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# NEOCLASSICAL ADMINISTRATIVE LAW

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This article introduces an approach to administrative law that reconciles a more formalist, classical understanding of law and its supremacy with the contemporary administrative state. Courts adopting this approach, which I call "neoclassical administrative law," are skeptical of judicial deference on questions of law, inclined to give more leeway to agencies on questions of policy, and attend more closely to statutes governing administrative procedure than contemporary doctrine. This theory is "classical" in its defense of the autonomy of law and legal reasoning, separation of powers, and the supremacy of law. These commitments distinguish it from theorists who would have courts make a substantial retreat in administrative law. It is "new" in that, unlike other more classical critics of contemporary administrative law, it seeks to integrate those more formal commitments with the administrative state we have today—and will have for the foreseeable future.

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## INTRODUCTION

It is hard to sketch a river while sailing midstream, and the current state of administrative legal theory seems particularly resistant to neat mapping. Earlier eras strike us, in retrospect, as susceptible to easy periodization. We can speak of the time from the nation's founding to the dramatic growth of the administrative state, a period characterized by separation-of-powers formalism supervised by courts, as well as a limited role for federal agencies. This was followed by the Progressive and New Deal eras, which rejected both of those features in favor of expert agencies applying—and, later, having the primary task of formulating—wide-ranging federal policy while courts got out of the way. Then we can speak of the capture era, in which courts reengaged to ensure agencies pursued the interest of the public, not regulated industries. Each characterization is of course subject to qualification, but even such rough cuts suggest a distinctive cast of mind for each era in administrative thought.

Things have not been so clear ever since. Perhaps starting with the Supreme Court's decision in *Vermont Yankee*,[1] administrative legal thought is marked by an absence of any dominant tendency. If there is a signal feature, it is pragmatic compromise: judicial deference on questions of law (but not too much and not all the time) and freedom for agencies on questions of politics and policy (but not to an unseemly degree). Respect for the limits of judicial capacity interweave with concerns about agency slack or fecklessness, leading to a doctrinal fabric that is nuanced or incoherent, depending on one's priors. Yet, for much of this time, it would have been wrong to say that administrative law was in a state of theoretical crisis. There was disagreement around the edges—and some voices in the wilderness calling for radical change—but for the most part administrative law and scholarship trundled along, disagreeing, for example, about when *Chevron* deference[2] should apply or precisely how much a reviewing court should demand from agencies in policymaking decisions.[3] These were important disagreements, to be sure, but they operated within a shared framework of admittedly unstated, and perhaps conflicting, assumptions about the administrative state and the rule of law.

As with contemporary politics, however, that comfortable, overlapping consensus is showing cracks. Whatever one thinks about the nature and causes of our fractured politics today, the arising dissent from the administrative law mainstream is principled and intellectually rigorous—and does not always have a neat partisan valence. Although they share little else in common, Professors Adrian Vermeule and Philip Hamburger both offer important challenges to the

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[1] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. 435 U.S. 519 (1978).

[2] United States v. Mead Corp., 533 U.S. 218 (2001); Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[3] Motor Vehicles Manufacturers Association v. State Farm, 463 U.S. 29 (1983).

pragmatic balance administrative legal doctrine has struck in the past three decades. Vermeule sees the inner logic of administrative legal doctrine working itself pure, such that courts come to recognize the vanity of trying to do more than ensure agency decisions satisfy thin legal rationality.[4] Hamburger, by contrast, sees contemporary doctrine propping up an unconstitutional Leviathan.[5] Yet both tug at the two threads mainstream administrative law seeks to hold together in workable tension, namely (a) the desire for effective and politically responsive administrative governance in a complex world and (b) the aspiration for a robust yet impersonal rule of law above administrative fiat.[6]

Rumblings at the Supreme Court also suggest that the current balance is becoming unstable. Inspired by criticisms along the line of Hamburger's, a number of justices have questioned the breadth and even the validity of *Chevron* deference to agencies' interpretations of statutes.[7] Judges on the courts of appeals have followed suit.[8] Following up on a line of criticism voiced in concurring opinions,[9] the Court this Term agreed to reconsider the longstanding doctrine of judicial deference to agencies' interpretations of their own

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[4] Adrian Vermeule, Law's Abnegation. (2016).

[5] Philip Hamburger, Is Administrative Law Unlawful? (2014).

[6] For a more general exploration of this tension, see Jeffrey A. Pojanowski, Reason and Reasonableness in Review of Agency Decisionmaking, 104 Nw. U. L. Rev. 799 (2010).

