VIRGINIA LAW REVIEW

VOLUME 104 DECEMBER 2018 NUMBER 8

## *ARTICLES*

# ADMINISTRATIVE RATIONALITY REVIEW

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*Under the familiar rational basis test, a court must uphold a challenged statute if there is any conceivable basis to support it. Courts routinely accept speculative—even far-fetched—justifications that few would describe as "rational" in a colloquial sense. Modern rational basis review typically is justified as a necessary concession to the nature of the legislative process. The puzzle is why courts apply this same deferential standard when reviewing constitutional challenges to administrative agency actions. Neither courts nor scholars have explained why administrative agencies—which share few of the features of democratically accountable legislative bodies—should enjoy the same degree of judicial deference to their decisions. In many states and localities, this permissive rationality standard is all that constrains the decisions that agencies make. This Article argues that there is in fact no justification for the prevailing approach and that as a constitutional matter courts have an obligation to scrutinize agency regulations more closely than they do legislative enactments. Courts must ensure that agencies at all levels of*

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*government act on the basis of actual reasons, and there is at least a plausible connection between regulatory means and ends.*



## INTRODUCTION

Absent some reason to apply heightened scrutiny, courts afford a great deal of deference to legislative judgments. Under the familiar "rational basis" test—which is the default standard for equal protection and substantive due process claims—courts insist on little more than a plausible connection between legislative means and ends.[1] The

[1] See Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) (upholding a state law that barred opticians from replacing broken glasses without a new prescription from an optometrist); United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (upholding

government need not produce any evidence to support a classification.[2] And it does not matter if all available evidence suggests the legislature was mistaken.[3] A statute may be upheld based on *any* conceivable basis, including one that the legislature never considered.[4] Indeed, it may fairly be said that rational basis scrutiny hardly cares about rationality at all.

Courts and commentators have justified this highly permissive standard on a variety of grounds. Some point to the majoritarian basis for legislation, and the fact that legislatures are accountable to the public in ways that courts simply are not.[5] Others note that legislatures must have some leeway to draw arbitrary lines—for example, by imposing certain restrictions only on businesses with 50 or more employees, even though all agree there is no meaningful difference between companies that have 51 employees as opposed to 49.[6] Still others point to the political influence of interest groups to argue that the very idea of "rationality" is based on a misperception of the legislative process, which is not an exercise in rational deliberation but rather of pluralist, political will.[7]

statute banning the sale of filled milk based on speculative concerns about consumer confusion).

[2] See FCC v. Beach Comms, Inc., 508 U.S. 307, 315 (1993) (noting that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data").

[3] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (emphasizing that "litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken").

[4] See Flemming v. Nestor, 363 U.S. 603, 612 (1960) (noting that it is "constitutionally irrelevant" whether the basis on which a statute is upheld "in fact underlay the legislative decision").

[5] See, e.g., Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2d ed. 1986) (justifying judicial restraint on majoritarian grounds); J. Clifford Wallace, The Jurisprudence of Judicial Restraint: A Return to the Moorings, 50 Geo. Wash. L. Rev. 1 (1981) (same).

[6] See, e.g., Erwin Chemerinsky, The Rational Basis Test Is Constitutional (and Desirable), 14 Geo. J. L. & Pub. Pol'y 401, 404 (2016) ("[W]hen a state determines who passes or who fails the bar exam or a drivers' license test, a line has to be drawn. Setting the score at one point or another treats some differently than others, often with significant consequences for their lives, but inevitably a line must be drawn.").

[7] See Hans A. Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 212 (1976) (arguing that courts should not engage in any sort of rationality review because "policy often results from the accommodation of competing and mutually inconsistent values, or because it simply intends to favor one interest at the expense of another"); Richard A. Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974

What's puzzling, however, is why courts apply the same rational basis standard to *administrative agencies* as well—at least when agency actions are challenged on constitutional grounds.[8] For example, in *Dandridge v. Williams*, the Supreme Court rejected an equal protection challenge to a Maryland state agency regulation that allocated funds under the Aid to Families with Dependent Children ("AFDC") program in a way that disadvantaged children born into large families.[9] As Justice Thurgood Marshall pointed out in dissent, the Court did so by relying on arguments that government attorneys introduced late in the litigation, after the district court rejected the reasons on which the state agency had in fact relied.[10] More recently, in *Cook v. Bennett*, a federal circuit court applied the rational basis test to uphold a local school board's teacher evaluation scheme that, among other things, assessed eleventh and twelfth grade *math* teachers on the basis of *tenth grade English* scores.[11] As in *Dandridge*, the court relied on a dubious set of arguments that school board officials had themselves disclaimed earlier in the case.[12] And in *Sensational Smiles, LLC v. Mullen*, the Second Circuit upheld a state dental board regulation that by all accounts was intended primarily to shield dentists from competition by teeth whiteners, noting that the board's "simple preference for dentists over teeth-whiteners" sufficed on constitutional rational basis review.[13]

To be sure, courts are not always quite so deferential to administrative agencies. Courts apply a much stricter standard to *federal* agencies as a matter of federal administrative law.[14] In reviewing federal agency

Sup. Ct. Rev. 1, 27 (1974) ("Many public policies are better explained as the outcome of a pure power struggle . . . among narrow interest or pressure groups.").

[8] See, e.g., Armour v. City of Indianapolis, 566 U.S. 673, 676 (2012) (upholding a rule adopted by a local board of public works); Dandridge v. Williams, 397 U.S. 471, 486 (1970) (upholding a rule adopted by a state agency); Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949) (upholding a rule adopted by a local police chief).

[9] 397 U.S. at 487. For a longer discussion of *Dandridge*, see infra notes 229–239 and accompanying text.

[10] Id. at 523–24 (Marshall, J., dissenting).

[11] 792 F.3d 1294, 1301 (11th Cir. 2015); see also Wagner v. Haslam, 112 F. Supp. 3d 673 (M.D. Tenn. 2015) (reaching the same conclusion in a similar case).

[12] *Cook*, 792 F.3d at 1300–01. See infra notes 314–325 and accompanying text (discussing the facts of the case).

[13] 793 F.3d 281, 287 (2d Cir. 2015).

[14] Although couched in the language of the federal Administrative Procedure Act, this standard of review "is a far cry from the lenient scrutiny" that Congress originally intended. As Gillian Metzger and others have argued, the standard evolved over time in response to

decisions under the Administrative Procedure Act ("APA"), courts ask whether the agency carefully considered all aspects of the problem, and reached a conclusion that is supported by the evidence before it.[15] Had the regulations at issue in *Dandridge* or *Cook* been adopted by federal agencies, the courts would have insisted that the rules stand or fall based on the justifications that the agencies themselves provided at the time the decisions were made.[16] Likewise, had *Sensational Smiles* been decided as a matter of federal administrative law, the court would have asked whether "simple preference" for dentists was a permissible statutory basis on which the agency could rely (it was not).[17] Because these decisions were made by state and local agencies, however, courts applied the more lenient *constitutional* standard that, at the federal level, is reserved primarily for decisions made by the legislative branch.

This paper thus asks a question on which there is a surprising gap in the literature: whether, as a constitutional matter, agencies—and in particular state and local agencies—should be subject to the same lenient rational basis test that courts apply to legislation. As Professor Matthew Adler, Professor Eric Berger, and others have pointed out, much of the literature and case law on constitutional judicial review adopts a

constitutional concerns about accountability and arbitrariness in the administrative state. Gillian E. Metzger, Ordinary Administrative Law as Constitutional Common Law, 110 Colum. L. Rev. 479, 491 (2010); see also Thomas J. Miles & Cass R. Sunstein, The Real World of Arbitrariness Review, 75 U. Chi. L. Rev. 761, 762 (2008) (describing "the hard look doctrine . . . as a second-best substitute for the original constitutional safeguards against the uncontrolled exercise of discretion"); Richard W. Murphy, The Limits of Legislative Control over the "Hard-Look", 56 Admin. L. Rev. 1125, 1127 (2004) (arguing that a congressional attempt to eliminate more rigorous judicial scrutiny of federal agency actions would have constitutional implications); Sidney A. Shapiro & Richard E. Levy, Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions, 1987 Duke L.J. 387, 388 (1987) (arguing that "the doctrine of separation of powers requires [more rigorous] scrutiny because of the unique position of administrative agencies in terms of the constitutional structure of government.").

[15] See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 52 (1983).

[16] See SEC v. Chenery Corp., 318 U.S. 80, 94–95 (1943) (holding that an agency rule may only be upheld based on reasons that the agency itself offered at the time the decision was made).

[17] See *State Farm*, 463 U.S. at 43 (noting that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider").

"legislature-centered" perspective.[18] Although there have been dozens of articles written criticizing (or defending) the prevailing rational basis test, all have debated its merits with legislatures in mind.[19] The very idea of the "counter-majoritarian difficulty," which has consumed so much of modern constitutional scholarship, is based on idea that judicial review puts courts in a position to overrule decisions made by democratically accountable actors.[20] As Berger writes, if "[j]udicial review is problematic . . . because it allows unelected judges to overturn the policies of elected, politically accountable" officials, "[o]ne might accordingly assume that judicial review would be less problematic, perhaps even desirable," in the agency context.[21] Yet for the most part,

[18] Matthew D. Adler, Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty, 145 U. Pa. L. Rev. 759, 762 (1997); Eric Berger, Deference Determinations and Stealth Constitutional Decisionmaking, 98 Iowa L. Rev. 465 (2013) (hereinafter Berger, Deference Determinations); Eric Berger, Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making, 91 B.U. L. Rev. 2029, 2032 (2011) (hereinafter Berger, Individual Rights).

[19] For criticism of modern rational basis review, see Randy E. Barnett, Our Republican Constitution: Securing the Liberty and Sovereignty of We the People 222–25 (2016) (arguing for heightened rationality review of legislative decisions); Richard A. Epstein, The Classical Liberal Constitution: The Uncertain Quest for Limited Government 311 (2014) (arguing that the rational basis test is too deferential and generally is the wrong approach in cases involving economic rights); Robert W. Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 Calif. L. Rev. 1049, 1056 (1979) ("Much of what the Court has said in the name of 'rationality,' . . . if taken seriously, would deprive the requirement of all real content."); Chemerinsky, supra note 6 (defending the rational basis standard generally but arguing that it is too permissive in several respects); John O. McGinnis, Reforming Constitutional Review of State Economic Legislation, 14 Geo. J. L. & Pub. Pol'y 517 (2016) (arguing for more stringent rational basis review); Clark Neily, Litigation Without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional, 14 Geo. J. L. & Pub. Pol'y 537 (2016) (same). For more favorable accounts, see Linde, supra note 7 (arguing that rationality review is inconsistent with how the legislative process functions); Posner, supra note 7 (same); and Suzanna Sherry, Selective Judicial Activism: Defending *Carolene Products*, 14 Geo. J. L. & Pub. Pol'y 559 (2016) (justifying deferential review of economic regulations).

[20] See Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 Yale L.J. 153, 165–66 (2002) (criticizing the assumption that judicial review necessarily involves overturning legislative decisions). See also Adler, supra note 18, at 762 (pointing out that "judicial review is not the practice of invalidating statutes"); Robert H. Bork, The Tempting of America: The Political Seduction of the Law 139–141 (1990) (criticizing judicial review on majoritarian grounds); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980) (grappling with the countermajoritarian character of judicial review and arguing for a new approach that would reinforce rather than undermine democratic processes).

[21] Berger, Individual Rights, supra note 18, at 2032.

courts have ignored—at least in the constitutional context—the substantial differences between agencies and legislatures in deciding how much to defer to the decisions they make.[22]

A small number of scholars have considered the extent to which the less-deferential judicial review of agency action under the federal APA is constitutionally mandated, or at least "constitutionally inspired."[23] Thus, Professors Cass Sunstein, Gillian Metzger, Kevin Stack, and others have argued that heightened judicial scrutiny of agency decisions under the APA is necessary to address constitutional concerns about the legitimacy of agency decisionmaking.[24] Adler has criticized the "simple extension" of countermajoritarian arguments against judicial review to the federal agency context.[25] Berger has urged courts to pay more attention to administrative law norms in deciding when to defer to agency decisions in cases that implicate fundamental rights.[26] With the exception of Berger, however, all have focused exclusively on federal

[22] See *Sensational Smiles*, 793 F.3d at 287 (assuming that agencies, like legislatures, are permitted to pick and choose policies based on "simple preference" for one group over another).

[23] Metzger, supra note 14, at 490–91.

[24] See Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. Rev. 461, 472–73 (2003) (hereinafter Bressman, Accountability) (arguing that one important goal of the APA is to guard against arbitrariness); Lisa Schultz Bressman, Deference and Democracy, 75 Geo. Wash. L. Rev. 761 (2007) (hereinafter Bressman, Deference) (justifying limits that the Court has imposed on the *Chevron* doctrine as furthering democratic norms); Metzger, supra note 14 (highlighting a range of administrative law doctrines that are either inspired or mandated by constitutional law); Murphy, supra note 14 (arguing that Congress could not do away with hard look review without raising serious constitutional concerns); Shapiro & Levy, supra note 14 (arguing that judicial review of agency action furthers separation of powers norms); Kevin M. Stack, The Constitutional Foundations of *Chenery*, 116 Yale L.J. 952, 1020 (2007) (concluding that the *Chenery* rule is best understood as furthering principles of non-delegation); Cass R. Sunstein, In Defense of The Hard Look: Judicial Activism and Administrative Law, 7 Harv. J.L. & Pub. Pol'y 51 (1984) (arguing that hard look review furthers separation of powers norms); see also Cass R. Sunstein, Factions, Self-Interest, and the APA: Four Lessons Since 1946, 72 Va. L. Rev. 271 (1986) (arguing that the APA reflects a constitutional commitment against factional legislation); Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985) (same) (hereinafter Sunstein, Interest Groups).

[25] Adler, supra note 18, at 810–11 (pointing out that countermajoritarian arguments for judicial review make little sense in the context of the administrative state).

[26] Berger, Individual Rights, supra note 18, at 2054–80 (explaining how administrative law norms should shape judicial review of agency action under intermediate or heightened scrutiny).

administrative agencies and have primarily defended existing administrative law norms on separation of powers grounds.[27]

This Article fills the gap in this prior work by arguing that the minimal constitutional requirement of "rationality" under the Equal Protection and substantive Due Process Clauses provides an independent basis for courts to scrutinize agency decisions more closely than decisions made by legislative bodies. This focus on substantive rationality is important because, unlike federal separation of powers principles, the rationality requirement also is binding on state and local agencies.[28] The argument that this paper makes is that at least some features of APA-style review may in fact be binding as a constitutional matter on state and local agencies as well. This argument simply has not been made in the literature.

It is difficult to know just how consequential a shift in the prevailing rational basis standard would be, but it surely would matter. Although rationality review is just one of many constitutional standards that courts apply, it is the one that sets the constitutional floor for all government conduct that affects the public in some way.[29] Local agencies perform a variety of essential functions, including zoning, employment and business regulations, and school governance, all of which can substantially affect liberty and property interests.[30] Yet, in states that have limited the scope of judicial arbitrariness review as a matter of state administrative law—or have exempted local agencies from the requirements of state APAs—rationality review is the only requirement that governs the substance of these agency decisions.[31] Part of the

[27] See, e.g., Bressman, Accountability, supra note 24, at 494–503 (emphasizing that administrative law must also account for concerns with arbitrariness, but framing nonarbitrariness as a separation of powers norm).

[28] See Romer v. Evans, 517 U.S. 620, 631–32 (1996).

[29] See, e.g., St. Joseph Abbey v. Castille, 712 F.3d 215, 227 (5th Cir. 2013) (labeling the rationality requirement, "the outer-most limits of due process and equal protection").

[30] 3 Local Government Law §14–22 (cataloguing licensing, land development regulation, streets and public ways, provision of public services, welfare services, education, and property among the many fields local bodies may regulate in at least some circumstances).

[31] See infra notes 91–99 and accompanying text (pointing to gaps in state and local administrative law). This is especially true when it comes to administrative regulations—what courts call "legislative rules." Whereas administrative "orders" or "adjudications" also must comply with the requirements of procedural due process—which offers at least some assurance against arbitrariness—legislative rules do not. Compare Londoner v. City & Cty. of Denver, 210 U.S. 373, 380–86 (1908) (due process applies when local bodies act in an

problem in evaluating the impact of this deferential review is one of selection bias. Rationality review is so deferential, and so well established, that there has been little incentive for plaintiffs to challenge arbitrary decisions.[32] Challenges occasionally are brought—and cases involving them are discussed throughout this article—but it is highly likely that far more simply are not because the possibility of success seems nearly impossible.

To be clear, judicial intervention is not the only possible constraint on agency action. There also are political safeguards, and internal bureaucratic checks of various sorts, all of which can ensure even in the absence of meaningful judicial review that agencies generally act appropriately in carrying out their functions. The question is whether there is not also room for courts to step in—and in fact, a constitutional imperative that they do so—in those cases in which agencies do act in an arbitrary or discriminatory manner.

Part I briefly traces the history of constitutional rationality review, which developed primarily in the context of judicial review of legislative decision making. As Part I makes clear, although federal courts at one point applied the same deferential standards to both agencies and legislatures, by the middle of the twentieth century courts began to scrutinize agency decisions far more closely—but only as a matter of federal *administrative* law. Courts continued to apply the same deferential constitutional standard to state and local agency decisions.

Part II then turns to the arguments that courts and scholars have made in defense of the prevailing rational basis test, and concludes that they largely do not apply in the context of the administrative state. Although there are compelling reasons for courts to defer at least to some extent to agency decisions, there is no basis for the blanket deference that courts extend on constitutional rational basis review.

Finally, Part III considers what a constitutional standard of *administrative* rationality might entail. It argues that as a matter of

adjudicative capacity) with Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915) (due process inapplicable when agencies promulgate legislative rules).

[32] See Ann Woolhandler & Michael G. Collins, Judicial Federalism and the Administrative States, 87 Calif. L. Rev. 613, 687 (1999) (arguing that lowering the abstention bar to permit challenges to state and local agency rules in federal court would not "open the . . . floodgates" to litigation because claims would simply be dismissed on the merits).

constitutional law, courts ought to ensure that agencies actually have reasons for the decisions they make, and that there is at least a plausible connection between the means that an agency adopts, and its asserted ends. The test that Part III proposes is more modest than what courts require of federal agencies under the APA—but is considerably more robust than the rational basis test that currently applies to constitutional claims. What this paper argues, in short, is that courts should *in fact* undertake minimal rationality review when agency decisions are challenged on constitutional grounds.

