota* Court adjudicated the validity of the federal seizure of a telephone company under a wartime statute authorizing such the federal government to take possession of telephone systems if necessary for national security. *See id.* at 181. 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 the Tariff Act when it only authorizes review of "questions of law"). The other case Rehnquist cites, *Chicago and S. Airlines v. Waterman S.S. Corp*., 333 U.S. 103, 111 (1948), treated Presidential decisions to license international air carriers as a political question because of the President's foreign affairs power. *See* Baker v. Carr, 369 U.S. 186, 282 (1962) (citing *Waterman, supra*, as an exemplar of the political question doctrine).

Commentators agree that non-statutory review has traditionally included reasonableness review.[137] But the writ of mandamus and other forms of do 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 part 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 "finally wrought . . .procedure" to enact legislation—requiring passage of a bill by both houses of Congress and presentment to the President.[138] 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.[139] 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 decisionmaking the American colonists had suffered when the British King established policies by decree.[140]

The Constitution requires the President to "take Care that the Laws be faithfully executed."[141] This 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.[142] Instead, they believed in an ideal of "disinterested leadership" and hoped to avoid the creation of "faction."[143]

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[137] Bruff, *supra* note 10, at 21 (noting that nonstatutory review includes review to ascertain rationality); *see also* GELLHORN, BYSE, and STRAUSS, *supra* note 127, at 923 (noting that a writ of mandamus may check arbitrary or capricious action); Siegel, *supra* note 127, 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"); 28 U.S.C. §1361 (authorizing district courts to issue writs of mandamus to compel an "officer employee of the United States" to perform a duty); Note, *Mandamus in Administrative Actions: Current Approaches,* 1973 DUKE L. J. 207, 209-211 & n. 23 (noting a split of judicial authority about whether mandamus can lie to remedy abuse of discretion, but noting that commentators unanimously claim that it does).

[138] *See* INS v. Chadha, 462 U.S. 919, 951 (1983).

[139] *See id.* at 951 (characterizing bicameralism and presentment as the "single" procedure for exercising legislative power); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588-89 (1952) (stating that Congress not the President must make the law).

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

[141] U.S. CONST. art. II, § 3.

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

[143] *See* GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 165 (2002) (discussing the Framers' "vision of disinterested leadership").

The principal domestic policymaking role envisioned for the President involved the power to veto unwise legislation. The Constitution, however, limits the presidential power to block legislation by allowing Congress to override a veto with a 2/3 vote.[144] 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.[145]

At the same time, the Constitution makes the President a nationally elected official and gives him the executive power.[146] 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.[147]

In order to ensure that the executive branch faithfully executes the law and not make policy on its own, the Founders denied the President sole control over the executive branch of government.[148] 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.[149] 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.[150] Although the modern understanding of separation of powers has evolved to allow Congress to specify other means of removing officers, Hamilton's view provides further evidence that the Framers sought a stable rule of law based on legislative supremacy and disinterested leadership, not wild swings in policy every four years.[151]

In the years since George Washington, the President has assumed a much greater role in shaping policy. Congressional delegation of substantial powers to 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.[152] Justice Scalia, however, argued for a unitary executive theory under which the President must control all executive branch decisionmaking in an emphatic dissent.[153] While the Supreme Court never adopted the unitary executive theory, a number of prominent

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[144] U.S. CONST. art. II, § 7, cl. 2.

[145] *See* PHELPS, *supra* note 142, at 139-42, 150-54 (describing Washington's use of the veto as only focused on foreign policy and correcting unconstitutional actions).

[146] *See* U.S. Const. art. II, § 1.

[147] *See* United States v. Burr, 25 F. Cas. 30, 34 (No. 14,692-D) (C.C.Va. 1807) (Marshall, J.) (comparing the President to the "first magistrate" of a state and therefore finding him amenable to service of a subpoena).

[148] *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 the executive branch).

[149] *See* THE FEDERALIST NO. 77, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1962) (noting that the Constitution subjects the President to legislative control with respect to appointments).

[150] *See* ID. at 459 (stating that "The consent of [the Senate] would be necessary to displace as well as appoint.").

[151] *See* THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 142 (supporting "steady administration" of the laws).

[152] *See* Morrison v. Olson, 487 U.S. 654 (1988) (upholding the assignment of prosecutorial duties to an "independent counsel").