[7] Three current justices in addition to recently retired Justice Kennedy have raised such questions. See Michigan v. EPA, 135 S. Ct. 2699, 2712 (Thomas, J., concurring) (arguing *Chevron* is inconsistent with the Constitution and *Marbury*); Pereira v. Sessions, 138 S. Ct. 2105, ___ (2018) (Kennedy, J., concurring) (noting that "reflexive deference" to agencies under *Chevron* is "troubling" and stating "it seems necessary and appropriate to reconsider" the doctrine); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (Gorsuch, J., concurring); Brett Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150 (2016) (questioning *Chevron* deference). Chief Justice Roberts has not directly challenged *Chevron*, though he has argued that the courts must be more exacting in ensuring Congress has delegated agencies interpretive authority. See City of Arlington v. FCC, 569 U.S. 290, __ (2013) (Roberts, C.J., dissenting). Justice Alito joined his dissent. *Ibid.*

[8] See Egan v. Delaware River Port Authority, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring) (calling for the reconsideration of *Chevron*); Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring in the judgment) ("An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name."); Amul R. Thapar and Benjamin Beaton, The Pragmatism of Interpretation: A Review of Richard A. Posner, The Federal Judiciary, 116 Mich. L. Rev. 819, 822 (2018) (criticizing *Chevron* deference); Hon. Raymond M. Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 323–26 (2017) (criticizing *Chevron* deference).

[9] See Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1212–13 (2015) (Scalia, J., concurring in the judgment); id. at 1225 (Thomas, J., concurring in the judgment); id. at 1210 (Alito, J., concurring in part and concurring in the judgment); Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part); Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring); Appellate judges have also questioned *Auer*. See United States v. Havis, __ F.3d __, __ (2018) (Thapar, J., concurring) (questioning *Auer* deference); Egan v. Delaware River Port Authority, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring) (calling for the reconsideration of *Auer*).

regulations.[10] Coming in the opposite direction are challenges to judicially imposed constraints on agencies' policymaking processes. The Supreme Court unanimously repudiated as inconsistent with the Administrative Procedure Act ("APA") a D.C. Circuit doctrine that required agencies to go through the notice-and-comment process before changing interpretive rules that lack the force of law.[11] One of Justice Kavanaugh's most notable opinions on the D.C. Circuit, moreover, criticized that court's imposition of common law procedural requirements atop the APA's provisions for agency rulemaking.[12]

All told, hornbook doctrine on judicial review is under fire for being both too timid and too intrusive. With an eye toward such uncertainty, and taking the opportunity to rethink settled practice, this paper proposes an alternative way forward. It does not offer a wholesale defense contemporary doctrine's current, eclectic balancing of administrative fiat and legal reason, but neither does it embrace the wholesale rejection of the administrative state or bureaucratic supremacy over law. Rather, it identifies and offers a tentative defense of an approach that returns to a more formalist, classical understanding of law and its supremacy, without a complete rejection of the administrative state. To do so, it pulls together strands of thought emerging in administrative law and scholarship and expands upon the pattern. I call this alternative neoclassical administrative law.[13]

Neoclassical administrative law has a greater faith in the autonomy and determinacy of legal craft than the working, moderate legal realism that characterizes much mainstream administrative law. This faith in the autonomy

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[10] See Kisor v. Wilkie, No. 18-15 (cert granted Dec. 10, 2018); see Auer v. Robbins, 519 U.S. 452 (1997) (holding that a reviewing court will uphold an agency's interpretation unless it is "plainly erroneous or inconsistent with the regulation").

[11] See Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015), overruling Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F. 3d 579 (D.C. Cir. 1997).

[12] See American Radio Relay League, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in the judgment in part and dissenting in part). That said, the Court's scrutiny of agency policymaking often is consistent with more intrusive, "hard look" review. Compare Judulang v. Holder, 565 U.S. 42, 52 (2011) (applying vigorous arbitrary and capricious review) and Michigan v. E.P.A., 135 S. Ct. 2699, 2706 (2015) (same) with F.E.R.C. v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 782 (2016) (applying a lighter touch to arbitrary and capricious review).

[13] I have used this term, albeit in a slightly different sense, in a short essay on the early 20th Century scholar John Dickinson and his work's relationship to contemporary administrative law. See Jeffrey A. Pojanowski, Neoclassical Administrative Common Law, The New Rambler (2016). The movement I describe here is different than the approach Keith Werhan criticized in The Neoclassical Revival in Administrative Law, 44 Admin. L. Rev. 567 (1992). Werhan's account unites *Chevron* deference with a retreat of judicial common lawmaking in procedural and policymaking review, emphasizing a decline of faith in legal determinacy as part of 1980s administrative law. In my account, *Chevron* is suspect and the positive law governing judicial review comes front and center because of increased faith in legal craft. Both approaches, however, embrace the line between law and policy, id. at 590, though this article is more sympathetic to that development than Werhan, who defends an approach along the lines of administrative pragmatism discussed below.