## I. RATIONALITY REVIEW IN CONSTITUTIONAL AND ADMINISTRATIVE LAW

### *A. Rationality Review of Legislation*

For the most part, historically and at present, judicial review of legislation has been highly deferential.[33] At the state and local level, the primary context in which courts judged the "reasonableness" of legislative action was in deciding whether it fell within the scope of the state's police power.[34] As Professor Howard Gillman and others have written, courts generally construed the police power broadly.[35] They insisted that to qualify as a valid police power regulation, the provision had to have some plausible relationship to a legitimate "public" purpose.[36] But much like today, courts afforded statutes "[e]very

[33] See Richard A. Posner, The Rise and Fall of Judicial Self-Restraint, 100 Calif. L. Rev. 519, 520–21 (2012); James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 140–41 (1893).

[34] See Howard Gillman, The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence 7–9 (1993).

[35] Id. at 7–9. See also Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 576–78 (1871) (quoting Thorpe v. Rutland & B.R. Co., 27 Vt. 140, 150 (1855)) (noting that by virtue of the "general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the [S]tate"); William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (1996) (Discussing the "far-reaching conception of law and state serving the people's welfare").

[36] Gillman, supra note 34, at 7–9; see also Cooley, supra note 35, at 357 (noting that in order to fall within the police power, "the purpose must be public, and must have reference to the needs of government").

possible presumption" of validity.[37] They disclaimed any authority to inquire into the legislature's purpose.[38] And they upheld statutes based entirely on hypothetical rationales.[39] Courts were somewhat more willing to police the boundaries of municipal ordinances. A number of state courts required that municipal ordinances not only fall within the scope of the police power, but also be "reasonable and for the common benefit."[40] But in practice, even this requirement was only weakly enforced.[41]

At the federal level, judicial review was still more limited in scope. Prior to the Fourteenth Amendment, only a handful of the Constitution's provisions applied against the states.[42] The only context in which federal courts had authority to pass on the reasonableness of state enactments was under the dormant Commerce Clause, which nineteenth century courts interpreted as barring state interference with interstate commerce unless the interference was "incidental" to a valid police power regulation of intrastate conduct.[43] In deciding whether the regulation was valid, federal courts were just as deferential as their state court counterparts (if not more so).[44] The courts emphasized that it was not their job to determine "whether some other measure, interfering less with commerce, could not as well have accomplished the object."[45] It was enough that the provision in question was not "so far removed from

[37] Thayer, supra note 33, at 142 n.1 (quoting The Sinking Fund Cases, 99 U.S. 700, 718 (1878)).

[38] Caleb Nelson, Judicial Review of Legislative Purpose, 83 N.Y.U. L. Rev. 1784, 1806 (2008).

[39] See, e.g., De Camp v. Eveland, 19 Barb. 81, 88 (Sup. Ct. NY, 1854) (speculating that legislators must have had some basis to think that the population of a district had increased since the prior census, and that the redistricting plan was therefore valid as a result).

[40] Village of Buffalo v. Webster, 10 Wend. 99, 101 (Sup. Ct. NY 1833); see also Cooley, supra note 35, at 200–03 (describing requirements that apply to delegees).

[41] See, e.g., Milhau v. Sharp, 15 Barb. 193, 212 (Sup. Ct. NY 1853) (noting in reviewing a municipal order that "whether its laws are wise or unwise; whether they are passed from good or bad motives, it is not the province of this court to inquire").

[42] See Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 248–49 (1833) ("[N]o limitation of the action of government on the people would apply to the state government, unless expressed in [such] terms.").

[43] Nelson, supra note 38, at 1802–07.

[44] Id. at 1806.

[45] St. Louis v. Boffinger, 19 Mo. 13, 15 (1853).

the usual and fit scope of laws . . . as to be deemed . . . a covert attempt" to restrict interstate commerce.[46]

The Court was even more reluctant to overturn congressional enactments. During the entire antebellum period, the Court struck down just two federal statutes as unconstitutional: in *Marbury v. Madison*[47] and *Dred Scott v. Stanford*.[48] As Professor Larry Kramer and others have written, the primary mechanism for enforcing the Constitution was public opinion and electoral pressure, not judicial review.[49] Indeed, some judges expressed concern that if courts stepped in too often to police legislative excesses, they would be letting the public off the hook.[50] Others shared the modern view that courts are responsible for interpreting and enforcing the Constitution's commands, but nevertheless insisted that courts should step in only when a statute's invalidity was beyond all doubt.[51] They viewed judicial deference as "a matter of prudence and political expediency: something necessary to secure and preserve *judicial* . . .authority by minimizing the risks of overstepping."[52]

Federal judicial review of the "reasonableness" or "rationality" of legislation began in earnest after the adoption of the Fourteenth Amendment, which introduced the Equal Protection Clause and extended the requirements of due process to state actors. In cases like *Munn v. Illinois*[53] and *Mugler v. Kansas*,[54] the Supreme Court announced an early version of what we now know as the rational basis test. As the Court itself explained at the time and in cases since, the permissive test was designed to reconcile the Fourteenth Amendment's

[46] Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 312 (1851).

[47] 5 U.S. (1 Cranch) 137 (1803).

[48] 60 U.S. (19 How.) 393 (1857); Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States, *in* Cong. Research Serv., S. Doc. No. 108–17, 2119 (2002).

[49] See Barry Friedman, The Will of the People (2009) (describing role that public opinion plays in shaping judicial behavior); Larry D. Kramer, Foreword: We the Court, 115 Harv. L. Rev. 5 (2001) (describing theory of popular constitutionalism).

[50] Larry D. Kramer, Judicial Supremacy and the End of Judicial Restraint, 100 Calif. L. Rev. 621, 625 (2012).

[51] Id. at 623–25; see also Thayer, supra note 33 (comparing the standard for second-guessing legislative judgments to the "reasonable doubt" standard in criminal cases).

[52] Kramer, supra note 50, at 626.

[53] 94 U.S. 113 (1876).

[54] 123 U.S. 623 (1887).

guarantee of equal treatment with "the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[55] The Court explained that due process and equal protection required that laws have a "real [and] substantial relation" to some legitimate public purpose.[56] But the Court also emphasized that "courts ought not to declare [a statute] to be unconstitutional, unless it is clearly so."[57] Courts must assume that "if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed."[58] Much like state courts, federal courts in the late nineteenth century afforded considerable leeway to the legislative branch.

What happened next is the subject of substantial academic debate. The traditional account is that beginning around the turn of the century, activist conservative courts turned to vague concepts like "due process" and "liberty of contract" to strike down a host of social welfare regulations that they deemed suspect.[59] The Court's decision to strike down maximum hours regulations in *Lochner v. New York* is emblematic of this period.[60] More recently, revisionist scholars, such as Professor Howard Gillman, have challenged this traditional narrative. Gillman argues that Lochner Era courts were no more activist than their predecessors—they simply struggled to apply traditional police powers precedents to the new realities of industrial life.[61] Courts viewed Progressive Era labor regulations as putting a thumb on the scale in favor of workers, which violated the principle of a "neutral" state that had authority to act only in the "public" good.[62] In other contexts, courts

[55] Romer v. Evans, 517 U.S. 620, 631 (1996); see also Barbier v. Connolly, 113 U.S. 27, 31 (1884) (describing the Equal Protection Clause as a guarantee that "no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances").

[56] *Mugler*, 123 U.S. at 661.

[57] *Munn*, 94 U.S. at 123.

[58] Id. at 132.

[59] See, e.g., Barry Friedman, The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner*, 76 N.Y.U. L. Rev. 1383 (2001); Posner, supra note 33, at 526–30.

[60] 198 U.S. 45 (1905).

[61] Gillman, supra note 34, at 12–13.

[62] Id. at 10–13.

still were perfectly willing to uphold statutes on the thinnest of grounds.[63]

What is clear is that by the late 1930s the Court had decisively pulled back from any meaningful substantive review of legislative judgment. Although, superficially, the Court continued to insist that a statute must be "rationally related" to a legitimate state interest, it made clear in cases like *Williamson v. Lee Optical*[64] and *Flemming v. Nestor*[65] that any plausible justification—however speculative, and however minimally furthered by the state's chosen means—would suffice.

### *B. Judicial Review of Administration*

For much of the nineteenth century, courts had little occasion to consider the standard of review that ought to govern administrative agency decision making. Until the last decades of the nineteenth century, "agencies" as we know them today generally did not exist.[66] At the federal level, a small number of executive officials exercised what we now would describe as "administrative" powers of rulemaking or adjudication, but their authority was quite limited—both by the scope of congressional authorization and by the narrow confines of federal power.[67] At the state level, the vast majority of regulations, on everything from food production to occupational licensing, were

[63] In *Patsone v. Pennsylvania*, for example, the Court upheld a statute that prohibited resident aliens from hunting or owning a shotgun—while permitting others to do so. The Court did not even pretend to offer a reason for the distinction, noting that "the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong on its facts." Patsone v. Com. Of Pennsylvania, 232 U.S. 138, 144 (1914).

[64] 348 U.S. 483, 486–88 (1955) (upholding a state law requiring a prescription from an optometrist before an optician may replace a broken frame based on speculative rationales about consumer safety).

[65] 363 U.S. 603, 612 (1960) (speculating that Congress may have stripped certain deportees of social security benefits out of concern for the national purchasing power).

[66] The creation of the Interstate Commerce Commission ("ICC") in 1887 is traditionally considered the beginning of the American administrative state. See Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 12–13 (2012).

[67] Id at 12, 17–24. Although Mashaw points out that agencies exercised many of the same rulemaking and adjudicative powers that we typically associate with the modern administrative state, the examples on which he relies are confined to the relatively narrow sphere of federal regulation.

adopted by municipalities.[68] Like modern agencies, municipal councils exercised a mix of rulemaking and adjudicative powers, and operated subject to legislative delegations of authority.[69] Unlike agencies, however, these municipal councils were multi-member bodies subject to periodic elections—and thus direct popular control. They looked more legislative than administrative in today's terms.

As the administrative state came into being, courts initially applied the same sorts of deferential standards of review to agency regulations that they applied to legislatures, without articulating precisely why. In a 1904 case, the Court upheld a quarantine order banning the import of all cattle from Louisiana based on the state sanitation commission's speculation that anthrax "is liable to break out in the State."[70] The Court rejected plaintiffs' argument that the order was based on insufficient information. Because the record was silent regarding the commission's decision-making process, there was no reason to think "the sanitary commission *did not* make the most careful and thorough investigation."[71] In *Pacific States Box & Basket Co. v. White*—a 1935 case that scholars often cite as emblematic of the prevailing approach to judicial review—the Court held that the same strong presumption of validity "attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies."[72] The Court then applied a highly deferential rational basis standard to uphold a state packaging regulation based largely on hypothetical rationales.[73]

When Congress adopted the 1946 Administrative Procedure Act, it mostly incorporated this permissive approach. Section 706 of the APA authorized federal courts to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[74] But as the legislative history of the statute makes clear, the goal

[68] Novak, supra note 35 at 10.

[69] See Woolhandler & Collins, supra note 32, at 620–26 (likening local governments to pre-modern agencies).

[70] Smith v. St. Louis & S.W. Ry. Co., 181 U.S. 248, 250 (1901). The order was approved by the governor on recommendation from the state sanitation commission. The governor's involvement did not appear to play any role in the Court's approach to reviewing the case. Id.

[71] Id. at 258 (emphasis added).

[72] 296 U.S. 176, 186 (1935).

[73] Id. at 181.

[74] 5 U.S.C. § 706 (2012).

of the provision was simply to codify the due process standard of non-arbitrariness that the Court had applied in *Pacific States Box*.[75] The APA did impose a small number of new requirements on agency rulemaking—including the requirement that an agency issue "a concise general statement" describing the "basis and purpose" of a final rule.[76] But much like arbitrary and capricious review, this requirement was thought to be quite minimal.[77] Until the 1970s, courts routinely accepted agency statements that simply recited in a cursory fashion the requirements of the underlying statute, and the agency's belief that the rule furthered the statute's goals.[78]

Over time, federal courts began to apply a more exacting standard of review to federal agency decision. Although scholars have argued that this exacting review had constitutional underpinnings, it rested squarely in federal administrative law and thus did not apply beyond the federal domain.[79] In *SEC v. Chenery Corp.*, the Court held that an agency must defend its decision based solely on the grounds that the agency actually relied on at the time the decision was made.[80] A party that wished to challenge an order or rule did not need to negate every *conceivable* reason for the agency action—only those that the agency itself supplied. By the early 1970s, the Supreme Court began to describe arbitrary and capricious review under the APA as "thorough, probing, [and] in-depth."[81] In *Motor Vehicle Manufacturers Association v. State Farm Mutual*, the Court announced the modern "hard look" standard, which requires the agency to "examine the relevant data and articulate a

[75] Staff of S. Comm. On the Judiciary, 79th Cong., Administrative Procedure Act (Comm. Print 1945), *as reprinted in* S. Doc. No. 248, at 39 (1946); U.S. Dep't of Justice, Att'y Gen.'s Manual on the Administrative Procedure Act 108 (1947).

[76] 5 U.S.C. § 553 (2012).

[77] Metzger, supra note 14, at 509 & n.109; Richard Murphy, *Chenery* Unmasked: Reasonable Limits on the Duty to Give Reasons, 80 U. Cin. L. Rev. 817, 839 (2012).

[78] See, e.g. Kennecott Copper Corp. v. EPA, 462 F.2d 846, 848 (D.C. Cir. 1972) (acknowledging that a similarly cursory statement complied with the formal requirements of the APA); N.Y. Foreign Freight Forwarders & Brokers Ass'n v. Fed. Mar. Comm'n, 337 F.2d 289, 296 (2d Cir. 1964) (approving a statement that merely stated that the rules furthered the objectives of the statute).

[79] See supra note 14 (discussing scholarship on the constitutional foundations of federal administrative law).

[80] 318 U.S. 80, 95 (1943).

[81] Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[82]

As a matter of federal *constitutional* law, however, courts continued to apply to agencies the same deferential standard of rational basis review that applied to legislative enactments. *Dandridge v. Williams*[83] is a paradigmatic case. At issue was a regulation promulgated by the Maryland Department of Public Welfare, which imposed an absolute cap on grants to families with dependent children, irrespective of family size.[84] What this meant in practice is that families with more than six children received far less than what the state agency's own formula suggested was their minimum standard of need.[85] The state initially justified the regulation as a way to save money (which does not explain why this was how the state decided to conserve funds).[86] After the district court rejected the state's defense, attorneys came forward with four additional arguments—all dubious, and none having any basis in the administrative record.[87] Although the district court remained unconvinced, the Supreme Court found the state's post hoc arguments sufficient to satisfy the minimal requirements of rational basis review.[88] More recently, in *Armour v. City of Indianapolis*,[89] the Supreme Court upheld an order issued by the Indianapolis Board of Public Works on similarly shaky grounds—over a heated dissent that highlighted the implausibility of the government's arguments. Neither the majority nor the dissent focused on the fact that the decision had not been made by a legislature, but by an appointed local board.[90]

Because *federal* agencies are required to comply with the more rigorous APA requirements, the primary effect of the deferential rational basis test has been—as *Dandridge* and *Armour* make clear—at the state and local level. Some states have embraced a more rigorous standard of

[82] 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)); see also Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 119 Yale L.J. 2, 15–17 (2009) (describing *State Farm* as the case that formally embraced "hard look" review).

[83] 397 U.S. 471 (1970).

[84] Id.

[85] Id. at 490 (Douglas, J., dissenting).

[86] Id. at 523–24 (Marshall, J., dissenting).

[87] Id.

[88] Id. at 486–87.

[89] 566 U.S. 673 (2012).

[90] Id. at 682.

review as a matter of *state* administrative or constitutional law, but plenty of others have not.[91] For example, the Massachusetts Supreme Judicial Court has made clear that courts should be "as deferential" to agency rules as they are to legislative enactments.[92] In Massachusetts, agencies are under no obligation to cite facts or reasons for their regulations.[93] Instead, plaintiffs have the burden to prove "the absence of any *conceivable* grounds upon which [the rule] may be upheld."[94] If the administrative record "is silent as to the factual situation against which" the agency has acted, agency lawyers and courts are free to speculate about a plausible set of facts to justify the agency rule.[95] As the Court explained in one case, "[o]n this silent record, *it is not open to the plaintiffs to argue the contrary*."[96] Likewise, in Maryland, judicial review of agency rules is limited to ensuring that the agency acted within the bounds of its legal authority.[97] Maryland courts are not permitted to consider whether the agency acted rationally—only to ensure that it acted lawfully and constitutionally.[98] At the local level, the

[91] See William Funk, Rationality Review of State Administrative Rulemaking, 43 Admin. L. Rev. 147, 156–60 (1991) (highlighting the different models of state rationality review of agency decisions); William A. McGrath et. al., Project: State Judicial Review of Administrative Action, 43 Admin. L. Rev. 571, 752 & n.205 (1991) (citing Arkansas, Maryland, and Wisconsin as states that only permit review of agency rules to determine if the agency exceeded its statutory authority).

[92] Greenleaf Fin. Co. v. Small Loans Regulatory Bd., 385 N.E.2d 1364, 1371 (Mass. 1979).

[93] See Purity Supreme, Inc. v. Attorney Gen., 407 N.E.2d 297, 306 (Mass. 1980) (citing Colella v. State Racing Comm'n, 274 N.E.2d 331, 335 (Mass. 1971)) ("Purity may not meet its burden by arguing that the record does not affirmatively show facts which support the regulation.").

[94] Id. (emphasis added) (quoting *Colella* 274 N.E.2d at 334).

[95] *Colella*, 274 N.E.2d at 335.

[96] Id. (emphasis added).