[153] *See id.* at 705, 724 n. 4 (Scalia, J., dissenting).

scholars have championed it.[154] 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 Due Process clause did not provide a basis for substantive review of legislation for reasonableness.[155] But the original understanding did encompass the notion that official action must conform to the law.[156] Executive actions taken without legal authority likely offended the original understanding of the Fifth Amendment 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.[157] 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 v. Madison,* the Supreme Court claimed the authority to check a Republican President's decision to refuse delivery of a commission to an appointee of the outgoing Federalist administration.[158] 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.[159] And it tied this judicial enforcement of the duty to faithfully execute law to the necessity of maintaining a rule of law.[160] Similarly, in the *Youngstown Steel Seizure* case, the Supreme Court overturned a presidential executive order to seize the steel mills in order to maintain production

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[154] *See, e.g.,* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws,* 104 YALE L. J. 541 (1994); Martin S. Flaherty, *The Most Dangerous Branch,* 105 YALE L. J. 1725 (1996); *cf.* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (contesting the unitary executive theory).

[155] *See* Ryan J. Williams, *The One and Only Substantive Due Process Clause,* 120 YALE L. J. 408, 454 (2010) (claiming that the original understanding of the 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).

[156] *See id.* at 420-21, 457 n. 21 (explaining that the public meaning of the Due Process Clause followed a "positivist" conception defined as the 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 the Due Process Clause with the idea that actions must conform to the "rule of the land").

[157] U.S. CONST. art. III, §2.

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

[159] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 177 (1803).

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

vital to our war effort in Korea.[161] The Court relied heavily on notions of legislative supremacy and the rule of law.[162] 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 is made.[163]

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.[164] 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. 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 justify the rational basis tests, as we have seen, in the context of legislation. 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.

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.[165]

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[161] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583, 588-89 (1952).
[162] *Id.* at 587-89 (rejecting the Presidential steel mill seizure because no legislation authorized it).
[163] *See id.* at 634-655 (Jackson, J., concurring) (suggesting that Presidents may have implied powers where Congress approves or says nothing about his actions); Dames & Moore v. Regan, 453 U.S. 654, 674 (1981) (applying the Jackson concurrence in a case where it found that Congress had approved of the President's action); *cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (citing the *Youngstown* majority opinion for the proposition that the Constitution does not give the President a "blank check" even in war).
[164] *See* PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 12 (2016) (stating that the rule of law requires that officials may only use its coercive power when using "reasonable interpretations of preexisting . . . rules").
[165] *Cf.* Bruff, *supra* note 10, at 51 (grounding the requirement for judicial review of Presidential action in the need to ensure that his actions serve the "*particular* ends sought by the statute") (emphasis in original).

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 rulemaking authority to the President in large part because of the impossibility of Congress "finding for itself" all of the facts determining how a policy objective should be pursued.[166] 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 or review adequate to allow a tribunal to ascertain whether the executive branch is obeying the will of Congress and staying within a defined field.[167] 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.[168] 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.[169]

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 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. 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.[170] 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

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[166] *See, e.g.,* Field v. Clark, 143 U.S. 649, 681-694 (1891) (employing the fact-finding rationale to uphold delegation of tariff making authority to the President, relying on similar delegations going back to 1794); *see also* Yakus v. United States, 321 U.S. 414, 424 (1944) (suggesting that it would be impossible for Congress to find the facts necessary to apply general policies to particular circumstances and that this justifies allowing broad delegation).

[167] *See Yakus,* 321 U.S. at 423-25 (requiring adequate definition in a statute so that a tribunal can determine whether the executive branch has acted within the field's contours); American Power Co. v. S.E.C., 329 U.S. 90, 104-105 (1946) (linking approval of a delegation of authority to outlaw unduly complicated or unfair corporate structures to the ability to "test applications of the policy" in court).

[168] *See* Opp Cotton Mills v. Admin., 312 U.S. 126, 143-45 (1940) (articulating the ability to identify factors relevant to the statutory purpose as a basis for finding a delegation of authority to set a minimum wage constitutional).

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

[170] *See, e.g.,* Mistretta v. United States, 488 U.S. 361, 379 (1988) (stating the delegation is especially appropriate when expertise is needed); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 400 (1940) (accepting a somewhat vague definition of a jurisdictional term in a statute because it provides sufficiently precise guidance for factual determinations by experts).