of law does not, however, translate into a belief that the law never runs out. Rather, neoclassical administrative law holds that courts should be less engaged than current doctrine suggests on review of agency policymaking. Such an approach insists that the line between law and policy is sharper than administrative law's standard account, and that courts should be more vigilant in patrolling that boundary. Overall, this approach is "classical" in its defense of the autonomy of law and legal reasoning, commitment to separation of powers, and the supremacy of law. These commitments distinguish it from theorists who would have reviewing courts beat a complete retreat to the margins. It is "new" in that, unlike other more classical critics of contemporary administrative law, it seeks to integrate those more formal commitments with the administrative state we have—and will have for the foreseeable future.

Importantly, and relatedly, neoclassical administrative law holds that courts should more attentive and faithful to the positive law governing the administrative state, especially the APA. In particular, it contends that closer attention to the APA may provide more determinate and legitimate answers on questions of judicial review than the current doctrine's working pragmatism. This approach is not inherently skeptical of administrative common law. In fact, a neoclassicist reading of the APA can turn on lawyerly investigation of the common law of judicial review that Congress originally incorporated within the statute. Rather, it is a recognition of the hierarchy of statutory law over judicial doctrine, not skepticism about legal craft, that presses toward closer attention to the APA. This reading of the APA, moreover, coalesces with the neoclassicist's broader jurisprudential commitments about the division of labor between courts and agencies in the realms of law and policy, respectively.

Whether or not the neoclassical approach is persuasive, considering its merits can illuminate the broader and deeper commitments underlying competing approaches on offer. The neoclassical approach revives and adapts to the administrative state the two foundational—and competing—principles of Anglophone constitutional law identified by British legal luminary Albert Venn Dicey: legislative supremacy and the rule of law.[14] The neoclassical approach seeks to reconcile these rivalrous commitments by maintaining judicial supremacy over legal questions while accepting as supreme the policy choices agencies legislate in the discretionary space Congress has given them. As insightful scholars have recently emphasized, arguments about judicial review of agency action are attempts to reconcile, or overcome, the "Diceyan dialectic" between legislative supremacy and the rule of law after the rise of the administrative state.[15] Considering how neoclassical administrative law carves up

[14] See generally Albert Venn Dicey, Introduction to the Study of the Constitution.

[15] See Kevin M. Stack, Overcoming Dicey in Administrative Law, 68 U. Toronto L.J. 293, 297 (2018) ("Diceyan premises still anchor administrative law in the United Kingdom (UK) in important respects and have been a recurring source of appeal, critique, and argument in the United States and Canada."); Matthew Lewans, Administrative Law and Judicial Deference 14–

this conceptual space can shed light on, and help us evaluate, the assumptions of the alternative arrangements on offer.

The paper will proceed in three parts. *First*, I will situate neoclassical administrative law by outlining three established, competing frameworks for administrative law. In doing so, I will focus on those frameworks' approach to judicial review of questions of law and policy. *Second*, I will introduce neoclassical administrative law. There I will make a first pass in identifying its legal commitments and then explain how they play out along the same dimensions. This is in part a work of reconstruction and speculation, because I do not yet see a critical mass of thinkers marching under this banner with a uniform program on the questions at issue. *Third*, I will address the questions and challenges neoclassical administrative law faces, a task that will further illuminate its jurisprudential commitments.

## I. THREE LEADING FRAMEWORKS OF ADMINISTRATIVE LAW

At the cost of oversimplifying, we can draw a rough sketch of three prominent frameworks for thinking about administrative law and the legitimacy and shape of the administrative state today. These three sketches are ideal types and even thinkers I flag as representative may not agree with all the doctrinal particulars under any one heading. This section will explore the frameworks' competing approaches to judicial review of questions of substantive law, procedure, and policy. I could have explored other dimensions—review of factual findings immediately comes to mind—but these three questions will suffice for exposition. Identifying these competing approaches to this triumvirate of questions will help situate the fourth, neoclassical alternative that is emerging in recent years.

A quick note on scope. The discussion below focuses on judicial review of agency actions. For the most part it does not address, at least directly, the constitutionality of the governing structures Congress has chosen in building the administrative state. This latter category includes appointment and removal of officers, identifying who counts as an officer of the United States, vesting adjudicative powers in non-Article III courts, and the breadth of delegation to agencies. These are important questions and it is sometimes impossible to cordon them off entirely; nondelegation concerns, for example, can come into play for review of agencies' decisions on administrative policymaking. But these concerns are not directly relevant for all the perspectives I discuss below and, more importantly, I would like to focus on the operation of judicial review of agency decisions once the mechanisms are in place. In short this discussion focuses on ordinary administrative law rather than exploring questions of constitutional law directly.