[97] See Weiner v. Md. Ins. Admin., 652 A.2d 125, 129 (Md. 1995) (quoting Dep't. of Nat. Res. v. Linchester Sand & Gravel Corp., 334 A.2d 514, 523 (Md. 1975) ("In those instances where an administrative agency is acting in a manner which may be considered legislative in nature (quasi-legislative), the judiciary's scope of review . . . is limited to assessing whether the agency was acting within its legal boundaries . . ."); Oyarzo v. Md. Dep't. of Health & Mental Hygiene, 978 A.2d 804, 819 (Md. Ct. Spec. App. 2009) (citing *Linchester*, 334 A.2d at 522–23) ("In assessing the validity of a new regulation, a court must simply determine whether 'the [quasi-legislative] responsibilities were properly empowered to the agency and [whether they] have been performed within the confines of traditional standards of procedural and substantive fair play.'").

[98] See Mayor of Baltimore v. Biermann, 50 A.2d 804, 808 (Md. 1947) (noting that because "the action of the Board [is] an exercise of delegated legislative, or quasi legislative,

variance is still more pronounced. State administrative procedure acts often do not apply to local agencies, though some state courts have extended certain provisions "by analogy."[99]

In short, in an unknown and incalculable number of jurisdictions, decisions made by local administrative agencies—particularly, "quasi-legislative" decisions like agency rules—are subject to the very same minimal requirements of rationality as are congressional statutes.

The consequences of this blind deference to agency decisions can be serious, and in some cases devastating, for the individuals involved. Rules like the state dental board regulation at issue in *Sensational Smiles v. Mullen* deprive individuals of their livelihoods.[100] The Federal Trade Commission ("FTC") repeatedly has highlighted the negative consequences of unduly restrictive licensing regulations—particularly when adopted at the behest of industry groups to shield themselves from competition by new entrants.[101] Agency actions can impose other hardships as well. In *Dandridge*, the agency's hastily adopted rule arbitrarily deprived children in large families of the funds necessary to meet what the state itself considered their bare subsistence needs.[102] And in *Freeman v. Hayek*, the agency policy at issue permitted the Minneapolis Water Works to shut off water service to residents for non-

power, . . . the property owner has the heavy burden of overcoming the presumption of constitutionality of legislative action, even if the legislative body acted without evidence at all.").

[99] See, e.g., 2 Sandra M. Stevenson & Wendy Van Wie, Antieau Treatise on Local Government Law § 26.08 (2d ed. 2018) (citing Hawaii, Massachusetts, Montana, Nebraska, New York, Washington, South Dakota, and West Virginia as examples of states whose APAs do not apply to local agencies).

[100] 793 F.3d 281, 283 (2d Cir. 2015).

[101] See Competition and the Potential Costs and Benefits of Professional Licensure: Hearing Before the H. Comm. on Small Bus., 113th Cong. 2, 10–11 (2014) (prepared statement of Andrew Gavil, Dir. of the Office of Policy Planning at the Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf [https://perma.cc/8XU4-YZ5R] (describing the various costs of these licensing regimes). Under the Supreme Court's decision in *North Carolina State Bd. of Dental Examiners v. Federal Trade Commission*, a subset of particularly egregious regulations—when adopted by agencies whose membership is dominated by regulated entities—may be subject to antitrust liability. 135 S. Ct. 1101, 1111 (2015). But antitrust liability would not reach more traditional state agencies—and in any event is a federal statutory fix that is not a substitute for constitutional rationality review.

[102] *Dandridge*, 397 U.S. at 518 (Marshall, J., dissenting).

payment of debts *by prior tenants*.[103] By the agency's own admission, the rule was designed to facilitate debt collection from "multiple dwellings with transient residents"—that is, from individuals who may not be able to afford the extra few hundred dollars in utility payments (incurred by their predecessors) on which their water service hinged.[104]

Of course, irrational legislative classifications impose substantial costs as well. Indeed, some of the most egregious provisions that courts have upheld on rational basis review were adopted by legislative bodies.[105] But, as Part II suggests, there may be reasons to countenance—or at least tolerate—these sorts of legislative classifications in order to preserve other fundamental constitutional norms. The question this paper asks is whether similar arguments justify the deferential posture that courts take in reviewing constitutional challenges to agency actions as well.

### *C. A Failure of Explanation*

Although the Supreme Court has consistently applied the same minimal standard of rational basis review to both legislative and agency decisions, it never has explained why. The only case even to consider the question was the 1935 case *Pacific States Box*, mentioned above.[106] If anything is plain, it is that the rationale on which the *Pacific States Box* Court relied is out of step with many of the developments in both administrative and constitutional law in the decades since.

*Pacific States Box* involved a challenge to a rule promulgated by the Oregon Department of Agriculture, which required that all raspberries and strawberries be sold in "hallock"-type containers of a specific size and dimension.[107] The plaintiff was a California-based company that

[103] Freeman v. Hayek, 635 F. Supp. 178, 180 (D. Minn. 1986).

[104] In *Freeman*, the court in fact struck down the rule on equal protection grounds—but in doing so, applied a much stricter version of the rational basis test than courts typically apply. Id. at 184. But cf. *Armour*, 566 U.S. at 682–83 (upholding agency rule based on administrative convenience).

[105] Powers v. Harris, 379 F.3d 1208, 1211 (10th Cir. 2004). See also Meadows v. Odom, 360 F. Supp. 2d 811, 822–23, 825 (M.D. La. 2005) (upholding a Louisiana statute requiring florists to undergo extensive training and obtain a state license).

[106] *Pac. States Box & Basket Co.*, 296 U.S. at 185–86; see also supra notes 73-74 and accompanying text (discussing the standard of review applied by the Court in *Pacific States Box*).

[107] *Pac. States Box*, 296 U.S. at 178–79.

manufactured "tin-top"-type containers, which it then sold to Oregon fruit growers.[108] The company argued that tin-top containers were better suited to preserving fruit for transport—and that the Department had settled on the hallock-type containers because they were manufactured primarily by local firms.[109] The company also pointed out that if the regulation was meant to reduce the risk of consumer deception (which is what the defendants claimed), then hallocks were an odd choice: the containers had a raised bottom, and as a result, appeared to hold more fruit than they in fact did.[110]

Using language that soon would become a familiar staple of rational basis review, the Supreme Court explained that "if any state of facts reasonably can be conceived" to sustain a challenged rule, the court must presume their existence.[111] Contrary to the company's allegations, and indeed to the seeming evidence, the Court concluded that hallocks "*may conceivably*" protect consumers and better preserve the fruit.[112] On rational basis review, that was enough.[113]

The Court's rationale for applying this deferential standard to an administrative decision is worth quoting in full:

> Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies.[114]

[108] Id. at 178–80.

[109] See e.g., Brief of Appellant at 30–32, Pac. States Box & Basket Co. v. White, 296 U.S. 176 (1935) (No. 48).

[110] Id. at 29.

[111] *Pac. States Box*, 296 U.S. at 185 (quoting Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934)).

[112] Id. at 181–82 (emphasis added).

[113] Id. at 182.

[114] Id. at 185–86 (citations omitted).

The Court's rationale is difficult to parse, but it appears to be making two related points. First, that agencies are not in any meaningful way different from legislatures, which likewise only exercise power that is delegated by another source (the federal or state constitution). Second, that the principal way courts police agency decision making is by enforcing limits on delegation—and not by reviewing the substance of the decision reached.

Both of these points are consistent with how the Court had at one point conceptualized the role of agencies—but neither has much purchase today. The Court's approach reflects what Professor Richard Stewart has described as the "transmission belt" model of the administrative state.[115] As the administrative state came into being, one of the key questions that courts grappled with was how to reconcile agency rulemaking and adjudication with the fact that the Constitution vests legislative and judicial powers in the other two branches of government. The answer that courts came up with was that agencies did not really legislate or adjudicate—they simply implemented directives from the legislative branch.[116] The agency, in short, was just a "transmission belt" that translated legislative mandates into specific rules.[117] To ensure that agency action did not cross over into pure legislation, courts enforced the non-delegation doctrine, which required that legislatures provide agencies with adequate guidance on legislative priorities ("an intelligible principle").[118] Courts then reviewed agency decisions primarily to ensure that they were consistent with the legislature's commands.[119] Under the transmission belt theory, substantive review was thought to be largely superfluous.[120] If all an agency does is implement legislative directives, then second-guessing the agency's decision would have been tantamount to second-guessing the underlying statute adopted by the legislative branch. This seems to be precisely what the Court was saying in *Pacific States Box*.[121]

[115] Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1675 (1975).
[116] Id. at 1672–73.
[117] Id. at 1675.
[118] Id. at 1672–75.
[119] Id. at 1675–76.
[120] Id. at 1674–76.
[121] See *Pac. States Box*, 296 U.S.at 185–86.

Given the timing of the case, the Court's faith in the non-delegation doctrine as a meaningful check on agency discretion should not come as a surprise. Earlier that year, the Court had on two separate occasions—in *Panama Refining* and *Schechter Poultry*—struck down congressional statutes on non-delegation grounds.[122] Indeed, 1935 was both the first and last time that the Court used the non-delegation doctrine to invalidate a federal law.[123]

By the mid-1940s, however, the *Pacific States Box* Court's faith in the delegation doctrine to sustain deference to administrative agencies had become much more difficult to sustain. In cases like *Yakus v. United States*, the Court had made clear that it would not in fact enforce any meaningful constraints on legislative delegations of rulemaking authority.[124] In *Yakus*, the Court upheld a statute that authorized the Office of Price Administration ("OPA") to combat inflation by fixing wages and prices at whatever levels the OPA deemed to be "fair and equitable."[125] In place of the non-delegation doctrine, the Court gradually imposed more robust substantive and procedural constraints on agency orders and rules.[126] In justifying more searching review of administrative action, the court has distinguished between legislative and agency decision making—and pointed to the collapse of nondelegation as a plausible alternative constraint.[127]

*Pacific States Box* is in many ways an odd case. Scholars routinely cite the case in discussing the minimal level of scrutiny with which the

[122] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 432–33 (1935).

[123] Cass Sunstein famously quipped that the "doctrine has had one good year, and 211 bad ones (and counting)." Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 322 (2000).

[124] 321 U.S. 414, 423–26 (1944) (upholding a legislative delegation with "fair and equitable" as the principal constraint).

[125] Id. at 419–21.

[126] See supra notes 79–82 and accompanying text.

[127] See State Farm Mut. Auto. Ins. Co. v. Dep't of Transp., 680 F.2d 206, 221 & n.19 (D.C. Cir. 1982) (explaining that "the evolution of 'arbitrary and capricious' review . . . may partially be explained by increasing judicial sensitivity" to the fact that "an agency is not a legislature"); see also Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 627 (1986) ("Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision.").

Supreme Court reviewed agency decisions in the New Deal years.[128] Courts, meanwhile, have largely ignored it, which is unsurprising given the now outdated delegation rationale that justified the rule.[129] In classic agency rational basis cases like *Railway Express v. New York*, *New York City Transit Authority v. Beazer*, and *Dandridge*—as well as more recent cases like the 2012 decision in *Armour*—the Supreme Court has simply assumed without explanation or citation that the same deferential test applies to both legislative and agency decisions.[130] Were *Pacific States Box* argued today, it is hard to imagine that the Court would insist—as it had in 1935—that delegees must *necessarily* receive the same degree of deference as would the legislature itself.

* * *

In short, we are left with a rule—likely a consequential one—that is bereft of a rationale. The rule is that agencies get the same deference as legislatures. But the justification originally offered up to justify the rule, based in the non-delegation doctrine, surely cannot sustain the rule any longer. Which raises the question: why do courts review agency action under the same minimal standard of rational basis review?

## II. THE CASE FOR RATIONAL BASIS REVIEW

As Part I suggests, constitutional rationality review developed largely in the context of judicial review of legislative action. Although courts apply the same rational basis standard to agency decisions, no court in

[128] See, e.g., Murphy, supra note 77, at 830; Shapiro & Levy, supra note 14, at 426; Woolhandler & Collins, supra note 32, at 693 n.315.

[129] The Supreme Court cited the case in a handful of rational basis cases in the late 1930s, for example, *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 567–68 & n.35 (1939) (relying on *Pacific States Box*, 296 U.S. 176, to uphold an order issued by the Secretary of Agriculture), but has not relied on it since. Only a handful of lower courts have relied on *Pacific States Box* to explain why agency decisions must be judged according to the same minimal rational basis test that applies to legislative judgments. See, e.g., Steffan v. Cheney, 780 F. Supp. 1, 14 (D.C. Cir. 1991).

[130] 336 U.S. 106, 110 (1949) (applying minimal rational basis review to a rule adopted by a local police chief); 440 U.S. 568, 592–93 & n.39 (1979) (applying minimal rational basis review to a rule adopted by a local transit authority); *Dandridge*, 397 U.S.at 485 (applying minimal rational basis to a rule adopted by a state public welfare agency); *Armour*, 566 U.S.at 681 (applying minimal rational basis review to a rule adopted by a local board of public works).

the modern era has articulated why the requirements of rationality should in fact be the same in both contexts. This Part sets out the various arguments that courts and commentators have offered in defense of highly deferential rationality review of legislative decisions, and considers whether *any* of these arguments would justify a similarly deferential posture toward agency decisions as well. It also considers arguments that courts rarely have offered in the legislative context—but which could potentially provide an alternative explanation for deferential review in the context of the administrative state.

The arguments discussed here fall broadly into four categories: (1) "authority-based" claims (based on the idea that the decision maker in question has superior legal or political authority to resolve the question at issue); (2) "epistemic" claims (because the decision maker has more knowledge or expertise); (3) arguments about the importance of federalism; and (4) arguments about the inherent meaning of "equal protection" and "substantive due process" and what they require of government actors.[131]

What will become evident is that though some arguments, like agency expertise, can justify a certain degree of judicial deference to administrative decisions, *none* justifies the stark form of deference that rational basis review reflects.

### *A. Legal or Political Authority*

Many of the arguments in favor of deferential rational basis review follow from the basic idea that in a representative democracy, legislatures get to decide, within broad limits, what regulations are necessary for the public good.[132] These arguments reflect a range of views about the character of the legislative process: Some for example focus on the majoritarian cast of legislation, whereas others highlight the

[131] For a detailed discussion of why courts defer, see Paul Horwitz, Three Faces of Deference, 83 Notre Dame L. Rev. 1061 (2008).

[132] See Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955) ("[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new [law]."); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("[M]y agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."); Bickel, supra note 5, at 19–20; Bork, supra note 20, at 201; Ely, supra note 20, at 4; Adler, supra note 18, at 761–65 (describing the traditional conception of the countermajoritarian difficulty); Bennett, supra note 19, at 1049–51; Linde, supra note 7, at 200; Posner, supra note 7, at 27; Sherry, supra note 19, at 557.

role of interest groups in shaping legislative outcomes. Still others point to the actual process of drafting legislation, which has implications for what courts can or cannot expect by way of reason-giving or record evidence. What unites these arguments—and ultimately renders them largely inapplicable in the agency context—is that all focus in one way or another on the democratic pedigree of the decisions that legislatures make. As this Section argues, it is this basic assumption that does not hold in the context of the administrative state.

*1. As Applied to Legislatures*

The classic authority-based argument in favor of judicial deference is that it preserves the separation of powers between the legislative and judicial branch.[133] The concern from a separation of powers perspective is that rationality is too easily confused with wisdom. Arguments about the constitutional rationality of legislative choices often boil down to claims that the measures are unnecessary, are excessively costly, or are unlikely to produce the public health or safety benefits that the legislature expects.[134] For the most part, these choices are for legislatures, not courts, to make. The risk is that a judge who is skeptical of economic regulation may conclude that a provision is "irrational" when in reality it simply reflects a different set of underlying assumptions about the proper role of the state.[135] By requiring courts to apply every possible presumption in favor of the statute in question, the prevailing rational basis test reduces the likelihood that judges will trample on the legislative role.

Standing alone, however, separation-of-powers arguments do not necessarily point to any specific standard of review. The American system of judicial review is premised on the idea that courts play an essential role in safeguarding individual rights. In reviewing challenges

[133] Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

[134] See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469–70 (1981) (discussing plaintiffs' arguments that the statute would not in fact accomplish its stated objectives).

[135] The Court itself has on occasion expressed this concern, noting "we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be . . . out of harmony with a particular school of thought.'" *Ferguson*, 372 U.S. at 731–32 (quoting *Lee Optical*, 348 U.S. at 488).

to legislative action on constitutional grounds, courts must be cognizant of the fact that there are error costs in both directions. Although an insufficiently deferential standard can cause undue interference with legislative decision making, an overly permissive rational basis test may permit a great deal of "irrational" legislation (however defined) to slip through, at a cost to the individuals who are harmed by the provisions in question.[136] The rational basis test puts its thumb heavily on the scale in favor of legislative determinations—which requires some justification beyond the simple desire to respect the authority of a coordinate branch.

Often what bridges the gap—and justifies the highly deferential standard of review—is the idea that legislatures, unlike courts, are accountable to the majority will. In his *Lochner v. New York* dissent, Oliver Wendell Holmes famously described legislation as "the natural outcome of a dominant opinion."[137] Judicial review is by its very nature "undemocratic"—or as Alexander Bickel famously described, "countermajoritarian."[138] For Holmes and Bickel, what legitimates legislative decision making, and puts it largely beyond the reach of judicial review, is that it reflects the will of the people.[139] The decisions that legislatures adopt may be good ones—or they may be "stupid, irrational, or completely wrong-headed."[140] But that is largely beside the point: "the majority, *because it is the majority*, has a right to be mistaken. . . . [I]t is better that the majority make a wrong decision than that a judge make" a sound one.[141]

Others argue that courts should defer not because legislation is majoritarian, which in practice it often is not, but because it is *pluralist*—which is to say that it results from bargaining among competing (minority) interest groups. Richard Posner writes that "[m]any public policies are better explained as the outcome of a pure

[136] See, e.g., Powers v. Harris, 379 F.3d 1208, 1217 (10th Cir. 2004); Meadows v. Odom, 360 F. Supp. 2d 811, 818 (M.D. La. 2005).

[137] 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[138] Bickel, supra note 5, at 16–17.

[139] *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting); Bickel, supra note 5, at 16–17.

[140] Wallace, supra note 5, at 4.