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.[171] 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.

Generally, an intelligible principle embodies a legislative value choice.[172] 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 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.[173] 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.

Even an extremely broad standard like the requirement that immigration restrictions be in the "national interest" must have some limits. A President may not establish limits that serve Russian interests or that serve the interests of a faction only. A requirement for some factual support and a national interest rationale can detect the rare case where a President does not follow the national interest standard. At any rate, the nondelegation doctrine cases require findings even in cases where the relevant statutory language is extremely open-ended in order to keep the President within the broad bounds of the law.

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 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 act 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.[174]

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

[172] *See Yakus*, 321 U.S. at 424 (characterizing determination of policy as an essential part of the legislative function).

[173] *Cf.* Gersen & Vermeule, *supra* note 114, at 1385-87 (explaining why under conditions of uncertainty, the agency must make a "rationally arbitrary" decision among a feasible set of justifiable choices).

[174] *Panama Refining,* 293 U.S. at 431-33 (explaining that the Constitution requires both the President and an administrative agency to demonstrate through findings that their actions comport with the statute delegating authority); *see also id.* at 420 (explaining that the nondelegation doctrine applies fully to the President, just as it would to an administrative agency).

2. *The Collective Judgment Rationale*—The collective judgment rationale does not justify extreme deference to presidential decisions. 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 reflect 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.[175] To the extent that his decisionmaking 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. 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 decisionmaker 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.[176] While such cases are unusual, a failure to consult with government experts creates a high risk that concerns sometimes motivating a hard look at a decision under the arbitrary and capricious standard may apply—concerns that the President failed to consider relevant data and an important aspect of the problem he seeks to address. This would make even stronger the conclusion that at a minimum, the courts should demand a stated rationale and some factual support for a decision.

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.

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* that some questions require purely political decisions with which courts must not interfere.[177] At the same time, ordinary questions under most statutes require exercise of reasoned discretion under law.[178]

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[175] *See* Bruff, *supra* note 10, at 14-17 (describing the normal process in some detail).

[176] *See* Hawaii v. Trump, 859 F.3d 741, 756 (9th Cir. 2017) (per curiam) (noting that the President promulgated Travel Ban 1.0 "without interagency review").

[177] *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (describing the 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).

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

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 law because the people elected him.[179] The Framers sought to achieve a stable rule of law, and did not authorize Presidents from a different faction than the controlling faction at the time of a statute's passage to change it through faithless administration. The Constitution provides for legal change. But the primary method for fundamental change involves passage of new legislation. This ensures that the law remains stable and that the government will only fundamentally change its policy commitments when a large number of elected officials supports the change. So, a President as an elected official may legitimately seek passage of amendments changing the law, but if he seeks to undermine the law without securing passage of fresh legislation, he has violated his oath of office.

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.[180] Agencies cannot act beyond a limited domain. Presidents, however, have sometimes issued directives aimed at changing the administration of whole bodies of law.[181] 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 Parliament, have gradually changed or evaded laws fundamental to democracy, like laws protecting free speech and open and fair elections. [182] 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."[183]

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[179] *See* Kagan, *supra* note 14, at 2349-50 (explaining that Presidents tend to "push the envelope" in interpreting statutes more than agencies do).

[180] *See generally* Kaden, *supra* note 6, at 1545 (claiming that delegations to the President "pose the most difficult threat to separation of powers").

[181] *See, e.g.,* Presidential Order on Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9339 (February 3, 2017) (subverting the mandates of numerous agencies by requiring repeal of regulations to offset the costs of any new ones); Allan 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 the regulatory schemes put in place by Congress).

[182] *See generally* David Segal, *Turkey Wages War on "Enemies" in Business: Over 950 Companies Seized in Fallout of Coup Attempt,* N.Y. TIMES A1, A13 (July 23, 2017) (explaining that Turkey's President Erdogan has seized companies owned by people he sees as enemies, imprisoned opponents, and throttled the free press, making a former democracy authoritarian). *see also* Rick Lyman, *Poland's Siege on Democracy Targets Courts,* N.Y. TIMES A1 (July 20, 2017) (discussing rising threats to democracy in Poland).

[183] *See* McCullogh v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis in original).