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41 (2016) (exploring and "rethinking" the role of the "Diceyan dialectic" in administrative law) (hereinafter "ALJD").

### *A. Administrative Supremacy*

Administrative supremacy sees the administrative state as a natural, salutary outgrowth of modern governance. In its strongest form, it sees the role of courts and lawyers as limited to checking patently unreasonable exercises of power by the administrative actors who are the core of modern governance. To the extent that durable, legal norms are relevant, the primary responsibility for implementing them in administrative governance falls to the discretion of executive officials, who balance those norms' worth against other policy goals. Today, the work of Adrian Vermeule demonstrates this approach in almost platonic form.[16]

A slightly more interventionist strain recognizes the importance, indeed the constitutional necessity, of the administrative state, but concludes that courts can have a larger role in ensuring the legitimate and effective operation of those engines of governance. The courts do not operate primarily under the appellate model of reviewing the substance of the policymaking choices or ensuring the agency has chosen the best legal interpretation of the statute it administers. Rather, judicial interventions should provide incentives for effective governance or manage salutary checks and balances *within* the administrative state. Such an approach, exemplified by contemporary scholars like Gillian Metzger[17] and Jon Michaels,[18] has antecedents in thinkers like James Landis.[19]

What these approaches share is an unapologetic embrace of the administrative state and a confident rejection of challenges to its legitimacy. This framework, whether grounded in consequentialist or constitutional considerations, informs the pro-administrativist approach to judicial review.[20] This subsection explores such an approach to judicial review of questions of legal substance, procedure, and policymaking.[21]

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[16] Adrian Vermeule, Law's Abnegation (2016).

[17] See Gillian Metzger, Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 77–95 (2017).

[18] See Jon D. Michaels, Constitutional Coup: Privatization's Threat to the American Republic (2017).

[19] James M. Landis, The Administrative Process (1938).

[20] Compare Metzger, [Foreword], at 4 (coining the term "anti-administrativism" to characterize the recent wave of critique of the administrative state's legitimacy).

[21] A more complete account would consider judicial review of questions of fact. It is probable that supremacists would counsel wide deference on questions of fact, see Vermeule, Law's Abnegation at 214, that the new critics of the administrative state discussed in I.B below would call for de novo review of at least some questions of fact, see Evan D. Bernick, Is Judicial Deference to Agency Fact-Finding Unlawful?, 16 Geo. J. L. & Pub. Pol'y 27, 30 (2018), and that the pragmatist theorists discussed in I.C. below would embrace the more searching "mood" of substantial evidence review that falls between de novo and highly deferential review, see Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). I am bracketing the question because I am still thinking through how the neoclassical paradigm would treat the matter.

1. Review of Legal Interpretations – Substance

Administrative supremacy in its purest form advocates deference across the board to agency interpretations of statutes and regulations. Regarding statutes, the supremacist prescribes a Step Zero similar to Justice Scalia's dissent in *Mead*: if the interpretation under review is the agency's authoritative interpretation of the statute it administers, it should qualify for *Chevron* deference irrespective of the form in which it was proffered. Once *Chevron* applies, the reviewing court's scrutiny will not be searching. Unlike, say, Justice Scalia's rigorous, textualist Step One, the administrative supremacist will find the agency's interpretation reasonable if it is colorable under any well-accepted interpretive methodology, even if it is not the reviewing court's preferred method.[22] Similarly, a reviewing court should not scour the statutory scheme or deploy an array of canons to render an apparently unclear statutory provision more precise—a first, rough cut impression that the statute is susceptible to more than one interpretation should suffice.[23]

The administrative supremacist takes a similar tack on deference to agencies' interpretations of their own regulations. Whatever the original understanding or justifications of *Seminole Rock*/*Auer* deference,[24] the doctrine is correct today for the same reasons that justify *Chevron* deference: the resolution of legal uncertainty requires technical and political choices that agencies, rather than courts should make.[25] Practical worries about agency gamesmanship are unproven[26] and, largely, beside the point: to the extent agency seeks to use *Auer* as a way to get around *Mead*'s restriction on *Chevron* deference, the agency is

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[22] See Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 Mich. L. Rev. 885 (2003); see also Metzger, [Foreword] at 40 (contending that the attack on deference "conflicts with broadly accepted legal realist insights about the frequency of legal indeterminacy, and thus policymaking, in judicial decisionmaking").