[141] Id. (emphasis added); see also Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 629 (1993) ("Those who worry about the countermajoritarian difficulty favor decisions made by branches other than courts because such decisions ostensibly represent the will of the 'majority,' while courts' decisions do not.").

power struggle . . . among narrow interest or pressure groups."[142] Similarly, Hans Linde notes that "policy often results from the accommodation of competing and mutually inconsistent values, or because it simply intends to favor one interest at the expense of another."[143] Although legislators may claim to be acting in the public interest, in reality the only "reason" for a particular statute may be that it benefits the interest group that won.[144]

These pluralist authors see rationality review as fundamentally incompatible with a realistic understanding of how the legislative sausage is made. First, substantive rationality review ignores entirely the role of bargaining in the legislative process.[145] Courts are asked to opine on the reasonableness of discrete provisions without considering what the apparent winners and losers obtained in exchange. A legislative *bargain* may be rational even if particular resulting provisions appear not to be.[146] On a more fundamental level, rationality review assumes that legislatures have instrumental reasons for the various provisions and exemptions they adopt, when in reality their reasons may be political.[147] A regulatory statute might exempt a particular industry for no reason other than the fact that the provision was needed to win over the support of a powerful interest group.[148] Indeed, on this last point Bickel and Linde agree.[149] Bickel argues that it is a mistake to focus on rationality at all. A legislature's decision to promote a particular industry may not be "rational . . . in the sense that reason compels it."[150] It may simply

[142] Posner, supra note 7, at 27; see also, e.g., Robert A. Dahl, Pluralist Democracy in the United States: Conflict and Consent 373 (1967) (noting that groups often have strong incentives to push for policies that favor them at the expense of others); David B. Truman, The Governmental Process (1951) (arguing that pressure groups' great power to influence the legislative process and public policy is often overlooked).

[143] Linde, supra note 7, at 212; see also William D. Araiza, The Section 5 Power and the Rational Basis Standard of Equal Protection, 79 Tul. L. Rev. 519, 532 (2005) (arguing that the strong "presumption in favor of legislative judgments" that characterizes modern rational basis review followed directly from this "collapse of the Court's serious attempt to distinguish public-regarding from faction-based laws").

[144] Posner, supra note 7, at 27.

[145] Linde, supra note 7, at 208–11.

[146] Bickel, supra note 5, at 225–26.

[147] Linde, supra note 7, at 226–27.

[148] Id. at 208–11.

[149] See Bickel, supra note 5, at 226; Linde, supra note 7, at 208–11.

[150] Bickel, supra note 5, at 226.

reflect what a majority of legislators or voters think would be best.[151] What legitimates legislative choices is not their *rationality* but the fact that they are "the product of the constitutionally created political process of our society."[152]

Notably, neither theory is entirely consistent with how the courts themselves describe what they are doing when they conduct rational basis review. The Supreme Court never has upheld a statute solely on the ground that it reflects the views of the majority.[153] Nor has the Court said that mere legislative preference for one interest group over another is a sufficient basis for legislation, though a handful of lower courts have done so.[154] Rhetorically, at least, the Supreme Court continues to insist that legislation must be "rationally related" to some "legitimate" purpose—a statement that some have taken to mean that a statute must do more than simply promote the interests of a particular group.[155]

Notwithstanding what courts *say*, the majoritarian and pluralist accounts offer perhaps the best explanation for what courts *do*—particularly when it comes to some of the more controversial aspects of modern rational basis review. Take for example the requirement that courts consider every conceivable justification for the statute at issue, including reasons that legislators themselves never considered.[156] One way to understand this requirement is as a concession to the fact that legislators often are not motivated by instrumental reasons, but rather by political pressure. The requirement also accommodates the fact that individual legislators may each have different reasons or goals that reflect the interests of their particular constituents.[157] In a pluralist

[151] Id. at 226; see also Linde, supra note 7, at 220 (noting that often the most that can be said for a statute is that a majority of legislators prefer it).

[152] Posner, supra note 7, at 29. See also Jerry L. Mashaw, Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State, 70 Fordham L. Rev. 17, 20–21 (2001) ("We speak unselfconsciously not of legislative *reason* but of the legislative *will*." (emphasis added)).

[153] See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 465–70 (1981) (going through the motions of explaining why the legislature might have thought its classification rational).

[154] See Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286–88 (2d Cir. 2015); Powers v. Harris, 379 F.3d 1208, 1221–22 (10th Cir. 2004).

[155] Sunstein, Interest Groups, supra note 24, at 52.

[156] McGowan v. Maryland, 366 U.S. 420, 426 (1961).

[157] See, e.g., Araiza, supra note 143, at 538 (noting that the rule avoids "the well-known difficulty in identifying, and the conceptual challenge in even imagining, a real and unitary

system, one cannot expect a majority of legislators to come to an agreement on legislative ends. All that is required is that a majority of legislators vote in favor of the particular means that the statute adopts.

Similar arguments also help to explain why courts do not require the government to produce any evidence to support a legislative choice. Asking for evidence assumes that legislation is the product of rational deliberation rather than political will. It also is inconsistent with both majoritarian and pluralist accounts of how legislative decisions are made. Legislators act "on the basis of a wide variety of information, concerns, and interests."[158] And they acquire their information in different ways: they hear from lobbyists and constituents, talk informally with one another and with legislative aides, and follow local developments.[159] These sources of information may not add up to empirical "facts" that would satisfy a court—but facts are not what legitimate the decisions that legislators make.

Finally, at a more general level, rational basis review ensures that courts only overturn majoritarian decisions when their irrationality is beyond all doubt.[160] If a court can conceive of a possible explanation for a legislative measure, who can be sure that at least some legislators did not also have this consideration in mind? And without that certainty, should courts really put themselves in a position to thwart the popular will?[161] The main thing to see is that all of these arguments follow—in one way or another—from assumptions about the legislative process and the political character of the decisions that legislatures make.

### *2. As Applied to Agencies*

As should be immediately apparent, these sorts of majoritarian and pluralistic arguments become quite strained once one moves from the legislative to the agency context. Nevertheless, courts and commentators occasionally have relied on authority-based arguments to justify highly

legislative intent"). The Court itself has said that a legislature cannot be required to "record a complete catalogue of the considerations which move its members to enact laws." Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 510 (1937).

[158] William W. Buzbee & Robert A. Schapiro, Legislative Record Review, 54 Stan. L. Rev. 87, 90 (2001).

[159] See Linde, supra note 7, at 224.

[160] See Thayer, supra note 33, at 144.

[161] Id.; Wallace, supra note 5, at 6.

deferential review of agency decisions as well. Some have suggested, for example, that the countermajoritarian difficulty extends to agency action—either because agencies implement legislation which itself has a majoritarian basis, or because agencies are accountable to elected officials within the executive branch.[162] Others have argued that deference to agencies furthers separation of powers norms because it honors the legislature's choice to delegate authority to the agency in the first place.[163] And in *Sensational Smiles, LLC v. Mullen*, the Second Circuit relied on a pluralist account of the legislative process to uphold a rule adopted by a state dental board.[164] The plaintiffs had argued that the rule, which prohibited non-dentists from performing certain teeth-whitening services, did nothing to promote patient health, and was intended primarily to shield dentists from competition.[165] In an opinion written by Judge Guido Calabresi, the court explained that "[m]uch of what states do is to favor certain groups over others on economic grounds. We call this politics."[166] For this reason, the agency did not need to have a legitimate "public" purpose to justify its rule: "a simple preference for dentists over teeth-whiteners would suffice."[167]

In evaluating these arguments, it is essential to recall exactly what is at stake here. The question is not whether some deference is warranted for agency decisions—it surely is—but whether to apply the modern rational test, which in practice is tantamount to no review at all. As discussed above, both the majoritarian and pluralist arguments in favor of this hands-off approach are premised on the idea that legislation need not be *rational* at all, because the legislative process is fundamentally a *political* exercise. The question, then, is not whether there are authority-based reasons to defer to agency judgment or to leave policy choices for agencies to resolve (there undoubtedly are). Rather, the question is

[162] See, e.g. Bickel, supra note 5, at 19–20 (arguing that the countermajoritarian difficulty applies to agencies as well); Adler, supra note 18, at 806–43 (discussing various countermajoritarian critiques of judicial review of agency action).

[163] This argument often is used to justify the *Chevron* doctrine in the context of federal administrative law. See Metzger, supra note 14, at 494–95; see also McGrath, supra note 91, at 751 (noting that deferential judicial review to agency action often is justified on separation of powers grounds).

[164] 793 F.3d 281 (2d Cir. 2015).

[165] Id. at 285–86.

[166] Id. at 287.

[167] Id.

whether agencies, like legislatures, should be able to justify their decisions *solely* in reference to their democratic pedigree.[168] As the remainder of this Section makes clear, the answer to that question is decidedly no. The upshot is that although agency accountability may help justify *some* judicial deference, it cannot justify the blanket deference that courts extend under the modern rational basis test.

As a starting point, no one seriously contends that agencies themselves are designed to be majoritarian institutions. Unlike legislators, agency officials typically do not stand for election.[169] Nor do agencies have any formal mechanisms for aggregating constituent preferences in making their decisions. Although agencies at times open themselves up to public input—for example, by engaging in notice-and-comment rulemaking—the goal of these processes is not to identify the "majority" view.[170] Agency decisions, in short, cannot be justified based on any direct link between agency officials and the voting public, and no one argues to the contrary.

What some scholars argue instead is that there are a variety of *indirect* mechanisms through which agency decisions ultimately can be traced back to popular majorities. They point, for example, to the fact that agency rules implement legislative directives, which are themselves majoritarian.[171] Or that agency decisions always are subject to legislative reversal.[172] Others emphasize that legislatures can influence agency decisions through appropriations, committee hearings, and informal meetings with administrators.[173] In some states, for example, legislative veto provisions permit legislators to suspend an administrative rule by a

[168] Scott A. Keller makes the same point in a somewhat different context, in Depoliticizing Judicial Review of Agency Rulemaking, 84 Wash. L. Rev. 419, 431–433 (2009). See also Bressman, Accountability, supra note 24 (arguing that majoritarianism also cannot address concerns over arbitrariness).

[169] Agency officials at the state and local level sometimes are elected. Part III.B considers the extent to which these arguments apply when that is the case.

[170] Funk, supra note 91.

[171] Matthew Adler describes this as the "Simple Extension" of the countermajoritarian difficulty from the legislative to the administrative context. Adler, supra note 18, at 769.

[172] Bickel, supra note 5, at 20 (arguing that because agency decisions "are reversible by legislative majorities. . . . the essential majority power is there, and it is felt to be there").

[173] Christopher R. Berry & Jacob E. Gerson, Agency Design and Political Control, 126 Yale L.J. 1002, 1017 (2017); Funk, supra note 91, at 175–78; Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2257–58 (2001).

majority vote in one or both houses.[174] Finally, as then-Processor Elena Kagan and others have argued, agency decisions are subject to some degree of executive oversight.[175] At the federal level, presidents exert control by appointing agency officials who share their vision, by issuing directives to agency heads, and by insisting that agency rules undergo Office of Information and Regulatory Affairs ("OIRA") review before they can go into effect.[176] Similar mechanisms exist—to varying degrees—in the states.[177]

What matters for immediate purposes, however, is that although these mechanisms help legitimate agency action, they cannot transform agencies into majoritarian institutions. And importantly, they cannot guarantee that there is a majoritarian basis for the decisions that agencies make. Arguments about legislative delegation, for example, only apply in a very narrow class of cases in which agency decisions involve a fairly straightforward application of legislative commands.[178] And although legislatures *can* overturn agency decisions with which they disagree, the structural impediments to legislative action famously make it difficult to infer legislative approval from a legislature's failure to act.[179] The verdict on direct oversight through legislative committee hearings or executive office review similarly is mixed at best.[180]

In short, none of these mechanisms can *predictably* ensure that agency decisions reflect the views of a constitutionally significant majority. In the legislative context, a reviewing court can state with

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[174] Funk, supra note 91, at 176 & n.171.

[175] Kagan, supra note 173, at 2331–45.

[176] Id. at 2285, 2290, 2328.

[177] See, e.g., Aaron Saiger, *Chevron* and Deference in State Administrative Law, 83 Fordham L. Rev. 555, 577 & nn.171, 173 & 174 (2014).

[178] See Adler, supra note 18, at 765; see also, e.g., Margaret H. Lemos, The Consequences of Congress's Choice to Delegate: Judicial and Agency Interpretations of Title VII, 63 Vand. L. Rev. 363 (2010) (highlighting ways in which agency interpretations of Title VII likely expanded the scope of the underlying statute beyond what the enacting Congress may have intended).

[179] William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L. Rev. 67, 98 (1988); see also Funk, supra note 91, at 177 (noting that legislators cannot possibly scrutinize the thousands of rules, orders, and opinions that agencies issue each year).

[180] On the limits of legislative oversight, see Jerry L. Mashaw et al., Administrative Law 160 (7th ed. 2014) (noting serious doubts about the effectiveness of legislative oversight); Kagan, supra note 173, at 2259–60 (pointing out that a great deal of oversight happens in committees which are themselves not majoritarian). On the limits of executive oversight, see Kagan, supra note 173, at 2303–09 (pointing to gaps in executive oversight).

certainty that the statute in question was approved by a majority of legislators and signed by the chief executive. In this regard, legislation is necessarily "majoritarian," even if there is reason to doubt that legislative outcomes reflect what an actual majority of the public prefers. In the agency context, in sharp contrast, the most that can be said is that some mechanisms exist that sometimes ensure agency action is commensurate with executive or legislative will. This much weaker link between agency decisions and majoritarian preferences means that agency decisions cannot be explained as a raw exercise of political power. Something else—be it rationality or expertise—must fill in the gap to explain why it is that an agency acted as it did.

Pluralist arguments, which justify deferential review as necessary to accommodate interest group bargaining, fall even further from the mark in the context of the administrative state. Recall the core assumptions behind judicial deference to legislative decisions on pluralist grounds: that legislators are given relatively free rein to pursue whatever ends they wish, and that legislation results from bargaining and compromise among competing groups.[181] Absent clear constitutional guidance, there is no principled way to distinguish between responsiveness to constituent interests and illegitimate legislation to favor particular industries and groups.

These basic assumptions do not hold up in the agency context. First, unlike legislative bodies, agencies emphatically do not have the freedom to pursue an unlimited number of goals. They are authorized only to implement the specific objectives that the legislature itself set out.[182] The pluralist conception of politics as a freewheeling bargain across a broad range of policy domains simply is inapt given the limited sphere within which agencies are expected to act. In *Sensational Smiles*—the Second Circuit's teeth whitening case discussed above—the legislature already had defined the goals that the State Dental Commission could legitimately pursue.[183] The Commission's charter authorized it to promulgate regulations "to insure proper dental care and the protection of public health, considering the convenience and welfare of the

[181] See supra Part II.A.1.

[182] See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[183] *Sensational Smiles*, 793 F.3d at 283; see also Conn. Gen. Stat. § 20–103a (2017) (detailing the responsibilities of the State Dental Commission).

patient."[184] Shielding dentists from competition—or, as Judge Calabresi put it, expressing "a simple preference for dentists over teeth-whiteners"[185]—did not plausibly fall within the range of permissible goals.

This limitation on agency decision making is nontrivial; it is an essential feature of constitutional design. Indeed, under both federal and state nondelegation doctrines, legislatures are *required* to impose substantive constraints on agency decision making, precisely to preserve the separation of powers between the legislative and executive branch. At the federal level, the Court has said that in creating an administrative agency, Congress "must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."[186] State courts have, if anything, been even more insistent that legislatures set clear parameters within which agencies may act.[187] The animating principle behind these doctrines is that the power to pick and choose among a broad range of competing objectives is an inherently legislative task, which cannot be delegated to the executive branch.[188]

For this reason, Linde argues that agencies have an obligation to defend the rationality of their decisions even though legislatures do not.[189] He writes that "[t]he duty to defend the rationality of a decision . . . depends very simply on whether the policy makers are limited to prescribed aims, or whether they are free to pursue any aim of their own choice."[190] Agencies, "no matter how broad their discretion may be, . . . are obliged to justify their actions in instrumentalist terms, as means toward a goal within the scope of their assignment."[191] Their decisions must reflect something other than a purely political bargain between competing interest groups.

The other problem with justifying deferential review in pluralist terms is that agency decision-making *processes* lack the essential features that

[184] Conn. Gen. Stat. § 20–103a (2017).
[185] *Sensational Smiles*, 793 F.3d at 287.
[186] Wichita R.R. & Light Co. v. Pub. Utils. Comm'n., 260 U.S. 48, 59 (1922).
[187] See Jim Rossi, Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States, 52 Vand. L. Rev. 1167, 1193–97 (1999) (describing the more robust nondelegation doctrines in the states).
[188] Stack, supra note 24, at 983.
[189] Linde, supra note 7, at 229.
[190] Id.
[191] Id. at 225.

help to legitimate the product of interest group bargaining in the legislative sphere. Here, it is important to distinguish between the pluralist thesis as a descriptive account of the legislative process, and as a normative or constitutional argument for deferential review. As a descriptive matter, many have noted that pluralist pressures can affect the administrative process as well.[192] In *Governmental Process*, a classic in pluralist thought, Professor David Truman described matter-of-factly the various ways in which interest groups exert influence on administrative decisions.[193] Since then, scholars have devoted thousands if not tens of thousands of pages to describing and analyzing the problem of agency "capture" by regulated interest groups.[194] Few doubt that interest groups play an outsized role in the administrative process.

As a constitutional matter, however, the operative question is not whether interest groups influence agency decisions—rather, it is whether the existence of interest group pressure is a reason for courts to *defer* to the decisions that agencies make. The reason why courts and scholars are so willing to tolerate interest group wrangling in the legislative process is because it takes place according to a set of rules that the Constitution itself sets out.[195] These rules determine the structure of legislative bodies, and they "define the prerequisites of lawmaking procedure," including "the central concept of enactment by a majority of a legal quorum," the "passage of the same text by two separate houses," and "the assent of an independent executive."[196] These structural

[192] Truman, supra note 142, at 437–46; Robert L. Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189 (1986); Richard B. Stewart, The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act, 62 Iowa L. Rev. 713, 721–23 (1977).

[193] Truman, supra note 142, at 437–46.

[194] See, e.g., Nicholas Bagley & Richard L. Revesz, Centralized Oversight of the Regulatory State, 106 Colum. L. Rev. 1260, 1284–86 (2006) (discussing regulatory capture theory); Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 21–24 (2010) (same); Stewart, supra note 115, at 1683–88 (same); see generally Rabin, supra note 192 (reviewing the history of the development of the administrative state from a political and judicial perspective).