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 subsection 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 part 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 decisionmaking as in the administrative agency context and also makes some suggestions about how to soften arbitrary and capricious review to ameliorate these concerns.[184]

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."[185] 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 that arise in separation of powers cases may cut the other way.[186]

While the *Franklin* Court's statement by itself does not explain why separation of powers or the presidential role counsels no APA review, the *Franklin* Court cited a case that provides some clues, *Nixon v. Fitzgerald,* which immunized the President from damage suits not specifically authorized by Congress.[187] *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.[188] 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

[184] *Cf.* Siegel, *supra* note 127, at 1704 (noting that *Franklin*'s exemption of the President from APA review provides opportunities for the judiciary to appropriately "modulate" judicial review of presidential action).
[185] *See* Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992).
[186] *Cf.* Siegel, *supra* note 127, at 1676 (suggesting there is no serious problem in suing the President, just a question of mere "delicacy.").
[187] *See Franklin,* 505 U.S. at 801 (citing Nixon v. Fitzgerald, 457 U.S. 731 (1992)).
[188] *See id.; Fitzgerald,* 457 U.S. at 751-52.

to avoid the Constitution's "finely wrought procedure" for legislative change and instead take the short cut of amendment through maladministration.[189]

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 actions may affect a great number of individuals negatively.[190] 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.[191] Because of the Court only allows injured plaintiffs to sue, such lawsuits will come from injured plaintiffs, just as private suits for damages do.[192] But since there is no possibility of damage awards, financial motives will not encourage a proliferation of needless suits.[193]

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.[194]

While other remedies exist to deter presidential misconduct, they provide weak deterrents to evasion of the law.[195] Presidential elections do not ensure fidelity to law. Voters rarely know a lot about law or policy, and even less about whether a President properly implements law.[196] 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.[197] To the extent voters know anything about law and policy, they will evaluate presidential decisions based on their congruence with their current values, not their conformity to

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[189] *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).

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

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

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

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

[194] *See* Siegel, *supra* note 127, at 1674 (noting that the President suffers no distraction from his duties in answering "a nonstatutory review suit" because "[g]overnment attorneys would handle the suit"); *see generally* United States v. Lee, 106 U.S. 196, 206 (1882) (stating that the government is not degraded by having to appear as a defendant, "because it is constantly appearing as a party in such courts").

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

[196] 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 Administration in Agency Rulemaking,* 88 TEX. L. REV. 441, 447-48 (2010) (finding public ignorance about regulation defeats the theory that Presidential regulatory decisions reflect the public's views).

[197] *See generally* ACHEN & BARTELS, *supra* note 196, at 91-93 (describing the theory of "retrospective voting" under which voters choose candidates based on their perception of their own well-being under the previous administration with little understanding of how policies might have shaped or not shaped their condition).

laws enacted in the past.[198] 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.[199] 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 seems 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.[200] The House has only impeached a President when the opposing party controlled it, and then only twice in our nation's history.[201] 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, Congressmen have become much more interested in advancing their current policy objectives through the oversight process than their prior collective decisions.[202] Kevin Stack has concluded that Congress has not been a "robust monitor of the president's assertion of statutory authority," as it has overturned only four of the more than 3,500 executive orders issued between 1945 and 1998.[203] 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 Court's 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'

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

[199] *See* Criddle, *supra* note 196, at 458-60 (noting that voters tend to focus on presidential candidates' "experience and temperament" rather than on their policies); *see, e.g.,* 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); Michelle Alexander, *Why Hillary Clinton Doesn't Deserve the Black Vote*, THE NATION (Feb. 10, 2016) (explaining that black voters preferred Hilary Clinton over Bernie Sanders, even though Sanders' policy proposals better serve their interests).

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

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

[202] *See* Kagan, *supra* note 14, at 2259-60, 2350 (suggesting that special interests tend to influence congressional oversight more than the interests of "Congress as a whole or the general public" and that it may have no interest in following the intentions of the enacting Congress); Daryl J. Levinson, *Empire-Building Government in Constitutional Law,* 118 HARV. L. REV. 915, 950-60 (2005) (explaining that Congressmen have not defended congressional prerogatives vigorously in recent years).