[23] See Dole v. United Steelworkers of America, 494 U.S. 26, 43 (White, J., dissenting) ("The Court's opinion today requires more than 10 pages, including a review of numerous statutory provisions and legislative history, to conclude that the Paperwork Reduction Act of 1980 (PRA or Act) is clear and unambiguous on the question whether it applies to agency directives to private parties to collect specified information and disseminate or make it available to third parties."); Adrian Vermeule, Judging Under Uncertainty 4 (2006) (arguing that judges' institutional limitations suggest they should engage in clause-bound, even "wooden" approaches to statutory interpretation).

[24] Cf. Sanne H. Knudsen & Amy J. Wildermuth, Unearthing the Lost History of *Seminole Rock*, 65 Emory L.J. 47 (2015); Jeffrey A. Pojanowski, Revisiting *Seminole Rock*, 16 Geo. J.L. & Pub Pol'y 87 (2018).

[25] See Cass R. Sunstein & Adrian Vermeule, The Unbearable Rightness of *Auer*, 84 U. Chi. L. Rev. 297 (2017); Metzger, [Foreword], at 94 (arguing that when Congress has delegated interpretive authority, "a necessary consequence of Congress's power to delegate is that courts should defer to agencies' exercise of that interpretive authority").

[26] See Daniel E. Walters, The Self-Delegation False Alarm: Analyzing *Auer* Deference's Effect on Agency Rules, 119 Colum. L. Rev. 1 (2018) (finding that "agencies did not measurably increase the vagueness of their writing in response to *Auer*").

doing the good work of ameliorating the misguided[27] limits the Court has imposed at Step Zero. Constitutional objections about separation of powers and self-delegation, moreover, are unavailing on their own terms and misplaced, since *Auer* merely affects the timing of the exercise of agency power, not its ultimate allocation.

This is not to say a champion of the administrative state would never counsel against deference on unclear questions of statutory interpretation. If Congress clearly did not want the court to defer, presumably legislative supremacy would require courts to respect that choice.[28] Professor Jon Michaels, a champion of the administrative state's legitimacy and necessity,[29] moreover, would calibrate deference doctrines to give agencies incentives to ensure participation of civil servants and public commenters in policymaking process.[30]

2. Review of Agency Legal Interpretations – Procedure

In a similar vein, the administrative supremacist would give agencies wide leeway in choosing how to make law and policy. Whether the agency followed proper policymaking procedures is one respect a legal question: the reviewing court is asking whether the agency correctly interpreted, for example, Supreme Court due process jurisprudence, the APA, its organic statute, or its own procedural regulations. I have broken this category out from interpretations of substantive law for three reasons.

First, some courts and commentators treat procedural provisions differently for deference purposes.[31] Second, the complexity introduced by overlapping sources of procedural law makes these kinds of legal questions feel different than your standard *Chevron* or *Auer* problem—we carve off things like *Chenery II*[32] questions into a different conceptual space even if, at some level, we are asking whether the agencies choice to proceed by adjudication was lawful. Finally, procedural questions have a duck-rabbit character with respect to review of legal interpretations and review of agency policymaking. Arguments about failure to provide a "reasoned explanation" on the policy merits merge into

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[27] Cf. Adrian Vermeule, *Mead* in the Trenches 71 Geo. Wash. L. Rev. 347 (2003); see also Lisa Schultz Bressman, How *Mead* Has Muddled Judicial Review of Agency Actions, 58 Vand. L. Rev. 1443 (2005).

[28] Cf. Metzger, Foreword, at 93–94 (acknowledging that deference rests on identifying a delegation).

[29] See Michaels, Constitutional Coup, at 55–57 (characterizing most defenses of the administrative state as apologetic and conceding its dubious constitutional legitimacy).

[30] Michaels, Constitutional Coup, at 181.

[31] For arguments along this line, see William S. Jordan III, *Chevron* and Hearing Rights: An Unintended Combination, 61 Admin. L. Rev. 249 (2009); Melissa Berry, Beyond *Chevron*'s Domain: Agency Interpretations of Statutory Procedural Provisions, 30 Seattle U. L. Rev. 541 (2007).

[32] SEC v. Chenery Corp., 332 U.S. 194 (1947) (granting agencies wide discretion to choose between rulemaking and adjudication in implementing their statutory mandates).

claims that the agency failed to satisfy the APA's procedural requirement of a statement of basis and purpose (as liberally construed by appellate courts).[33]