[195] See, e.g., Linde, supra note 7, at 240, 254 (describing the various constitutional constraints on the legislative process as a reason to defer to legislative outcomes).

[196] Id. at 240.

safeguards are designed to aggregate preferences, check factional impulses, and balance the interests of competing groups.[197]

Administrative processes do not have the same constitutional pedigree—and just as importantly, agency decision-making processes lack the structural safeguards that help to ensure in the legislative context that the "basic constitutional standard of democratic accountability" is met.[198] For this very reason, scholars and courts have been much less sanguine about the influence of interest groups in the administrative state. As Professors Robert Rabin, Richard Stewart, and others have pointed out, courts in the 1960s and 1970s responded to the perceived influence of regulated interests in the administrative process by ratcheting up both the procedural requirements that agencies must follow, as well as the substantive standards of judicial review.[199]

In other words, rather than pointing to pluralist politics as a basis for judges approving of agency action, they provided an argument for greater judicial scrutiny.[200] For example, in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, the Supreme Court announced a heightened substantive standard of review that required agencies to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[201] A number of scholars have read the decision as a direct rebuke of politicized agency decision making.[202] Even those who are critical of the decision generally agree that political considerations can at most offer a partial explanation for agency decisions and cannot substitute for careful consideration of "existing evidence and facts."[203]

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[197] See Harold H. Bruff, Legislative Formality, Administrative Rationality, 63 Tex. L. Rev. 207, 212–14 (1984).

[198] Linde, supra note 7, at 240; accord Sunstein, Interest Groups, supra note 24, at 66–67.

[199] Rabin, supra note 193, at 1284–91; Stewart, supra note 192, at 728–40.

[200] See, e.g., Stewart, Reformation of Administrative Law, supra note 115, at 1723–60 (describing a variety of new constraints on agency action, including broadened participation rights, lower standing requirements to challenge agency action, and requirements that agencies respond to the comments that they receive).

[201] 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U. S. 156, 168 (1962)).

[202] Mashaw, supra note 153, at 22 (noting that the decision "stands broadly for the proposition that a change of administrative ideology . . . cannot provide a sufficient reason for rescinding an administrative rule").

[203] Watts, supra note 82, at 80.

Legislatures generally have not been any more welcoming of pure interest group wrangling in the administrative process. The advent of "negotiated rulemaking" underscores the point that there necessarily are sharp limits to a pluralistic conception of agency decision making.[204] In response to complaints that traditional notice-and-comment rulemaking had become too adversarial, legislatures at both the federal and state levels introduced a more collaborative decision-making process called "negotiated rule making."[205] As the name suggests, the goal of negotiated rulemaking is to bring together all of the stakeholders who might be affected by a particular regulation to hammer out a deal that all can live with.[206] Although negotiated rulemaking is premised on the idea that administrative policymaking itself ultimately is the product of compromise among competing interests, the comparison to traditional interest group bargaining in the legislative process largely ends there. Under the federal Negotiated Rulemaking Act, all rulemaking meetings must be open to the public, and the rulemaking committees themselves must reflect a balance of views.[207] At the end of the process, the agency still must go through formal notice-and-comment rulemaking, and rules still are subject to judicial review.[208] Both assure the fundamental rationality of agency action. As Professor Jody Freeman notes, "even among ardent supporters" of negotiated rulemaking, there is "broad agreement" that these safeguards are essential to guard against agency capture and establish the legitimacy of the rules that result.[209]

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[204] See Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 2–6, 33–36 (1997).

[205] Id. at 10–12, 34–35; Cary Coglianese, Assessing Consensus: The Promise and Performance of Negotiated Rulemaking, 46 Duke L.J. 1255, 1260–66 (1997); Philip J. Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1, 19–29 (1982). Similarly robust requirements are included in state negotiated rulemaking acts. See, e.g., Tex. Gov't Code Ann. § 2008.051–057 (West 2016) ("Negotiated Rulemaking Act").

[206] Freeman, supra note 205, at 34.

[207] 5 U.S.C. §§ 564–65 (1994); 5 U.S.C. app. § 10 (1994); see also Freeman, supra note 203, at 39–40 (explaining how the National Rifle Association ("NRA") interacts with the Federal Advisory Committee Act ("FACA")).

[208] 5 U.S.C. § 570 (1994). The goal, of course, is to reduce the likelihood of litigation by getting all of the key stakeholders to agree in advance that the rule is sound, but the background threat of substantive judicial scrutiny remains. Freeman, supra note 205, at 34–35; Coglianese, supra note 206, at 1264–66.

[209] Freeman, supra note 205, at 35.

Across a variety of contexts, then, the reaction to the fact that interest groups exert considerable influence on the administrative process has been to insist on more process, more rationality—and often, more judicial scrutiny.[210] None of this is necessarily dispositive on the underlying question of what constitutional rationality review might require of administrative actors. But it does underscore the degree to which pluralist arguments for judicial deference are simply out of place in the administrative state.

In sum, neither majoritarian nor pluralist arguments provide a plausible basis for applying the same deferential rational basis test to administrative agency decisions. At best, they suggest that *some* deference is warranted to agency decisions, either because agencies are to some extent accountable to the public, or because courts generally should avoid overstepping the boundaries of judicial authority. Part III takes up the question of precisely how much deference is owed. What matters here is that none of these arguments can justify the blanket deference that courts afford on rational basis review.

### *B. Legislative and Administrative Expertise*

Courts also justify deference to both legislatures and administrative decisions on competency grounds.[211] Professor Paul Horwitz explains that "courts defer to other institutions when they believe that those institutions *know more* than the courts do about some set of issues"—either because of their superior fact-finding ability or their underlying expertise on the matter at hand.[212] If, for example, the question is whether banning plastic milk containers will benefit the environment, a court might conclude that legislators are better positioned to gather and assess the evidence regarding the environmental costs of different

[210] Sunstein makes a similar point in Interest Groups in American Public Law. Sunstein, supra note 24, at 63 ("Reviewing courts are attempting to ensure that the agency has not merely responded to political pressure but that it is instead deliberating in order to identify and implement the public values that should control the controversy.").

[211] See, e.g., Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (citing expertise as a key factor for deference to agency interpretations of their statutory authority).

[212] Horwitz, supra note 131, at 1085.

packaging options, and to make a prediction as to the likely effects of various proposals.[213]

Superficially, at least, expertise would seem to provide a particularly compelling argument for why courts should defer to agency decisions. As Professor Sidney Shapiro writes, "[e]xpertise plays a starring role in administrative law."[214] The Supreme Court repeatedly has said that agency decisions involve complex and highly technical determinations, and that agency officials have "more than ordinary knowledge respecting the matters subjected to agency regulations."[215] Courts routinely cite agency expertise as a reason to defer, at least to some extent, to the decisions that agencies make.[216]

Still, as this Section makes clear, claims of agency expertise cannot support the sort of blanket deference that courts apply to constitutional rational basis review.

To see this, it is important to understand that "deference" under the rational basis test differs in significant ways from deference in other contexts in which courts have considered the comparative expertise of legislatures, agencies, and courts. This is not just a difference of degree, but one of kind. In other contexts, the question that courts often face is whether to defer to legislative or administrative *facts*, or to the decision-maker's judgment on the basis of the facts before it.[217] In deciding whether a federal statute falls within Congress's enforcement powers, for example, courts must decide whether to defer to congressional findings regarding existing patterns of discrimination that the statute purports to address.[218] Similarly, as a matter of administrative law, courts defer to agency choices among policy alternatives so long as there is some basis for the choice (even if a court might think another choice

[213] See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981) (quoting Ferguson v. Skrupa, 372 U.S. 726, 729 (1963)) (rejecting the lower court's conclusion that the legislature "misunderstood the facts" on the ground that "it is up to legislatures, not courts, to decide the wisdom and utility of legislation").

[214] Sidney A. Shapiro, The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences, 50 Wake Forest L. Rev. 1097, 1097 (2015).

[215] *Chevron*, 467 U.S. at 844 (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)).

[216] Id. at 844–45 (listing cases).

[217] See William D. Araiza, Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation, 88 N.Y.U. L. Rev. 878, 886–87 (2013) (discussing the appropriate degree of deference to legislative fact-finding).

[218] Id. at 933–34.

would have been best).[219] When courts justify deference in these other contexts, they often point to legislatures' and agencies' superior fact-finding ability or their comparative expertise in drawing conclusions based on the evidence before them.[220]

In the context of rational basis review, however, arguments about legislative or administrative fact-finding largely are inapposite, because facts themselves often are treated as irrelevant.[221] The distinguishing feature of rational basis review is that courts may uphold a challenged statute *in the absence* of facts. On rational basis review, "if any state of facts reasonably can be *conceived*" to sustain a challenged classification, the court must assume that the facts do in fact exist.[222] Courts routinely imagine facts in support of the government's arguments.[223] Consider *Railway Express v. New York*, in which the Supreme Court upheld a rule prohibiting common carriers from putting advertisements on the sides of their trucks while permitting company delivery vehicles to do so.[224] The Court thought it conceivable that "those who advertise[d] their own wares . . . do not present the same traffic problem" as those who hosted advertisements for others (even though the government had offered no evidence to suggest this was the case).[225] The practice of permitting courts to make up their own facts cannot be justified by referencing the superior fact-finding ability of the decisionmaker whose judgment is under review.

For similar reasons, claims of expertise cannot justify the judicial practice of upholding statutes or rules based on hypothetical rationales that the decision maker never even considered. Under the rational basis test, courts "are not bound by explanations of the statute's rationality

[219] See, e.g., Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 105 (1983) ("It is not our task to determine what decision we, as Commissioners, would have reached. Our only task is to determine whether the Commission . . . articulated a rational connection between the facts found and the choice made.").

[220] Berger, Individual Rights, supra note 18, at 2046; Horwitz, supra note 131, at 1085–89.

[221] See, e.g., Ry. Express Agency v. New York, 336 U.S. 106, 109–10 (1949) (upholding a challenged regulation based on hypothetical facts).

[222] Lindsley v. Nat. Carbonic Gas Co., 220 U.S. 61, 78 (1911) (emphasis added).

[223] See, e.g., U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 166–67, 178 (1980) (speculating why Congress may have wished to distinguish between two classes of retirees); Flemming v. Nestor, 363 U.S. 603, 612 (1960) (upholding a provision denying certain deportees social security benefits based on far-fetched rationales).

[224] 336 U.S. at 106–07.

[225] Id. at 110.

that may be offered by litigants."[226] If government officials fail to provide a rational basis for a challenged justification, courts are obligated to "*resort to [their] own talents* . . . to discern the rationality of the classification in question."[227] This aspect of the rational basis test obligates courts at times to substitute their *own* judgment—or that of government lawyers—for the judgment of "expert" decision makers to whom they are meant to defer. This may be justifiable in the legislative context for the various reasons discussed in Part II.A, but it is entirely inconsistent with the idea that courts ought to defer for reasons of agency expertise.[228] Expertise as a rationale requires that the agency actually have considered and justified its outcomes on the basis of its own thinking. The rational basis test explicitly eschews any need for that thinking process to have occurred.

Consider for example *Dandridge v. Williams*,[229] the welfare benefits case discussed in Part I. The rule in question, adopted by the Maryland Department of Public Welfare, imposed an absolute cap of $250 per month on welfare benefits to families under the state-administered Aid to Families with Dependent Children program.[230] Because of the rule, families with six or more children received considerably less than what the agency itself had calculated to be the minimum "standard of need."[231] At the trial level, attorneys for the agency argued that the regulation was necessary "to conserve state funds" because the legislature had not appropriated enough money to pay benefits in full.[232]

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[226] Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 463 (1988).

[227] Burke Mountain Acad., Inc. v. United States, 715 F.2d 779, 783 (2d Cir. 1983) (quoting First Nat'l Bank of Or. v. United States, 571 F.2d 21, 25 (Ct. Cl. 1978) (emphasis added) (internal quotation marks omitted).

[228] The Court itself has recognized as much in the administrative law context. See, e.g. Inv. Co. Institute v. Camp, 401 U.S. 617, 628 (1971) ("It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.").

[229] 397 U.S. 471 (1970).

[230] Id. at 474.

[231] Id. at 528 (Marshall, J., dissenting). The Maryland Department of Public Welfare developed an elaborate formula to calculate each family's standard of need based on a variety of factors including family size. Under that formula, plaintiff Linda Williams was eligible to receive just under $300 per month to support her eight children—but because of the cap she received just $250. Another plaintiff was eligible to receive $330 but also received just $250. See id. at 490–91 (Douglas, J., dissenting).

[232] Williams v. Dandridge, 297 F.Supp. 450, 454 (D. Md. 1968), rev'd, 397 U.S. 471 (1970).

The district court rejected this rationale on various grounds and then "searched the record in vain" for any other plausible justification for the provision.[233] Finding none, it struck down the rule.[234] After the court issued its initial decision, the state's lawyers petitioned for a rehearing, and offered four *additional* justifications.[235] Among these was the argument that the Supreme Court eventually relied on to uphold the rule: the benefits cap would encourage parents to seek gainful employment instead of relying on public funds.[236]

Although the Supreme Court insisted that it was not its place to "second-guess state officials," its opinion effectively did just that by relying on arguments that state experts never offered up in defense of the challenged rule.[237] As the district court pointed out in rejecting the state's claims, there were good reasons to doubt that agency officials intended the benefits cap to encourage recipients to seek employment (or that officials believed the rule would succeed in achieving this objective).[238] Agency officials knew better than anyone that only a tiny fraction of AFDC families could plausibly be classified as employable, particularly the large families affected by the rule.[239] The idea that the benefits cap was necessary to discourage otherwise employable recipients from applying for benefits is precisely the sort of argument that sounds good to *non-experts* who have little familiarity with the realities that AFDC families face. It is not clear that it persuaded anyone at the agency that was tasked with administering the program. A rational basis test that takes seriously the idea of agency expertise would ask

[233] Id. at 458.

[234] Id. at 458–59.

[235] Brief of Appellants at 32–41, Dandridge v. Williams, 397 U.S. 471 (1970), 1969 WL 119895, at *32–41; see also id. at 524 (1970) (Marshall, J., dissenting) (describing how the state's justifications evolved as the case made its way through the courts).

[236] Id. at 486.

[237] Id. at 487.

[238] The district court thought it "equally tenable that the maximum grant regulation was adopted to make the . . . program more palatable politically." Williams v. Dandridge, 297 F.Supp. 450, 467 n.12 (D. Md. 1968), rev'd, 397 U.S. 471 (1970).

[239] The vast majority of recipients were single mothers. Under AFDC regulations, state officials were not permitted to direct mothers to seek employment if they were needed to take care of children in the home. Mothers with six or more children under the age of eighteen would seem particularly likely to fall within that class—assuming of course they were not already ineligible for work due to medical issues, as some recipients were. *Dandridge*, 397 U.S. at 526–27 (Marshall, J., dissenting).

whether a rule is rationally related to the *actual* reasons on which agency officials relied at the time the decision was made.

Of course, certain aspects of rational basis review are more obviously defensible on the basis of agency expertise. Professors Jacob Gersen and Adrian Vermeule, for example, argue that it is perfectly rational for experts to make judgments on the basis of scant evidence when the costs of acquiring additional information exceed the benefits of obtaining greater certainty about the decision in question.[240] Knowing when to look for more information and when to accept some measure of uncertainty is itself a form of expertise.[241] At least in some circumstances, then, agency expertise may justify upholding a rule when there is little evidence to support it.[242] Similarly, Shapiro writes that over time, agency officials develop what he calls "craft" expertise, which gives officials an "*intuitive* sense of what might work and be a good result."[243] He relies on the idea of "craft" expertise to argue for a more deferential standard of review than what is presently required under "hard look" review as a matter of federal administrative law.[244]

But again, the point here is not that expertise cannot justify *some* degree of deference—or even highly deferential review in some circumstances. The question of just how much deference courts should afford to agency decisions, and under what circumstances, is addressed in much greater detail in Part III—and it is there that the arguments of Gersen, Vermeule, and Shapiro take on weight. What matters for present purposes is that "expertise" cannot plausibly provide a justification for applying to agency action the blanket sort of deferential review that is applied in the legislative context.

### *C. Federalism*

Because so many rational basis decisions involve state and local legislation, judicial deference also is justified at times on federalism

[240] Jacob Gersen & Adrian Vermeule, Thin Rationality Review, 114 Mich. L. Rev. 1355, 1357 (2016).

[241] Id.

[242] Id. at 1357–58, 1395.

[243] Shapiro, supra note 214, at 1114 (emphasis added); see also Jerry L. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims 45 (1983) (providing an example of "craft" expertise in the physician context).

[244] Shapiro, supra note 214, at 1099–100, 1102.

grounds. The Court has emphasized that "states are accorded wide latitude in the regulation of their local economies under their police powers" and that federal courts should be wary of overturning state legislation on constitutional grounds.[245] Modern rationality review reflects the "constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition."[246]

All of these federalism concerns would seem to apply with equal force in the agency context as well—and in fact, they already play a prominent role in judicial review of state and local agency decisions by limiting the sorts of claims that may be heard in federal court.[247] Under the judge-made *Burford* abstention doctrine, federal courts routinely refuse to exercise jurisdiction over claims that state agencies acted arbitrarily or in violation of either state or federal law.[248] The Supreme Court has emphasized that state administrative decisions are most often reviewed in state courts, and that as a result these courts acquire "specialized knowledge" that federal courts may lack.[249] Federal courts may reach incorrect or inconsistent results, and in doing so, undermine carefully calibrated regulatory schemes.[250]

There are two responses to these sorts of arguments. First, it is important to distinguish the question of *who* should review agency actions, from the question of what substantive standard ought to apply. *Burford* is focused exclusively on the former, whereas the focus here is

[245] City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

[246] Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525, 536 (1949); see also *Dandridge*, 397 U.S. at 485–86 ("[The rational-basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.").

[247] Woolhandler & Collins, supra note 32, at 681; see generally Barry Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1211 (2004) (discussing how federalism principles have shaped decisions about what cases may be heard in federal courts).