[203] Stack, *supra* note 9, at 541-42.

activities, international events, sports, and other matters for attention.[204] 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.[205] 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.[206] 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.[207]

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,[208] wars they conducted,[209] speeches they made,[210] personal

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[204] *See* Michael J. Robinson, *Two Decades of American News Preferences*, PEW RESEARCH CENTER (Aug. 22, 2007), http://www.pewresearch.org/2007/08/22/two-decades-of-american-news-preferences-2/ (noting that only about 26% of Americans followed political news closely, compared with 39% who followed disasters closely, 34% who followed the economy closely).

[205] *See, e.g.,* Lisa Friedman & Brad Plumer, *EPA Announces Repeal of Major Obama-Era Carbon Emissions Rule,* N.Y. TIMES A1 (October 10, 2017) (reporting illegal repeal of the Clean Power Plan primarily as a policy and political move before briefly mentioning that EPA "is still required to regulate greenhouse-gas emissions"); Robert Schiller, *Why Trump's 2-For-1 Rule on Regulations is No Quick Fix,* N. Y. TIMES, Feb. 17, 2017, at ___ (discussing the policy significance of the 2-for-1 executive order, not its legality).

[206] Derek Koehler, *Can Journalistic "False Balance" Distort Public Perception of Consensus in Expert Opinion*?, 22 J. OF EXPERIMNNTAL PSYCHOL.: APPLIED (advance online publication 1, 1 (2016)) (discussing the 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, at ____ (briefly mentioning that one expert thinks the order illegal).

[207] *See* JEFFREY COHEN, THE PRESIDENCY IN THE EAR OF 24-HOUR NEWS 183-84 (2008) (discussing how media fragmentation has left the public confused about what news to believe); Susan Milligan, *The President and the Press*, 53 COLUM. JOURNALISM REV. 22, 23-24 (2015) (discussing Presidential manipulation of news through social media and other techniques).

[208] *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 LBJ for the civil rights act); *cf.* Dean Kieth Simonton, *Presidential Greatness: The Historical Consensus and Its Psychological Significance*, 7 POL. PSYCHOL. 259 (1989) ("stating that scholars, and laypersons have frequently indulged in more global and subjective estimates of presidential 'greatness.'" than suggested by their legislative accomplishments and other objective criteria);

[209] *See, e.g.,* ROBERT MERRY, WHERE THEY STAND 119 (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) http://www.nytimes.com/2013/07/03/opinion/why-the-civil-war-still-matters.html?mcubz=0 (listing Lincoln's persistence in prosecuting the civil war as a major factor cementing his reputation).

[210] *See, e.g.,* FRANK FREIDEL AND HUGH SIDEY, THE PRESIDENTS OF THE UNITED STATES OF AMERICA (2006), https://www.whitehouse.gov/1600/presidents/abrahamlincoln (discussing Lincoln's speeches as a significant part of his legacy); Martha Watson*, Ordeal by Fire: The Transformative Rhetoric of Abraham Lincoln,* 3 RHETORIC AND PUB. AFF. 33, 33-48 (2000); John Kenneth White, *Ronald Reagan: The Power of Conviction and the Success of His Presidency*, 34, PRESIDENTIAL STUD. Q. 170, 173-174. (2004) (reviewing Robert M. Eisinger, The Evolution of Presidential Polling (2003)) (discussing the ideas Reagan advanced in his speeches as crucial to his legacy).

misconduct,[211] and even events that happened to occur on their watch,[212] rather than for faithful (or faithless) execution of the statutes they administer.[213]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.[214] 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 decisionmaking not based on the reflection and consensus building demanded by the procedure of bicameralism and presentment.[215]

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.[216] 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.[217]

Leading administrative law scholars argue that arbitrary and capricious review of agency action has tended to paralyze administration with unpredictable and onerous demands.[218] The

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[211] *See, e.g.,* Ivan Eland, Recarving Rushmore: Ranking the Presidents on Peace, Prosperity, and Liberty 324 (2014) (stating that Nixon is "remembered primarily for Watergate").

[212] *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, 528-529 (2010) (stating that economic performance matters a lot to our evaluation of Presidents); Ed Hornick, *Historians: Bush presidency 'battered,' 'incompetent,' 'unlucky',* CNN, Nov. 6, 2008, http://www.cnn.com/2008/POLITICS/11/06/bush.legacy/index.html (quoting Harvard University Political History Scholar Barbara Kellerman as associating Bush's reputation with 9/11, Hurricane Katrina, and the financial crisis); 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 the importance of the Soviet Union's fall in discussion of President Reagan's reputation).