Administrative supremacy here focuses on canonical cases giving agencies substantial deference in choosing what procedure the law requires; put another way, it is hesitant to say the law constrains much at all. *Chenery II*, as noted, rejects the notion that the APA gives (or that courts should craft) any substantial legal limits on the choice to proceed through rulemaking or adjudication.[34] Also taking pride of place is *Vermont Yankee*'s rejection of the D.C. Circuit's attempt to overlay a common law of procedural obligations atop the APA requirements for the comment phase of informal rulemaking. Similarly, *Perez v. Mortgage Bankers Association* rejected the D.C. Circuit doctrine that required agencies to undertake notice-and-comment rulemaking before amending interpretative rules.[35] Less frequently mentioned, but within the same vein, is *Florida East Coast Railway*'s dispatching of agency obligations to engage in formal rulemaking,[36] as well as cases invoking *Chevron* to give agencies wide latitude in their choice to proceed through informal or formal adjudication.[37]

Drawing on this canon, administrative supremacy targets doctrines that limit agencies' interpretations of their own procedural obligations. At the top of the list are judicially imposed requirements for the notice stage of rulemaking, as well as judicial expansion of the requirement that an agency issue merely a brief statement of basis and purpose in defense of its rules. Indeed, some have even questioned the legal basis for the doctrine that agencies must adhere to their own regulations, including procedural rules, until they are amended.[38]

In all of these cases, the administrative supremacist is either saying that (i) the positive administrative law we have clearly does not significantly limit administrative discretion or, (ii) to the extent that there is play in the legal joints, courts ought to stay their hands, or both. The first line of argument echoes *Vermont Yankee*'s emphasis on how the APA is a compromise that hammers in place both a floor and a ceiling, at least from the perspective of judicial intervention. The second line of argument, premised on the legal indeterminacy of the procedural materials, insists that judicial intervention in this realm is just

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[33] See Gary Lawson, Federal Administrative Law 752–53 (6th ed.) (2013).

[34] 332 U.S. 194 (1947).

[35] 135 S. Ct. 1199 (2015)

[36] United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973).

[37] See, e.g., Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989). The D.C. Circuit's position is the majority one. See Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12 (1st Cir. 2006) (rejecting its prior presumption in favor of formal adjudication in light of *Chevron* and the majority approach in *Chemical Waste*).

[38] See Cass R. Sunstein and Adrian Vermeule, The Morality of Administrative Law (preliminary draft of Oct. 4, 2017), at 25–26 ("The problem is that neither *Arizona Grocery* nor *Accardi* offers a clear justification for that idea. What source of law is involved?"); see also id. at 27 (describing an argument grounding *Arizona Grocery*/*Accardi* in the APA as "plausible, but not clearly convincing").

as inappropriate as it is with respect to substantive law. The trade-offs inherent in deciding how many resources to spend on process in pursuit of a policy is no less value-laden than picking the proper point in the "policy space" created by ambiguity in substantive law.[39]

3. Review of Agency Policymaking

Administrative supremacy in its purest form presses against the "hard look" doctrine originating in the D.C. Circuit and blessed by the Supreme Court in *State Farm*. As a normative matter, administrative supremacy claims that rigorous judicial scrutiny is unwise and illegitimate. Courts have neither the technical expertise nor the political accountability to check the agencies' homework. They are more likely to introduce policy errors than to correct them. Furthermore, the demand for extensive reason-giving slows down administrative policymaking and asks for more than agencies can provide when they operate under uncertainty.[40]

As archetypes of this approach, we could choose Justice Marshall's dissent in the *Benzene* case, where he would have given the agency wide latitude to operate under scientific uncertainty,[41] or Justice Rehnquist's partial dissent in *State Farm*, which would require less fulsome explanations while also allowing more leeway for the administration's political priorities to affect policy judgments.[42] Accordingly, "thin" rationality review is the optimal role for courts.[43] Furthermore, as a matter of fact, such an approach may be more representative of the daily work of courts, notwithstanding the casebooks' emphasis on rigorous hard-look cases.[44]

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[39] Some vocal defenders of the administrative state are more agnostic along these lines. Gillian Metzger, for example, has defended the *legitimacy* of the courts' power to craft judicial common law that imposes additional procedural requirements, but recognizes reasonable disagreement about the *wisdom* of such doctrine. See Gillian Metzger, Embracing Administrative Common Law, 80 Geo. Wash. L. Rev. 1293, 1355 (2012) ("[T]hat the practice of administrative common law is constitutionally legitimate and not statutorily precluded says nothing about whether developing administrative common law is a good approach for the courts to pursue.").

[40] See Vermeule, Law's Abnegation, ch. 4.

[41] Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 688 (1980) (Marshall, J. dissenting); see also Center for Highway Safety v. FHA, 956 F.2d 309 (D.C. Cir. 1992) (Thomas, J.) (allowing agency to adopt private standard setting in the face of uncertainty).

[42] Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 57 (1983) (Rehnquist, J., concurring in part and dissenting in part).