[248] Burford v. Sun Oil Co., 319 U.S. 315, 317–18 (1943) (announcing the principle that federal courts may refuse to hear challenges to state agency decisions in order to avoid undue interference with state interests); see also Woolhandler & Collins, supra note 32, at 616–17 (observing that *Burford* was the starting point for the Supreme Court's attempts to "work out principles of administrative abstention and related doctrines to curtail federal court review of state agency action").

[249] *Burford*, 319 U.S. at 327–34.

[250] Woolhandler & Collins, supra note 32, at 643–44.

on the latter. One can take seriously the comity concerns expressed in *Burford* and still conclude that as a matter of federal constitutional law, agency decisions should be reviewed more carefully than decisions made by the legislative branch.[251] Were federal courts to adopt the more searching rational basis standard advocated in this Article, they still would be free to decide that this review should by and large take place in state courts.

As far as federalism arguments generally, they fare little better than generalized separation of powers concerns in justifying the highly deferential review of the rational basis test. Federalism is an important value—but it is just one among many. Across a variety of contexts, federalism principles routinely give way, at least to some degree, to a countervailing interest in safeguarding individual rights.[252] The Court's procedural due process cases provide an apt analogy. Beginning in the late nineteenth century—and accelerating with the procedural due process revolution of the 1960s—courts have imposed a variety of requirements on state and local government decision making.[253] For largely historical reasons these requirements apply only when government entities act in individual cases, and not when they promulgate forward-looking rules.[254] But the effect on state and local government decision making nevertheless is substantial. Agencies typically must provide some form of hearing, the timing and formality of which depends on the nature of the rights at stake.[255] In some circumstances, agencies must provide some reasoned justification for

[251] On the role of comity as an animating principle in *Burford* cases, see James C. Rehnquist, Taking Comity Seriously: How to Neutralize the Abstention Doctrine, 46 Stan. L. Rev. 1049, 1077 (1994).

[252] See, e.g., Miranda v. Arizona, 384 U.S. 436, 490–92 (1966) (requiring warnings during custodial interrogation and rejecting the suggestion that the court wait until state and local legislatures have developed rules of their own).

[253] See, e.g., Goldberg v. Kelly, 397 U.S. 254, 254 (1970) (requiring hearing prior to depriving individuals of public welfare benefits).

[254] Compare Londoner v. City of Denver, 210 U.S. 373, 380–86 (1908) (hearing required when officials act in an adjudicative capacity), with Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915) (no hearing required when adopting legislative rules). See also Metzger, supra note 14, at 489–90 & n.33 (pointing out that *Bi-Metallic* rests on a fairly outdated set of rationales).

[255] See Mathews v. Eldridge, 424 U.S. 319, 333–34 (1976).

their decisions that later can serve as a basis for judicial review.[256] Importantly, these requirements apply not only to administrative agencies, but also to electorally accountable bodies, like city councils, when they act in an adjudicative capacity (which they often do).[257] All of these requirements undoubtedly interfere with local decision-making processes and therefore impose the sorts of federalism costs identified above. And for this reason, federalism concerns also have loomed large in court decisions grappling with just how much process is due.[258] But in the procedural due process context, individual rights have, at least to some extent, been thought to trump.

In addition, broad federalism principles do not, in and of themselves, point to any particular doctrinal test or level of scrutiny. One can just as easily envision a deferential standard that nevertheless ensures that local views were taken into account, or that measures local agency decisions against the reasons that agencies themselves offer in their defense. Indeed, that is precisely what Part III does. The point here, yet again, is only that even a strong commitment to federalism values might still leave room to consider whether local *administrative* decisions might be subjected to greater scrutiny than those made by legislative bodies.

### *D. The Substantive Constitutional Standard*

The foregoing sections proceeded on the assumption that modern rational basis review represents a compromise between the constitutional guarantee of nonarbitrariness, and the countervailing constitutional and practical imperatives that counsel deference to legislative will. In effect, this Article thus far has treated modern rational basis review as an "underenforced" constitutional norm—a downward departure from the underlying constitutional ideal.[259] An alternative explanation, of course, is that rational basis review simply reflects the most plausible understa-

[256] See *State Farm,* 463 U.S. at 43 (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

[257] See *Londoner*, 210 U.S. at 385–86.

[258] See, e.g., Mackey v. Montrym, 443 U.S. 1, 17–19 (1979) (citing traditional deference to states in the realm of public safety as a reason to find that the procedures available under the challenged statute were constitutionally sufficient).

[259] The idea that courts sometimes "underenforce" constitutional rights out of institutional concerns is most frequently associated with Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1212 (1978).

nding of what the Constitution actually does (or does not) require of government actors. In other words, prudential arguments in favor of deference do not explain the rational basis test; rather, the test simply reflects what the Equal Protection or Substantive Due Process Clauses actually mean. If that were true, that would seem to be the end of it: that same understanding would apply with equal force to agencies as well. This argument likewise has problems, which is why it is discussed last, and only briefly.

The strong version of this argument is that the Equal Protection and Due Process Clauses have nothing to do with *rationality* at all.[260] Professor C. Edwin Baker, for example, argues that the Equal Protection Clause does not prohibit irrational classifications—only those that deny individuals or groups "equality of respect."[261] Professor Robert Nagel has characterized "discussion of a statute's rationality" as a "meaningless and confusing exercise."[262]

Others, of course, have argued just as persuasively that rationality is a fundamental requirement of constitutional law. Professor Richard Fallon writes that the Fourteenth Amendment "reflects the simple but far-reaching principle . . . that goverument [sic] cannot be arbitrary" and "that government must pursue its ends by reasonable means."[263] Professor Cass Sunstein argues that the rationality requirement reflects a Madisonian commitment to checking the influence of faction and ensuring "that representatives have acted to promote the public good."[264] And in their classic essay on equal protection, Professors Joseph Tussman and Jacobus tenBroek describe rational basis review as a compromise between the legislative need to classify, and the

[260] C. Edwin Baker, Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection, 131 U. Pa. L. Rev. 933, 992–93 (1983).

[261] Id. at 992.

[262] Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123, 154 (1972); see also Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 576–78 (1982) (arguing that rationality does not follow from equal protection—but suggesting that it may follow from substantive due process).

[263] Richard H. Fallon, Jr., Some Confusions about Due Process, Judicial Review, and Constitutional Remedies, 93 Colum. L. Rev. 309, 310, 315–16 (1993).

[264] Sunstein, Interest Groups, supra note 24, at 85; see also Bennett, supra note 19, at 1099 (arguing that the rationality requirement reflects a fundamental commitment to checking the "dominance of legislatures by 'factions' and by popular prejudices").

constitutional imperative that "those who are similarly situated be similarly treated."[265]

More importantly, the Court itself has consistently described the rationality requirement in precisely these terms. The Court has never disavowed the requirement that a legislative "classification bear a rational relationship to an independent and legitimate legislative end."[266] Rather, it has explained that the deferential rational basis test is an "attempt[] to reconcile" the Fourteenth Amendment's guarantee of equal treatment "with the practical necessity that most legislation classifies for one purpose or another."[267] To hold that the Constitution does *not* prohibit arbitrary and irrational conduct would require a far greater departure from longstanding constitutional principles than the modest changes in judicial review that this Article proposes.

A narrower claim might be that although the Fourteenth Amendment embraces a commitment to nonarbitrariness, the various presumptions that sap the rational basis test of any vitality are themselves based in the constitutional text. Thus, the Court has suggested at times that it has an obligation to consider every *conceivable* basis for legislation because the legislature's actual purpose is "constitutionally irrelevant" on rational basis review.[268]

There are several problems with this narrower argument as well. First, in later cases, the Court has modified this statement somewhat, explaining that "*because we never require a legislature* to articulate its reasons for enacting a statute, it is entirely irrelevant . . . whether the conceived reason for the challenged distinction actually motivated the legislature."[269] This clarification seems to fall back upon reasons for deference to a legislature, rather than a reading of the Constitution itself. A plausible reading of the Court's statement, consistent with the democratic accountability arguments discussed above, is that a *legislature's* purpose is constitutionally irrelevant because of the conceptual difficulty in ascribing a collective intent to a legislative body.

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[265] Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 344 (1949).

[266] Romer v. Evans, 517 U.S. 620, 633 (1996).

[267] Id. at 631.

[268] Flemming v. Nestor, 363 U.S. 603, 612 (1960); see also U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (quoting *Flemming*, 363 U.S., at 612).

[269] FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (emphasis added).

At least in theory, then, an *agency's* actual purpose might in fact be relevant on rational basis review.

The bigger problem with this argument—as a number of scholars have pointed out—is that it is impossible to reconcile with the fact that legislative purpose tests have become the norm across much of constitutional law.[270] This is particularly true when it comes to equal protection, which is one of the two contexts in which the rational basis test is most often used.[271] In deciding the level of scrutiny to apply, courts routinely ask whether the statute in question was intended to discriminate against a protected class.[272]And under both intermediate and strict scrutiny, the Court has refused to permit the government to rely on speculative or hypothetical rationales.[273] To the extent that the Court refuses to consider the legislature's purpose on rational basis review, that decision seems entirely to be animated by the sorts of institutional concerns discussed earlier in this Part—and which apply with much less force in the context of the administrative state.

* * *

In sum, although there may be plenty of reasons for courts to defer to some degree to agency decisions, none of these reasons are sufficient to justify the precise forms that deference takes on rational basis review. At least as applied to agencies, none of the arguments that courts have offered in support of the prevailing rational basis standard can account for the courts' practice of upholding regulations based on conceivable as opposed to actual reasons, or of ignoring actual record evidence of a

[270] Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 414, 483–91 (1996) (highlighting the role of purpose tests in the First Amendment context); Maria Ponomarenko, Note, Changed Circumstances and Judicial Review, 89 N.Y.U. L. Rev. 1419, 1438 (2014) (discussing the prevalence of purpose tests across constitutional law).

[271] See United States v. Virginia, 518 U.S. 515, 532–533 (1996); Washington v. Davis, 426 U.S. 229, 239–46 (1976).

[272] See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (noting that a finding of discriminatory purpose requires that the decision-maker adopted a particular course of action "'because of,' not merely 'in spite of' its adverse effects upon an identifiable group"); *Davis*, 426 U.S. at 239–40 (requiring evidence of discriminatory purpose, not simply disparate impact).

[273] *Virginia*, 518 U.S. at 516.

provision's irrationality in favor of hypothetical facts that the court itself comes up with.

## III. CONSTITUTIONAL RATIONALITY REVIEW FOR THE ADMINISTRATIVE STATE

At the heart of the constitutional requirement of non-arbitrariness is the idea that government must act on the basis of *reasons*. The Supreme Court has said repeatedly that an action is "arbitrary" and thus in violation of the Constitution if it is done "without reason."[274]

As Part II makes clear, courts largely have dispensed with the requirement of "reasoned" decision making when reviewing legislative decisions under the rational basis test—but they have done so for reasons that are inapt to the agency context. They have relied, for example, on the fact that legislatures are multi-member bodies whose members each represent distinct constituencies and may thus have different reasons for supporting a piece of legislation.[275] Or they have pointed to the fact that legislative judgment may simply reflect the people's *will*, as opposed to a reasoned conclusion that a policy is optimal in some abstract sense.[276]

By contrast, agencies are not designed to aggregate preferences or to channel the popular will.[277] The very essence of being an agency means pursuing a pre-ordained objective for a set of often-required reasons.[278] Even if courts do not ask the same of legislatures, courts can and should insist that agencies have *reasons* for the choices they make.

This fundamental difference between legislative and administrative bodies has important implications for constitutional rationality review of agency action. This Part begins by sketching out what an agency-focused standard of rationality review might entail. It then addresses the question of what counts as an "agency" for constitutional purposes, which determines when the heightened standard of review should apply.

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[274] See, e.g., McGowan v. Maryland, 366 U.S. 420, 535 (1961) (Frankfurter, J., concurring); Yick Wo v. Hopkins, 118 U.S. 356, 367 (1886).

[275] See supra Part II.A.1.

[276] Posner, supra note 7, at 27–29.

[277] See supra Part II.A.2.

[278] See, e.g., INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) ("[T]he Executive's administration of the laws . . . cannot reach beyond the limits of the statute that created it.").

### *A. "Administrative" Rationality Review*

As this Article has argued throughout, the key difference between agencies and legislatures is that agencies must act *rationally*. In the agency context, there are two independent—but related—requirements that are necessary to give content to this core principle of rationality. The first is that agency officials must actually have reasons for their actions before proceeding. The second is the somewhat more difficult question of how good those reasons (or the evidence in support of them) would need to be.

#### *1. Having Reasons*

It seems basic to say that minimal rationality requires having reasons. But what does it mean to say that an agency must have reasons for its actions? And perhaps more importantly, what are the implications of a reasons-having requirement for constitutional review of agency rules?

A useful place to start is by distinguishing—as do Gersen and Vermeule—between *having* reasons and *giving* reasons.[279] Rationality requires that agencies have reasons. Federal administrative law, on the other hand, tends to require that agencies give them. For example, when a federal agency promulgates a rule, it must include as part of the rulemaking record a detailed statement that describes the purpose of the rule and responds to any criticisms or comments that the agency received during rulemaking proceedings.[280] Under *SEC v. Chenery Corp.*, the agency may rely only on these stated reasons if the rule is challenged subsequently in court.[281]

As Gersen and Vermeule point out, however, an agency may have reasons—and thus be acting rationally—even if it does not write those reasons down.[282] In other words, a "having reasons" requirement focuses entirely on the substantive rationality of an agency decision. A "giving reasons" requirement also dictates the procedures that the agency must use. Requiring agencies to give reasons can of course help to ensure that they have them, but failure to give reasons is not itself evidence of

[279] Gersen & Vermeule, supra note 240, at 1396.

[280] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41, 43–44, 48–49, 51–52 (1983).

[281] Id. at 43 (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

[282] Gersen & Vermeule, supra note 240, at 1400–01.

irrationality. As a requirement of substantive rationality, reason *giving* would be overbroad.

Perhaps unsurprisingly, scholars and courts have typically justified reason *giving* in federal administrative law as a way of facilitating political accountability over agency decisions, and have grounded the requirement in the Constitution's separation of powers. Professor Kevin Stack, for example, argues that the *Chenery* rule is understood best as an extension of the nondelegation doctrine, which is thought to ensure that important decisions are made by accountable officials within the legislative branch.[283] Professor Sidney Shapiro and Professor Richard Levy likewise argue that "the reasons requirement is best understood as a product of separation of powers" because it ensures "agency fidelity to narrow statutory mandates."[284] To the extent that the argument for reason giving is rooted in separation of powers, it would not apply to review of state administrative agencies, at least not as a matter of federal constitutional law. This explains why the federal *Chenery* rule applies only to federal administrative agencies, and does not extend to the states.[285]

On the other hand, to the extent that reason *having* is an essential component of rationality, it would be equally applicable to federal and state agencies alike. Taken seriously, a reason-having requirement would have significant implications for rational basis review.

First and foremost, if an agency must have had reasons for its decisions, a court should be able to ask what those reasons were. An agency could satisfy the requirement in any number of ways—by pointing to formal findings, if any, or by submitting affidavits explaining the decisions it made.[286] But government attorneys could not

[283] Stack, supra note 24, at 1020.

[284] Shapiro & Levy, supra note 14, at 427–28. The Court itself has on occasion made the connection, noting that "[o]ur recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision." Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 627 (1986).

[285] Shapiro & Levy, supra note 14, at 427–35 (discussing the separation of powers foundation for the *Chenery* rule).

[286] Even as a matter of federal administrative law, courts have sometimes permitted agency officials to submit affidavits or give testimony explaining their decisions in cases where the APA did not require the agency to amass any sort of record or make formal findings prior to issuing a decision. See, e.g., Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 409–20 (1971).

simply come up with plausible reasons after the fact—nor could courts supply agencies' reasons for them. Courts also could not put the burden on *plaintiffs* to negate every conceivable rationale for a challenged order or rule.

To see what a reason-having requirement might mean in practice, consider *Armour v. City of Indianapolis*, a 2012 case that involved an equal protection challenge to a resolution issued by a local board of public works.[287] For decades, Indianapolis had financed certain public works projects—such as new sewer lines—by assessing the costs to the homeowners who directly benefited from the improvements.[288] Homeowners could pay a lump sum, or in installments over a period of years.[289] In 2005, the city council introduced a new financing scheme that relied in part on bond revenue, and thereby reduced substantially the costs to individual parcel owners.[290] In order to speed up the transition, the city's Board of Public Works issued a resolution forgiving the outstanding debts of all homeowners who still owed money under the previous scheme.[291] It did not, however, issue refunds to those who already had paid their share in full.[292] Christine Armour was one of 180 homeowners who benefited from one of the last projects completed under the prior financing regime. She and 37 other homeowners had each paid their $9,278 assessments up front.[293] Their other 142 neighbors paid as little as $309 before the Board forgave their debts (a thirtyfold difference).[294] In issuing the resolution, the Board explained that the previous financing scheme had imposed too great a burden on homeowners, and that according to the Board's "financial model[s]" it made sense simply to forgive outstanding payments.[295] The resolution did not say anything about the homeowners who paid their assessments up front, or explain why they should not receive even a partial refund.[296]

[287] 566 U.S. 673 (2012).
[288] Id. at 675–76.
[289] Id. at 676–77.
[290] Id. at 677–78.
[291] Id. at 678.
[292] *Armour*, 566 U.S. at 679.
[293] Id. at 677–79.
[294] Id. at 679.
[295] City of Indianapolis v. Armour, 918 N.E.2d 401, 406–07 (Ind. Ct. App. 2009).
[296] Id.

After Plaintiffs brought suit challenging the decision on equal protection grounds, the Board chair submitted an affidavit to further explain the Board's reasoning.[297] But much like the resolution, this affidavit *also* did not even try to explain why the Board decided not to issue partial refunds to those who had already paid.[298] Given that this was the whole focus of the litigation, the omission was somewhat baffling—and suggests that the Board had never really considered the question to begin with.[299]

Under the approach advocated here, the Board's action should have been invalidated. The Board had two opportunities to explain why some taxpayers should pay thirty times more for the same municipal service and it failed to do so. This is strong evidence of the underlying arbitrariness of the Board's decision.[300]

Under the prevailing rational basis test, however, the Board's repeated failures of explanation had no influence on the court considering the case. At some point in the course of the litigation, the City's lawyers sprang into action and came up with a set of possible justifications for the Board's decision. The City argued that it would have been too much of an administrative burden to return the funds, but never explained—or was made to explain—precisely what that burden would have entailed.[301] The Court simply accepted the rationale at face value.[302] The City also argued that those who decided to pay upfront could afford to do so, whereas those who opted to pay in installments were in worse financial shape.[303] Whether this would have been a sufficient justification or not is a question for the next Section of this paper.[304] The fact that the City did not even make this argument until the appellate phase of the litigation, however, suggests that it had absolutely

[297] Id. at 406.