[213] *See* Curry & Morriss, *supra* note 212, 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- 113 (1970) (noting that polls rating multiple Presidents tend to leave out faithful execution of statutes as a factor).

[214] *Cf.* Siegel, *supra* note 127, at 1690 (noting that disobeying a court order may "carry with it a significant political cost").

[215] *Cf.* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 31-61, 113-22 (2010) (advocating substituting political constraints for judicial review based in part based on the desirability of rapid response to emergencies).

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

[217] *Cf.* Kagan, *supra* note 14, at 2380 (recommending less intrusive judicial review when a President shapes an agency rule).

[218] *See* E. Donald Elliot, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1493-94 (1992); Thomas O. McGarity, *The Courts and Ossification of Rulemaking: A Response to Professor Seidenfeld,* 75 TEX. L. REV. 525, 557 (1997); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process,* 41 DUKE L.J. 1385, 1412 (1992); Richard J. Pierce, Jr., *Seven Ways to*

courts have interpreted the arbitrary and capricious standard in ways that force agencies to provide much more than a little evidence and a simply stated rationale.[219] They require a reasoned response to all significant comments and sometimes a very robust explanation.[220] Accordingly, regulated parties can tie the agencies in knots by submitting voluminous comments and lots of data.[221] The agencies must respond to substantially all of these comments and explain why the data provided do 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.[222] As a result, agencies typically generate an enormous record and explanations for their actions that can run on for hundreds of pages.[223] 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.

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.[224] Accordingly, arbitrary and capricious review will not force the development of an enormous record and hundreds of pages of justification. [225]

Scholars have debated the arbitrary and capricious test's success in countering the ideological reversal of agency action associated with Lochnerism. The Supreme Court has upheld agency actions 92% of the time, thereby suggesting that the intended deference has taken hold.

Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59 (1995); *cf.* Gersen & Vermeule, *supra* note 114, at 1369 (disputing the ossification claim); Mark Seidenfeld, *Demystifing Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking,* 75 TEX. L. REV. 483 (1997); 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 (2012).

[219] *Cf.* 5 U.S.C. §553(c).

[220] *See* Lilliputian Sys., Inc., v. Pipeline & Hazardous Materials Safety Admin., 741 F.3d 1309, 1312 (D.C. Cir. 2014) (interpreting the "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 the principle that agencies must respond to material comments); *cf.* Kagan, *supra* note 14, at 2270 (characterizing hard look review as requiring an agency "to address all significant issues, take into account all relevant data" and more).

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

[222] *See* Shapiro & Murphy, *supra* note 92, at 33 (characterizing judicial review of rulemaking as "political and unpredictable").

[223] 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 200 to 1,000 page statements to respond to 10,000 to 1,000,000 pages of comments).

[224] *See* John E. Noyes, *Executive Orders, Congressional Intent, and Private Rights of Action,* 59 TEX. L. REV. 837, 839 n. 10 (1981); *cf.* Siegel, *supra* note 127, at 1704 (noting that subjecting the President to the APA would make some of his executive orders into rules that would have to be issued in accordance with the APA's rulemaking provisions).

[225] *See* Kagan, *supra* note 14, at 2266-67 (identifying public participation as a "principal culprit" in the ossification of rulemaking); Shapiro & Murphy, *supra* note 92, at 338-49 (describing how the courts created hard look review in part to foster greater public participation and influence).

But the agencies' batting average may be worse in the lower courts.[226] Scholars have found evidence of ideological judging under the arbitrary and capricious test, as in other areas of law.[227]

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.[228] 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.

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.[229] (Conversely, a Congressional majority cannot correct an executive order subverting the law, because the President will likely veto the legislation).[230]

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

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[226] *See* Gersen & Vermeule, *supra* note 114, at 1359, 1364-37 (suggesting a lower court win rate of between 64%, but based on an idiosyncratic and limited data set that may give too little weight to rules adopted outside of the adjudication process).