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

[44] See Vermeule, Law's Abnegation, ch. 5. Again, some leading critics of anti-administrativists are less strident on this score. Metzger notes plausible arguments for and against hard-look review. See Metzger, [Administrative Common Law] at 1355 ("Again, the conclusion that judicial elaboration of the reasoned decisionmaking requirement is legitimate says nothing about whether the Court's current account of what reasoned decisionmaking entails is appropriate."). Jon Michaels would use the threat of hard-look review as a lever to ensure participation of the civil service and the general public *within* the administrative process. If the

4. Jurisprudential Orientation

The administrative supremacist's approach transports the restrained Thayerian approach of judicial review in constitutional law to the administrative context.[45] On questions of substantive law, the court is not to ask whether the agency as identified "the true construction" of the relevant law, but rather whether the agency "has acted unreasonably."[46] On procedure, the administrative supremacist carries the mantle of Justice Frankfurter (another committed Thayerian[47]), who would give agencies broad leeway to "adapt their decision-making processes to their statutory mandate."[48] On questions of policy, the administrative supremacist's championing of thin rationality review echoes Thayer's standard for judicial review of legislative policy choices, which would defer to the political branches unless the policy choice "is so obviously repugnant…that when pointed out by judges, all men of sense and reflection in the community may perceive the repugnancy."[49] As with rationality review of legislation,[50] the administrative supremacist is disinclined to explore the agency's reasoning process and motivations so long as the decision falls within this wide range of reasonableness.

Administrativists with constitutional theories more robust than Thayerian minimalism can nevertheless fit within this frame. Michaels, for example, draws on constitutional principles to suggest judicial intervention with administrative action, but with an eye toward ensuring proper separation of powers within the

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reviewing court is satisfied the agency's procedural structure is "rivalrous, heterogeneous, and inclusive," it should give wide berth to the agency on the policy merits. Michaels, [Constitutional Coup] at 181; see generally id. at 182–87.

[45] See Stack, Overcoming Dicey at 299 (identifying Vermeule as a Thayerian); Lewans, [ALJD], at 94–103 (linking Thayer with deference in American administrative law).

[46] James B. Thayer, Constitutionality of Legislation: The Precise Question for a Court, 38 Nation 314 (1884) (cited in Stack, supra note __ at 295).

[47] See Lewans, [ALJD] at 126 ("Throughout his career, Frankfurter repeatedly invoked Thayer's famous article, which he regarded as 'the great guide for judges…of what the place of the judiciary is in relation to constitutional questions.'"). Justice Frankfurter, however, was inclined to require more process when individual, non-economic liberty was at stake. See id. at 131 (citing Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[48] Lewans, [ALJD], at 130 (citing United States v. Morgan, 313 U.S. 409 (1941).

[49] James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 142 (1907); see also Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (a courts should defer to a legislative choice unless "a rational and fair main would necessarily would admit that [it] would infringe fundamental principles as they have been understood by the traditions of our people and law") (cited at Lewans, [ALJD], at 111).

[50] See Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955) ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

administrative state.[51] He does so, however, to restore the mid-20th Century equilibrium that translated core constitutional values into a well-functioning administrative state. Once that is in place, there are no constitutional concerns and the courts have little role to play besides protecting those structures. As a first-generation Thayerian would be deferential to the outputs of the original constitution's political branches, Michaels would defer to the choices of a properly constituted administrative state now at the center of modern governance. Following James Landis, whose work on internal separation of powers Michaels' resembles,[52] this second-generation Thayerian approach holds that once the proper administrative structures are in place, the courts should not stand in the way.[53]

While Thayer is a helpful touchstone for understanding administrative supremacy, we can also understand this approach as a way of reconciling the modern administrative state with the inherited Diceyan framework of constitutional law. Professor Matthew Lewans has argued that Diceyan constitutional theory—which identifies (i) legislative supremacy and (ii) rule of law as the two foundational principles—excludes legitimate administrative authority "by stipulation."[54] Under the Diceyan framework ultimate legal authority flows from a supreme legislature[55] whose dictates are authoritatively interpreted by courts, thereby preserving the rule of law.[56] In the classical understanding, an administrative agency is not the legislature, whether we define it as Congress in the United States or Queen-in-Parliament in the United Kingdom. Nor are administrative agencies "ordinary courts" charged with ensuring actions of legal officials are subordinate to law; rather, they consist of the very officials who must be subordinate to the rule of law.[57]

As neither ultimate lawmakers nor duly constituted courts, administrative agencies are the excluded middle under the logic of traditional, Diceyan constitutionalism.[58] Administrative supremacy overcomes this dilemma, and makes space for the administrative state, through two steps. First, it recognizes

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[51] See Jeffrey A. Pojanowski, Reconstucting an Administrative Republic, 116 Mich. L. Rev. 959, 963–64 (2018) (describing Michaels' broader argument).