[298] Id.

[299] Indeed, the Indiana Court of Appeals noted the "remarkable disconnect" between the reasons given and the decision made. Id. at 415.

[300] It is particularly compelling in this case, given that the underlying state law that authorized the entire assessment regime required that the tax burden be "'apportioned equally among all abutting lands.'" Id. at 406 (quoting Ind. Code § 36–9–39–15(b)(3)).

[301] *Armour*, 566 U.S. at 682–84.

[302] Id.

[303] City of Indianapolis v. Armour, 946 N.E.2d 553, 562 (Ind. 2011).

[304] See infra Part III.A.2.

nothing to do with why the agency made the decision it did.[305] And that fact alone should have invalidated the decision under a requirement of reason-having.

A number of other leading rational basis cases also would look quite different under a "reason-having" standard. Recall for example *Dandridge v. Williams*, discussed earlier in Part II.[306] The agency had originally defended its decision to impose a benefits cap on large families by arguing that the measure was necessary to conserve state funds.[307] After the district court rejected that rationale, agency lawyers came forward with four additional arguments in support of the regulation, none of which had any basis in the record—and at least one of which was inconsistent with the agency's own statistics.[308] Even if these post-hoc rationales had been more persuasive, they would not have changed the fact that the agency itself appeared to have given the regulation little if any thought (or as the district court speculated, acted on the basis of political considerations that it preferred not to disclose to the courts).[309] Similarly, consider *Railway Express v. New York*, in which the Court stated that "local authorities *may well have concluded* that those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use."[310] The operative question, however, is whether local officials *did in fact* conclude this—and if so, on what basis.

In short, if rationality requires anything in the agency context, it is that agency officials justify their decisions based on *actual* as opposed to *conceivable* rationales. Agency officials need not necessarily write their reasons down. But if an agency decision is later challenged in court, they must be able to explain either through affidavits or record evidence why the agency acted the way it did.

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[305] *Armour*, 918 N.E.2d at 413 (noting that the City had raised two new arguments on appeal).

[306] 397 U.S. 471 (1970); see supra Part II.B.

[307] Williams v. Dandridge, 297 F. Supp. 450, 454 (D. Md. 1968), rev'd, 397 U.S. 471 (1970).

[308] See *Dandridge*, 397 U.S. at 525–26 (Marshall, J., dissenting) (pointing out that although the state had argued that the cap would encourage employment, less than .4% of AFDC recipients could be considered employable).

[309] *Williams*, 297 F. Supp. at 454, 467 n.12.

[310] 336 U.S. 106, 110 (1949) (emphasis added).

### *2. Degree of "Fit" Required*

The next question is whether the content of the reasons is of any importance—that is, do those reasons actually have to advance the substantive goal? In the legislative context, courts similarly relax this other core requirement of rationality: that there be some relationship between government's means and ends.[311] The Court has said that the link between means and ends cannot be "so attenuated as to render the distinction arbitrary or irrational."[312] But the Court *also* has said that a distinction is rational if it advances the legislature's purpose "to the slightest degree."[313] In rational basis cases, it is the latter statement that prevails. Courts routinely uphold statutes and regulations that bear virtually no relation to the state's proffered rationales.

If agencies, unlike legislatures, must have reasons for their actions, then one must tackle the question of how persuasive those reasons need to be. The question, in short, is whether any tenuous reason will do, or whether there must be some fit between the agency's chosen means and its asserted goals.

#### *i. The Prevailing Standard*

The school board case with which this Article began is a particularly glaring example of the prevailing standard.[314] In *Cook v. Bennett*, the state legislature adopted a new statute requiring that at least fifty percent of a teacher evaluation score be tied to student performance.[315] For teachers whose students took standardized tests in the subject taught, that fifty percent was to reflect students' improvement on scores over prior years.[316] For teachers who taught grades or subjects that were not included on standardized tests, school boards were instructed to develop alternative metrics.[317] Some school boards made the perfectly sensible decision to evaluate these teachers based on how well their students

[311] See Neily, supra note 19, at 543–47 (criticizing this aspect of rational basis review).
[312] Nordlinger v. Hahn, 505 U.S. 1, 11 (1992).
[313] Bennett, supra note 19, at 1056 & n.37.
[314] See generally Neily, supra note 20, at 539 (listing other cases where courts similarly upheld statutes or agency decisions on dubious facts); Clark Neily, No Such Thing: Litigating Under the Rational Basis Test, 1 N.Y.U. J.L. & Liberty 898 (2005) (same).
[315] Cook v. Bennett, 792 F.3d 1294, 1296–97 (11th Cir. 2015).
[316] Id. at 1297; Fla. Stat. § 1012.34(3)(a)(1) (2011).
[317] *Bennett*, 792 F.3d at 1297; Fla. Stat. § 1012.34(3)(a)(1) (2011).

performed on subject-specific final exams.[318] The Alachua County School Board decided instead to assess teachers based on school-wide standardized test scores.[319] At the time, the only standardized test scores available at the high school level were for ninth and tenth grade reading, which is what the school board decided to use to assess all *eleventh* and *twelfth* grade teachers at the school (that is, teachers who had yet to teach the students being evaluated).[320] This meant that an eleventh grade math teacher who received a perfect score on the other components of her evaluation could nevertheless receive an "unsatisfactory" rating if *ninth* and *tenth* grade students had performed poorly on *reading* tests that year.[321] Ratings were used to determine eligibility for pay raises and promotions, and thus had tangible consequences for teachers' livelihoods.[322]

Lawyers for the school board, and for the state Department of Education that had approved this scheme, argued that it was "rational" for school board officials to evaluate eleventh and twelfth grade teachers in this manner because it would encourage the teachers to mentor their colleagues who taught lower grades, thereby promoting overall improvements in student achievement.[323] To put that in rational basis terms, officials conceivably could conclude that the scheme furthered the stated purpose "to the slightest" degree because it could at least in theory lead to some small incremental improvements in student performance.[324] Both the district court and the Eleventh Circuit upheld the policy on these grounds.[325]

In the legislative context, courts accept these sorts of tenuous justifications for many of the same reasons that they uphold classifications based on conceivable as opposed to actual rationales. Legislatures are designed to balance competing interests and respond to constituent pressure—which means that legislatures often end up adopting policies that are not optimal in an abstract sense, and may

[318] State Defendants' Motion for Summary Judgment at 4–5, Cook v. Stewart, 28 F. Supp. 3d 1207 (N.D. Fla. 2014) (No. 1:13-cv-00072-MW-GRJ).
[319] *Stewart*, 28 F. Supp. 3d at 1211.
[320] Id. at 1210–11, 1215–16.
[321] Id. at 1213 & n.7.
[322] Id. at 1215–16.
[323] Id. at 1212–13.
[324] Id.; *Bennett*, 792 F.3d. at 1301.
[325] *Stewart*, 28 F. Supp. 3d at 1216; *Bennett*, 792 F.3d at 1302.

include provisions that are hard to justify in instrumental terms.[326] Subjecting every single provision and exemption to rigorous rationality review would make it more difficult for legislators to strike political bargains and make at least some progress toward societal goals.[327] The prevailing standard also accommodates the fact that legislators gather information in various ways, many of which do not make their way into a formal legislative record.[328] Without record evidence, government attorneys often can do little more than speculate about the plausible factual basis for the statute in question.

As the previous Part made clear, however, agencies differ from legislatures in each of these respects. Agencies are not designed to strike bargains across a broad range of policy domains. They are designed to apply their expertise to optimize policy within a limited sphere, and it is that expertise that legitimates the choices they make. At a minimum, this requires that expertise *in fact be exercised*. In the agency context, it also is typically much easier to recover the factual basis upon which an agency had decided to act (assuming it had one). State and local agencies often are required to maintain at least minimal records to support their decisions, and even when they are not, it may be possible to ask officials simply to explain what evidence they considered and why.[329] In *Armour*, for example, defendants produced affidavits from key officials explaining the process and reasoning behind their decisions.[330] All of this makes it much more feasible for courts to assess the substantive rationality of the decisions that agencies make.

[326] See supra Part II.A.1.

[327] Linde provides a classic example of a seemingly arbitrary exemption that nevertheless should be permissible on rational basis review. He asks readers to imagine a hypothetical Oregon statute that imposes a weight limit on all trucks "in the interest of highway maintenance and safety," but exempts logging trucks from the requirement. Because logging trucks are just as dangerous as other trucks, such an exemption appears to be irrational when measured against the statute's asserted purposes. But it would make perfect sense as an effort to promote some improvement in highway safety without running afoul of an important local industry. Linde, supra note 7, at 208.

[328] See, e.g., Linde, supra note 7, at 224.

[329] See Funk, supra note 91, at 163.

[330] See *Armour*, 566 U.S. at 682–83.

In reviewing agency action, courts should—at the least—"put[] rationality back into the rational basis test."[331] In *Bennett,* for example, the court might have asked whether school district officials actually had any basis for thinking that eleventh grade math teachers could influence ninth and tenth grade reading scores to a degree that would justify using the scores as a measure of teacher effectiveness. One could perhaps *imagine* a state of facts to support that decision—but in *Bennett* it would have been easy enough for the court to ask whether any of these hypothetical facts had actually been before the Board. Were teachers in Alachua County expected to collaborate on curricular development with colleagues in other departments and grades? Did teachers have an opportunity to observe their colleagues' classes and provide feedback? Had officials rationally decided to adopt the assessment scheme at issue, these are the sorts of facts one would expect to find.

In reality, the record shows just the opposite. In district court filings, the Alachua School Board admitted that eleventh and twelfth grade teachers were not expected to play any role in improving the scores of ninth and tenth grade students.[332] Two other defendant school boards (who used a similar assessment scheme and were joined in the suit), stipulated that the challenged scheme "conditions those teachers' employment prospects on factors that those teachers neither impact, nor control."[333]

*Bennett*, in short, would have come out differently had the court simply applied the reason-having standard discussed above, because officials disclaimed the very reasons upon which courts ultimately upheld the challenged policy. But the stipulations also make clear that

[331] Jeffrey D. Jackson, Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment, 45 U. of Rich. L. Rev. 491, 491–93 (2011).

[332] Plaintiffs First Set of Requests for Admission to Defendant School Board of Alachua County at 7–8, Cook v. Stewart, 28 F. Supp. 3d 1207, (N.D. Fla. 2014) (No. 1:13-cv-0072-MW-GRJ); Defendant School Board of Alachua County's Response to Plaintiffs' Request for Admissions at ¶¶ 15, 17, 22, Cook v. Stewart, 28 F. Supp. 3d 1207 (N.D. Fla. 2014) (No. 1:13-cv-0072-MW-GRJ).

[333] Joint Stipulation of Plaintiffs, Bethann Brooks and Hernando Classroom Teachers Association, and Defendant, School Board of Hernando County at 7–9, Cook v. Stewart, 28 F. Supp. 3d 1207 (N.D. Fla. 2014) (No. 1:13-cv-0072-MW-GRJ); Order Granting in Part and Denying in Part State Defendants' Motion to Dismiss at 5, Cook v. Stewart, 28 F. Supp. 3d 1207 (N.D. Fla. 2014).

the state of facts that could plausibly have supported the Board's decision simply did not exist.

*ii. Possible Alternatives*

The challenge, of course, is in moving from specific examples of arbitrary provisions to a more general statement of what courts might require of agencies on rational basis review. If an agency cannot rely on the sorts of attenuated justifications that typically pass muster on mere rationality review, what must it be able to show to defend its decisions in court?

One possible answer is that courts should apply what scholars sometimes call "rational basis with bite."[334] (Bite, after all, would seem to be precisely what is needed.) As scholars point out, in the rare cases in which the Court has struck down a statute on rational basis review, it seemingly has applied a more rigorous version of the test.[335] In *City of Cleburne v. Cleburne Living Center*, for example, the Court overturned a city council order denying a special use permit for a group home for the intellectually disabled after considering and rejecting several of the city's proffered rationales.[336] The Court rejected the city's argument that the home might pose a fire hazard due to over-crowding on the ground that other expressly permitted uses posed exactly the same set of concerns.[337] On traditional rational basis review, the court simply would have said that it was *possible* that the group home at issue posed unique concerns of which the courts simply were not aware (or that legislatures should be permitted to deal with problems "one step at a time").[338] Instead, the Court said that there was no basis in the record for treating

[334] See Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 809 (2006) (discussing "rational basis with bite"); see also Gerald Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 22 (1972) (first using the term "bite" to describe heightened rationality review); Robert C. Farrell, Equal Protection Cases in the Supreme Court Since *Romer v. Evans*, 14 Geo. J. L. & Pub. Pol'y 441, 442 (2016) (describing rational basis "with bite"); Scott A. Keller, Depoliticizing Judicial Review of Agency Rulemaking, 84 Wash. L. Rev. 419, 426 (2009) (same).

[335] See, e.g., Winkler, supra note 334, at 808–09.

[336] 473 U.S. 432 at 447–50 (1985).

[337] Id. at 450.

[338] See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (citing Katzenbach v. Morgan, 384 U.S. 641, 657 (1966)) (upholding a challenged scheme in part on the ground that legislatures may address problems one at a time).

the plaintiff's home differently.[339] In short, the Court actually insisted that the state articulate some logical connection between its chosen means and ends.

The problem with saying that courts should simply apply "rational basis with bite" to agency decisions, however, is that the standard does not really exist. Courts never actually say they are applying "rational basis with bite."[340] Rather, scholars use the term only after the fact to describe cases in which the Court decides for one reason or another to strike down a challenged statute, *without* formally applying a heightened standard of review.[341] Indeed, the Court never has applied "rational basis with bite" to *uphold* a challenged law.[342] Professor Robert Farrell, who painstakingly analyzed each of these "heightened rationality" cases (as well as other Supreme Court cases that appeared to present comparable facts), could find no discernible pattern in the Court's decisions.[343] In short, it is hard to know what "bite" would require.

Federal administrative law may offer some assistance in defining the degree of fit required between means and ends, but it is at best a partial guide. Although federal courts do indeed apply a "heightened" form of rationality review to federal agency decisions, they ask far more of these agencies than courts plausibly could require of state and local agencies as a matter of constitutional law. Under the APA, courts are instructed to take a "'hard look' at the rationality of agency decisionmaking,"[344] and in doing so, to ask whether the agency has "examine[d] the relevant data" and articulated a "rational connection between the facts found and the choice made."[345]

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339 *Cleburne*, 473 U.S. at 450.

340 Farrell, supra note 334, at 441–43; Robert C. Farrell, Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through *Romer v. Evans*, 32 Ind. L. Rev. 357 (1999) [hereinafter Farrell, Successful Rational Basis Claims].

341 See, e.g., *Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in the judgment in part and dissenting in part) (pointing out that "Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation").

342 Farrell, supra note 334, at 441–43; Farrell, Successful Rational Basis Claims, at 357–58.

343 Farrell, supra note 340.

344 Gersen & Vermeule, supra note 240, at 1355.

345 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

The problem with relying on "hard look review" as a model for constitutional review of state and local decisions is that its fairly basic requirements operate against a backdrop of additional procedural and substantive constraints that, taken together, substantially ratchet up the standard of review. Consider, for example, judicial review of agency rules. The APA requires that an agency issue a "concise general statement" explaining the "basis and purpose" for a final rule, which courts over time have interpreted to require agencies to respond on the record to the comments they receive during rulemaking proceedings.[346] Because of the *Chenery* rule against post-hoc justification by courts, the agency gets only one shot to get it right.[347] Often when an agency decision gets overturned on hard look review, it is because the agency failed to address a particular counterargument to the satisfaction of the reviewing court. (This, incidentally, is what partly accounts for the voluminous rulemaking records that agencies routinely produce.)[348] Similarly, a number of federal statutes require agencies to perform various assessments—such as cost-benefit analysis or environmental impact assessment—which then become a basis for hard look review.[349] In *Chamber of Commerce v. SEC*, for example, the D.C. Circuit set aside an agency rule because the agency had not tried to quantify one of the potential costs that its regulation would impose.[350]

As the previous section made clear, an agency-focused rational basis standard would not require agencies to give reasons on the record. Nor can it plausibly be thought to require the sort of rigorous cost-benefit analysis that federal agencies at times are expected to perform. These are statutory requirements that further a variety of goals beyond simply ensuring that agencies act rationally in a constitutional sense. In short, federal administrative law cases are not particularly useful as a model for what heightened rationality review might entail.

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[346] 5 U.S.C. § 553(c) (2012); Action on Smoking & Health v. C.A.B., 699 F.2d 1209, 1215–16 (D.C. Cir. 1983), supplemented by 713 F.2d 795 (D.C. Cir. 1983).

[347] *State Farm*, 463 U.S. at 43 (citing *Chenery Corp.*, 332 U.S. at 196).

[348] See Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385, 1385–87 (1992).

[349] See, e.g., 15 U.S.C. § 80a–2(c) (2012) (requiring the Securities and Exchange Commission to consider whether the rule "will promote efficiency, competition, and capital formation").

[350] 412 F.3d 133, 143–44 (D.C. Cir. 2005).

*iii. A Return to Rational Basis First Principles*

Ironically, the best place to look for guidance on what rational basis review might require of state and local agency decisions may be the rational basis test itself. In *Nordlinger v. Hahn*, the Court explained that the rational basis test requires three things: (1) that there be a "plausible policy reason for the classification"; (2) that "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker"; and (3) that "the relationship of the classification to its goal" not be "so attenuated as to render the distinction arbitrary or irrational."[351] As the previous section made clear, when agencies are involved, the first part of the test ought to focus on *actual* as opposed to *plausible* reasons.[352] As for the other two components, all that "heightened" rationality review ought to require is that these conditions actually are met.