[227] *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008) (finding that ideological bias influences arbitrary and capricious review); *cf.* Frank S. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal,* 107 YALE L. J. 2155, 2168-72 (1998) (finding that judges' application of the *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 (2002) (finding that hard look judicial review fosters less "biased" agency decisionmaking); *see generally* 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 a great deal of evidence to support an "attitudinal" model attributing judicial decisionmaking 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 administrative law and other areas in a 1955 survey); Richard Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deference to Agency Rulemaking,* 1988 DUKE L. J. 300, 315-16 n. 103; Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit,* 83 VA. L. REV. 1717, 1719 (1997) (finding significant ideological influences on the D.C. Circuit's environmental law decisions).

[228] *See generally* Siegel, *supra* note 127, at 1677 (expecting a "generous" standard of review in "many cases").

[229] *See* Stack, *supra* note 9, at 576 (noting that Congress can ratify an incorrectly rejected executive order with a majority vote).

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

review as a fairly simple unitary standard (factual support and a reasoned explanation), even though courts vary the intensity of review in particular cases.[231] The *State Farm* case discussed earlier, for example, exemplifies "hard look review" of administrative rulemaking.[232] 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 decisionmaking, making full elaboration unnecessary here.[233]

But the constitutional theory elaborated above does have a few implications that require stating. Arbitrary and capricious review of presidential decisionmaking should aim to detect evasion of the legislative purpose.[234] 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.[235] This usually will require less intensive review than we sometimes find in cases reviewing the reasonableness of agency action.[236] But it does require some factual support for a decision and a rationale linking the decision to statutory policies.[237]

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 Federal Procurement Act (FPA).[238] The D.C. Circuit has interpreted the FPA as requiring a rational nexus

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

[232] *Cf.* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Agency Decisions*, 44 DUKE L. J. 1051, 1074 (1995) (arguing that limiting arbitrary and capricious review to the *State Farm* test would appropriately soften judicial review); Shapiro & Murphy, *supra* note 92, at 347-48, 358 (suggesting that the *State Farm* test softens current hard-look review, which has its basis in a less justifiable part of the decision); *cf.* Thomas O. McGarity, *On Making Judges do the Right Thing,* 44 DUKE L. J. 1051, 1052 (1995) (doubting that the *State Farm* test would sufficiently reign in hard look judicial review).

[233] *See* Bruff, *supra* note 10, at 50-61 (recommending flexible arbitrary and capricious review, but referring to it as a form of rational basis review).

[234] *See* Thomson v. Consol. Gas Utils. Corp., 300 U.S. 55, 69 (1937) (requiring a court to find no reasonable relationship between the agency rule and the authorizing statute's purpose to justify reversal).

[235] *Cf.* Gersen & Vermeule, *supra* note 114, at 1371 (stating that the requirement to consider relevant factors requires focusing on those factors that the authorizing statute makes relevant); *But see* David Zaring, *Reasonable Agencies,* 96 VA. L. REV. 135, 169 (2010) (finding that agencies win about 70% of the time regardless of the type of review standard chosen).

[236] *See generally* Siegel, *supra* note 127, at 1677 (expecting that the "standard of review" in reviewing Presidential action will be "extremely generous" in many cases).

[237] 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 acted pursuant to Presidential instructions. *See* Kagan, *supra* note 14, at 2380. She, however, would continue to demand factual support and apparently a rationale. *See id.* at 2381 (stating that the President's involvement would not excuse "disregard of contrary evidence" nor a failure to consider "obvious regulatory alternatives"). Furthermore, she only endorses softening hard look review when the President publically takes responsibility for his action. *See id.* at 2382.

[238] *See* Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 486(a) (1976).

between executive orders and the statutory purposes of improving the economy and efficiency of government procurement.[239] 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.[240]

Most of these cases tacitly apply an arbitrary and capricious test. For example, in *American Federation of Labor and Congress of Industrial Organizations v. Kahn,* the entire D.C. Circuit reviewed an executive order requiring federal contractors to adhere to guidelines restraining wages and prices to combat inflation.[241] 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.[242] 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.[243] The Court noted that the government offered some factual support for its conclusion by showing that most large companies seem inclined to adopt the voluntary wage and price restraints.[244] 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.[245] It reached this conclusion by engaging in something like hard look review of the record.[246] 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.[247] But it has figured in judicial review of applications of an executive order requiring affirmative action. In *Contractors Ass'n of Eastern Pennsylvania. v. Secretary of Labor,* the Third Circuit upheld an executive order requiring affirmative action in federally funded state construction projects based on record findings that

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

[240] *See e.g. id.* at 796 (upholding an executive order requiring government contractors to comply with wage and price guidelines because the 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 the cancellation of free parking for government employees, because parking charges would improve the economics of government property management); Chamber of Commerce v. Napolitano, 648 F. Supp. 2d 726, 736-38 (D.Md. 2009) (upholding an executive order requiring employers to verify the immigration status of their employees because verification would avoid the expense of immigration enforcement actions).