The statement that "the legislative facts" supporting the classification "may have been considered . . . true by the governmental decision-maker" incorporates two important insights.[353] First, it implies that officials must indeed be able to point to legislative facts to support their decisions. "Legislative facts" in this context are not the same as "evidence." Particularly in areas of uncertainty, it may be too costly, if not impossible, to gather definitive data on the probable effects of a statute or rule.[354] Sometimes the best officials can do is make an educated guess. But in doing so, agencies should *at the very least* be able to articulate the assumptions about the state of the world on which that guess is made. An agency could not, as did the Board of Public Works in *Armour*, simply claim that it would have been too much of an administrative burden to refund a portion of the assessment to those property owners who had paid in full.[355] As Chief Justice Roberts pointed out in dissent, for all the Court knew the "burden[]" amounted to

[351] 505 U.S. 1, 11 (1992).

[352] See supra Part III.A.2.ii.

[353] *Nordlinger*, 505 U.S. at 11.

[354] In these circumstances it is perfectly rational for agency officials to make an educated guess as to what policy is best. As Gersen and Vermeule note, agencies "will frequently have excellent reasons to depart from idealized first-order conceptions of administrative rationality." Gersen & Vermeule, supra note 240, at 1357.

[355] See *Armour*, 566 U.S. at 689–90 (Roberts, C.J., dissenting.)

little more than printing and mailing a check.[356] Had the agency actually decided to withhold refunds based on its assessment of administrative burdens, it almost certainly would have had a better sense of what the burden might have entailed.[357]

At the same time, the Court's statement that legislative facts need only to have been "*considered* to be true by the governmental decisionmaker" suggests an important caveat that appropriately limits the "bite" of rationality review.[358] So long as agency officials may reasonably have considered the relevant facts to be true, an agency decision should be deemed rational—even if a more probing investigation would have revealed otherwise. Government officials must be able to rely on the reasonably plausible facts that come before them, at least when they regulate matters that do not implicate fundamental rights. To hold otherwise would put an undue burden on officials to verify all of the information they receive, and it would potentially saddle courts with resolving evidentiary disputes on matters about which they have little expertise.

Turning to the other requirement—that the relationship between the classification and its goal cannot be "so attenuated as to render the distinction arbitrary or irrational"—the concern is the degree to which the statute or regulation actually furthers the state's asserted ends.[359] As often is true in law, it is not possible to articulate the contours of this requirement with much precision. (There is no precise formula for what intermediate or strict scrutiny require, either.) Still, a few points here are worth mentioning. First, agencies, like legislatures, must have some leeway to draw rough, at times even arbitrary, lines. All that the Court's

356 Id. at 691.

357 Id. at 689–93. There may of course be instances in which agencies are unable to articulate even the assumptions underlying their decisions, or at least to do so at a cost that would justify the exercise. A number of scholars have argued that agency decisions often are based in part on tacit expertise—knowledge and intuition built up over years of experience—which may be difficult to convey to generalist courts. Gersen & Vermeule, supra note 240, at 1357; Shapiro, supra note 214. It is hard to know how frequent these cases are, or the extent to which this would be an obstacle to more thorough rationality review. Often when authors make these arguments it is in the context of federal administrative law, which imposes a far greater burden of justification on agencies than what is contemplated here. See, e.g., Gersen & Vermeule, supra note 240 at 1397–98 (discussing tacit expertise in the context of judicial review under the APA).

358 *Nordlinger*, 505 U.S. at 11 (emphasis added).

359 Id. at 11, 13–15.

language suggests is that there must be some outer bound, which does not appear to exist under the prevailing test. The concern is not with everyday accommodations to the realities of governance, but with the sorts of gross disproportionalities that typically are cited by critics of modern rational basis review.[360]

Second, it is likely that an agency that satisfies each of the prior requirements would pass muster on this last point as well. Typically when a court upholds a statute or rule based on rationales that seem to bear no relationship to the state's chosen means, it is because government attorneys had come up with the rationale after the fact to explain a decision that either was entirely unreasoned or was based on considerations that the attorneys preferred not to admit. This is true of cases like *Bennett* and *Armour* and *Dandridge* discussed throughout this Article, as well as oft-criticized rational basis cases like *Railway Express* and *Williamson v. Lee Optical*. It is hardly surprising that *post hoc* rationales explain poorly the choices made.

There undoubtedly would be hard cases on which reasonable minds can disagree. *Sensational Smiles v. Mullen*—the Second Circuit case in which Judge Guido Calabresi argued that an agency's "simple preference" for one group over another sufficed on rational basis review—is one such example.[361] Judge Calabresi's arguments notwithstanding, the agency in question actually had conducted hearings prior to adopting its teeth whitening regulations, and had heard evidence from a medical expert who testified that teeth whitening potentially could result in burns and injuries if used improperly.[362] The expert cited two studies in support.[363] In court, Plaintiffs made a compelling case that the asserted risks were overblown, and that in any event the regulation would not advance the state's goals because customers could still apply teeth whitening gels and lights to their *own* teeth—they just could not get someone without a dental license to help.[364] But Plaintiffs had not

[360] See, e.g. Patel v. Texas Dep't of Licensing & Regulation, 469 S.W.3d 69, 92–123 (Tex. 2015) (Willett, J., concurring); Neily, supra note 19, at 544–45 (criticizing Meadows v. Odom, 360 F. Supp. 2d 811 (M.D. La. 2005)).

[361] Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 287 (2d Cir. 2015), cert. denied, 136 S. Ct. 1160 (2016).

[362] Martinez v. Mullen, 11 F. Supp. 3d 149, 152–53 (D. Conn. 2014), aff'd sub nom. Sensational Smiles, LLC v. Mullen, 793 F.3d 281 (2d Cir. 2015).

[363] Id. at 162–64.

[364] Id. at 155–56, 160–61.

appeared at hearings, and none of the evidence they amassed had been before the Board.[365] And the exception for self-applied teeth whitening reflected the simple fact that the Board only had jurisdiction over the practice of dentistry on *others*.[366] Non-dentists also are permitted to pull out their own teeth; they just cannot do so to others. In short, it is difficult to argue that the regulation was so unrelated to the state's asserted consumer safety goals that it necessarily should fall. (That said, given the strong likelihood that the regulation had in fact been motivated primarily by the desire to shield dentists from competition, it also would not have been the end of the world had the court taken a closer look at the agency's reasoning and concluded that something fishy was afoot.)

To summarize, when courts review agency decisions on rational basis review, they should only consider the arguments that the agency itself relied upon when adopting the provision in question. An agency also should be able to explain what evidence it considered—or in the absence of evidence, why it decided to proceed on the basis of more limited information. An agency must, in short, be able to explain to a court the nature of the problem that it encountered, and why it chose the course it did. The standard proposed here would not amount to constitutional "hard look review," but it would help to ensure the minimal rationality of the decisions that agencies make.

### *B. What Is an Agency?*

So far we have seen that the constitutional rationality requirement demands more of administrative agencies than it does of legislatures. To the extent that this imposes greater obligations on agency action, it raises a final question: What counts as an agency for the purposes of rational basis review?

Up to this point, this Article has made certain assumptions about the structure and function of agencies that in reality are true only of a subset of government entities that perform administrative functions. It has assumed, for example, that agency officials are appointed—which is universally true at the federal level, but not at the state and local level,

[365] See [Defendant's] Memorandum of Law in Support of Motion for Summary Judgment at 4, Martinez v. Mullen, 11 F. Supp. 3d 149 (D. Conn. 2014) (No. 3:11-CV-01787-MPS).

[366] *Martinez*, 11 F. Supp. 3d at 166; Conn. Gen. Stat. § 20–103a (2017).

where a subset of agency heads are elected.[367] It has pointed out that agencies often are required to comply with certain procedural requirements in making their decisions, but that too varies by jurisdiction.[368]

If courts are to apply a heightened rational basis standard to some government entities but not to others, they need some way of determining when the more rigorous standard applies.

In deciding what counts as an agency for the purposes of rational basis review, the place to start is by returning once more to the reasons for greater deference discussed in Part II. As that Part makes clear, the most plausible explanation for deferential rational basis review is that it accommodates the majoritarian (or pluralist) character of legislative decision making.[369] The problem is that there is little consensus on precisely what it is about the legislative process that warrants such a deferential standard of review. Some emphasize the majoritarian basis for legislative decisions, which is assured at least in theory through periodic elections.[370] Others focus on the legislative process itself: the role of political pressure and compromise, the inchoate nature of legislative fact-finding, and as a result, the absence of anything approximating a complete legislative "record" against which to judge the rationality of a challenged statute.[371] Still others point to the fact that legislators are given free rein to pursue whatever goals they wish, which leaves courts without a meaningful way to distinguish between legitimate and illegitimate ends, and thus to evaluate the rationality of legislation.[372]

Each of these arguments suggests a different set of criteria that one might look to in deciding whether a government entity counts as an "agency" for the purposes of rational basis review.

One possible consideration is whether officials are elected directly by the people, or are appointed by others within the executive or legislative branch. Elections matter because they are the only direct link between government officials and popular majorities. As Adler and others have

[367] Funk, supra note 91, at 178.
[368] Id. at 163, 165 & n.115.
[369] See supra Part II.
[370] See supra Part II.A.
[371] Id.
[372] Linde, supra note 7, at 208–09; see generally supra Part II.A.

argued, elections are what make it possible for officials to justify their decisions purely in majoritarian terms, thereby escaping meaningful judicial review.[373] Appointed officials may be *accountable* to the public in various ways, but they must nevertheless justify their decisions by pointing to something other than the popular will. They must, in short, have reasons, which courts can scrutinize after the fact.

Another factor may be the degree to which the decision maker must follow a certain course of procedure in making its decisions. Legislative bodies typically have wide discretion in deciding whether and how to gather evidence.[374] Agencies, on the other hand, typically must follow specific procedures in issuing orders or rules. An agency may be required to hold hearings, provide an opportunity for public comment, or give reasons on the record explaining its decisions.[375] These sorts of constraints all likewise suggest that the entity is expected to act on the basis of reasons.

Finally, another possible distinction between legislatures and agencies is that legislatures have broad leeway to decide what goals to pursue—whereas agencies are authorized only to pursue specific ends. This matters for two reasons. First, these limitations on the agency's authority suggest that the legislature did not create the body simply to facilitate free-wheeling political combat and to reweigh, based on whatever considerations it deems important, the legislative balance that already was struck. Second, these constraints facilitate judicial review by giving courts a baseline against which to judge the rationality of the agency decision.[376] In short, they make it possible to engage in real "rationality" review.

At the federal level, all government entities (other than Congress, the courts, and the President personally) satisfy all three criteria. Which is to say, all agency heads are appointed not elected, all are bound to follow the procedures outlined in the Administrative Procedure Act, and all are required to pursue whatever objectives Congress itself set out.[377] In

[373] Adler, supra note 18, at 788–92 & n.94; Bickel, supra note 5, at 16–17.

[374] See, e.g., City of Boerne v. Flores, 521 U.S. 507, 531–32 (1997) ("As a general matter, it is for Congress to determine the method by which it will reach a decision.").

[375] Funk, supra note 91, at 157.

[376] Hans Linde makes this point. See Linde, supra note 7, at 225.

[377] The Administrative Procedure Act applies to all executive officials, with only a small number of exceptions, which are not germane here, such as military commissions and executive orders. 5 U.S.C. § 701(b)(1)(f) & (g) (2012); Franklin v. Massachusetts, 505 U.S.

short, all federal agencies, boards, and commissions are "agencies" for the purposes of constitutional rational basis review.[378]

But at the state and local level, things get quite a bit murkier. A number of states have a plural executive system of government, which means that voters select not only the governor, but also a subset of cabinet officials and agency heads.[379] At the local level, commissions and boards often are elected, as are officials who oversee many of the nearly 40,000 "special" or "single-purpose" districts.[380] Procedural requirements also vary widely. Many state and local agencies are bound by various fact-finding and reason-giving requirements.[381] Others are permitted to structure their decision-making processes however they wish.[382]

On the other hand, the one thing that all of these various bodies share in common is that they exercise *delegated* power which, under delegation doctrines in all fifty states, must be accompanied by legislative guidance on how this power may be used.[383] This fact begs the obvious question: When a government entity shares some of the features of a traditional administrative agency but not others, which of the proposed criteria are necessary or sufficient to justify heightened scrutiny?

As a starting point, any entity whose officials are *appointed* as opposed to elected should probably count as an "agency" and thus be subject to heightened review. As this paper has argued throughout, elections are the only available mechanism for predictably linking government decisions (even in theory) to majoritarian preferences. Without this link, officials must have some basis for action other than pure political whim. In short, they must have reasons, which courts can scrutinize on heightened rational basis review.

788, 800–01 (1992). And as a matter of federal non-delegation law, Congress must describe at least in broad strokes the objectives that agencies are required to pursue. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–40 (1935).

[378] Though as discussed throughout, review of federal agency decisions would largely be unaffected by this Article's proposal because federal agencies are subject to the much more robust requirements of the APA.

[379] Miriam Seifter, Gubernatorial Administration, 131 Harv. L. Rev. 483, 493–94 (2017).

[380] Nadav Shoked, Quasi-Cities, 93 B.U. L. Rev. 1971, 1988, 2032, 1977 n.18 (2013).

[381] Funk, supra note 91, at 154–55, 163.

[382] Id. at 154–55.

[383] Id. at 162.

At the same time, the mere fact that agency heads are elected should not be enough to shield agency decisions from meaningful scrutiny. Consider for example locally elected commissions and boards. Unlike city council members or state legislatures, members of a water board or zoning commission are not elected to broadly represent the interests of their constituents across a variety of issues. They are elected to implement existing statutory mandates within a relatively narrow sphere. The decisions that boards and commissions make are not divorced from politics or ideology—a pro development zoning commissioner, for example, may take a different position on a proposed variance than would a commissioner who is concerned primarily with overcrowding. But neither commissioner could rely on these factors at the *expense* of whatever factors the legislature itself set out. Although board members and commissioners may be elected to represent specific constituent interests, they *also* are obligated to justify their decisions in light of statutory commands. This burden of justification—whether formalized as a reason-giving requirement or simply implicit in the statutory authorization—ought to take commissioner decisions outside of the realm of pure politics and into the realm of rationality.

In sum, for elected boards and commissions, procedure and delegation matter. When there is some indication that the entity is expected to consider certain factors or follow a course of procedure designed to ensure the rationality of its decisions, the heightened rational basis standard ought to apply.[384]

A final question is whether city council decisions should ever be subject to heightened rationality review. Although city councils typically are vested with broad police powers, they also exercise certain powers subject to much more specific delegations of legislative authority.[385] In

[384] There may be a hard set of cases when decisions appear to be left entirely to the discretion of these bodies, without meaningful substantive or procedural constraints. The analogue in federal administrative law is the exemption from judicial review for decisions that are "committed to agency discretion by law"—which the Court has described as instances when there is "no law" for courts to apply. See Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). Federal courts have interpreted the exemption narrowly, limited primarily to cases involving enforcement discretion and internal agency matters. Webster v. Doe, 486 U.S. 592 (1988); Heckler v. Chaney, 470 U.S. 821 (1985). One can envision similarly broad state or local delegation that arguably could preclude more probing review.

[385] Linde, supra note 7, at 229.

Texas, for example, power over zoning and land use regulations is specifically delegated to municipalities as part of a comprehensive code that describes the permissible purposes and goals of zoning regulations, and describes the processes that government entities—including city councils—must follow in adopting regulations.[386] The code requires each municipality to set up an appointed zoning commission to recommend regulations.[387] A city council is not permitted to adopt a zoning ordinance until the commission has issued a preliminary report, held public hearings, and submitted a final report to the council.[388]

These were the procedures that the Cleburne city council was required to follow in adopting the ordinance at issue in *City of Cleburne,* which excluded group homes for the intellectually disabled from residential areas.[389] The Court struck down the ordinance after applying what many have described as "rational basis with bite"—which is to say that the Court actually scrutinized the city's arguments and asked whether there was in fact a rational relationship between legislative means and ends.[390] Although scholars speculate that the Court applied this heightened standard out of concern that the ordinance was motivated by animus against the intellectually disabled,[391] the standard also may have been appropriate given the nature of the decision that the Cleburne City Council was authorized to make. By requiring study, hearings, and a recommendation from an appointed administrative body before an elected body could act, the Texas state legislature made clear that zoning decisions ought not to be left entirely to the municipal councils' discretion, and should in fact be based on *reasons* consistent with the objectives that the statute set out. As the Court rightly found, these reasons were decidedly absent in that case.

One could argue—as Linde does—that when a municipality exercises specific powers subject to these sorts of constraints, it acts more like an "agency" for constitutional purposes than as a purely "legislative" body whose decisions should to be subject to the most deferential standard of

386 See Tex. Loc. Gov't. Code Ann. § 211.003 (West 2016); see generally Id.. § 211.
387 Id. § 211.007(a).
388 Id. § 211.007(b).
389 City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).
390 *City of Cleburne*, 473 U.S. at 447–50.
391 See, e.g., Chemerinsky, supra note 6, at 411–12; Farrell, supra note 334, at 461.

review.[392] But one need not go that far. Even under the narrowest possible definition of an agency, constitutional law would look quite different if courts took seriously the differences between legislative and administrative bodies, and insisted that agencies comply with at least the very minimal requirement of non-arbitrariness: that they have reasons for the decisions they make.

## CONCLUSION

Debates over the modern rational basis test have taken place almost exclusively in the context of legislative decisions. Proponents of the prevailing standard have focused primarily on the democratic or pluralist basis for legislation, as well as the character of the legislative process, which would be fundamentally altered were courts to engage in more exacting review. Whatever the merits of these arguments—and they certainly have their fair share of critics on both the left and right—they are largely inapplicable when the decision in question is made not by a legislature, but by an administrative agency. Unlike legislatures, agencies cannot justify their decisions in purely political terms. Agencies are expected to act on the basis of *reasons* that bear some relationship to their statutory authority. Agency decisions must, in short, be rational in ways that legislative decisions perhaps need not.

All of this suggests that rationality review should require something more of agencies than it does of legislative bodies. Part III set out the contours of such a standard: that agency decisions be upheld based only on *actual* as opposed to hypothetical reasons, and that courts insist on at least some minimal degree of fit between means and ends. Although courts eventually may refine and build on these initial ideas, the overarching point is that there simply is no constitutional basis for absolving agencies of *any* burden of justification for the decisions they make.

[392] Linde, supra note 7, at 229.