[241] 618 F.2d at 785 (describing the issue as whether the FPA authorizes the denial of contracts exceeding $5 million to companies not complying with "voluntary wage and price standard").

[242] *See id.* at 792 (describing the District Court as "alarmed" at the diversion of contracts from low bidders not in compliance with the standards to high bidders).

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

[244] *See id.* at 792 & n. 46.

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

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

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

discrimination in employment in the construction industry is especially likely to drive up costs.[248] The Fourth Circuit, however, invalidated the executive order as applied to federal subcontractors underwriting workers compensation insurance in *Liberty Mutual Insurance Co. v. Friedman*.[249] It relied squarely on the lack of factual findings suggesting that affirmative action in the insurance industry has an effect on federal contracting cost.[250] The lack of findings revealed that in the insurance context the executive order simply advanced a general social policy, rather than serve the FPA's goal of limiting the cost of government procurement.[251]

The approach advocated here, however, brings into question the rationale employed in some of the more extreme cases. For example, in *UAW-Labor Employment and Training Corp. v. Chao,* the D. C. Circuit tacitly applied rational basis review to allow evasion of the FPA.[252] *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.[253] 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.[254] 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.[255] 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.[256]

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."[257] 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."[258] 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. A court understanding that the constitutional supports arbitrariness review can better rationalize efforts to detect evasion of the statutory purpose.

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[248] *See* 442 F.2d 159, 163, 171 (3rd Cir. 1971) (using detailed findings of special problems in the construction industry to justify a link to legitimate federal interest in economic use of federal financial assistance to state construction projects).

[249] 639 F.2d 164, 166-67 (4th Cir. 1981) (holding that an insurance company underwriting workers' compensation is a federal subcontractor under the FPA).

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

[251] *Cf. id.* (insisting on a nexus between the FPA's efficiency goals and "Executive Order social objectives").

[252] 325 F.3d 360 (D.C. Cir. 2003).

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

[254] *See id.* (quoting the executive order).

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

[256] For a rare example of a modern court applying extreme Lochner-style review to an Executive Order, *see* Associated Builders & Contractors of Se. Tex. v. Rung, 2016 WL 8188655 (E.D. Texas).

[257] *See* Hawaii v. Trump, 859 F.3d 741, 770 (2017).

[258] Id.

Arbitrariness review's structure could have improved the Court's reasoning. It demands an adequate rationale linking the Executive Order to the statutory 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.[259]

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.[260] 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.

Seeking to answer every possible question scholars might raise about how this test should apply in various domains 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 might need some rethinking in light of this analysis. 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. 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.[261] 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.[262] So, the need to ferret out evasion of legal constraints becomes acute in this context.[263] This may suggest that the courts should not hesitate to intensively review rationales purportedly based on national security or foreign affairs when the decisionmaking process does not involve the consultation with experts who could offer sensitive information to inform the decision. While resolving this tension lies behind the scope of this article, some applications of the arbitrary and capricious test may implicate this concern.

More broadly, this article justifies arbitrary and capricious review as a means of detecting evasion of statutory purpose.[264] This leaves open the question of whether such review has a role to

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[259] *Cf. id.* at 771 (noting that the Travel Ban contains "no finding that absent improved vetting procedures there likely will be harm to our national interests").

[260] *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").

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

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

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

[264] *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 the FPA because the President must exercise his authority consistently with the statute's structure and purpose).

play when the President acts on his own express or implied constitutional authority.[265] That question merits consideration.

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.[266] 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.

[265] *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 103-104 (1976) (suggesting that the Court might defer more to a President than an agency in an Equal Protection challenge to using statutory authorities to support exercise of the President's authority to make treaties); Siegel, *supra* note 127, at 1678 (discussing the possibility that some Presidential actions may be unreviewable).

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