[52] See id. at 967 (noting connections between Landis and Michaels); James M. Landis, The Administrative Process 46 (1936) (explaining how "administrative power" should offset "executive power"); see also Metzger [Foreword] at 78 (embracing Landis's vision of internal administrative separation of powers as providing legitimacy).

[53] See Landis [Administrative Process] at 155.

[54] Lewans, [ALJD], at 15.

[55] In jurisdictions with entrenched, written constitutions like the United States, the legislature is not supreme, but we can readily adapt it to the Diceyan framework by identifying the Constitution as ultimate positive law enacted by supreme lawmakers—the people through the process of ratification.

[56] Lewans, [ALJD] at 19–20.

[57] Id. at 20.

[58] Id. at 20 ("Dicey's conception of the rule of law…by definition…excludes the possibility that administrative institutions might wield legal authority under the constitution.").

the authority of the legislature to delegate its lawmaking power to administrative agencies, thus nesting them under the legislative supremacy principle of Diceyan constitutionalism.[59] Second, it sharply circumscribes the rule of law's empire, primarily by embracing a form of legal realism that dissolves the line between legal interpretation and policymaking. If most interesting questions of legal interpretation are inextricable from legislative policy choices, those decisions should fall to the deputized administrative legislature.[60] The ordinary courts' duties in upholding the rule of law are thereby limited to patrolling the borders of rationality. The administrative supremacist solves the Diceyan dilemma by mostly dissolving it. Delegated legislative supremacy grounds the administrative state, with the rule of law reduced to a thin residue around its margins.

### *B. Administrative Skepticism*

At the opposite pole, a growing body of literature criticizes the extent and legitimacy of the administrative state. The administrative state is illegitimate under the original understanding of the Constitution and regularly violates the common law rights that charter sought to protect. Even further, the administrative state may instantiate the evils of British monarchism that the framers sought to avoid by founding a new republic. Leading figures here are Philip Hamburger,[61] Gary Lawson,[62] Theodore Lowi,[63] David Schoenbrod,[64] as well as Bruce Frohnen and George Carey.[65] Under this approach courts are obliged to fulfill their judicial duty to say what the law is, even if (or especially if!) doing so undermines the regnant administrative state.

#### 1. Review of Legal Interpretations – Substance

The administrative skeptic rejects deference to agency interpretations of law, even if the agency is charged with administering the statute. Deference shirks the judicial duty to say what the law is and introduces a pro-government bias of

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[59] Cf. Metzger, [Foreword], 72 ("[T]he administrative state today is constitutionally obligatory, rendered necessary by the broad statutory delegations of authority to the executive branch that are the defining feature of modern government.").

[60] See Metzger, [Foreword], at 40 (embracing the "broadly accepted legal realist insights about the frequency of legal indeterminacy, and thus of policymaking, in judicial decisionmaking").

[61] Philip Hamburger, Is Administrative Law Unlawful? (2014).

[62] Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231 (1994).

[63] Theodore Lowi, The End of Liberalism (1979).

[64] David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation (1993).

[65] Bruce Frohnen and George Carey, Constitutional Morality and the Rise of Quasi-Law (2016); see also Joseph Postell, Bureaucracy in America: The Administrative State's Challenge to Constitutional Governance (2017).

dubious constitutional provenance.[66] On questions of statutory interpretation, the Court should reject *Chevron* deference and not tarry with half-measures like a *Mead* threshold test or even across-the-board *Skidmore* deference. Along these lines, Justice Thomas has questioned *Chevron*'s constitutionality[67] and similar disquieted rumblings have arisen from the courts of appeals, headlined by now-Justice Gorsuch's concurrence in *Gutierrez-Brizulea*.[68]

Deference to agency interpretations of their own regulations shares the same flaw, with the added transgression of violating a distinct aspect of separation of powers. Drawing on Locke and Montesquieu, critics of *Auer* deference argue that gathering the power to both promulgate and interpret the law is the *ne plus ultra* of the legal tyranny the framers sought to avoid, and that deference to agency interpretation allows agencies to engage in such self-delegation.[69] These concerns have led Justice Scalia and Thomas to call for a wholesale abandonment of *Auer* deference[70] and have given Justice Alito pause about the doctrine.[71]

2. Review of Legal Interpretations – Procedure

For the same reason the skeptics reject *Chevron* and *Auer* deference on questions of substantive law, they would resist any judicial thumb on the scale in favor of agencies on questions of procedure. If anything, giving agencies the right to tilt the law in their favor on procedure—the very rules they must follow in executing policy—cuts closer to the heart of the rule of law. Furthermore, where the positive law of procedure slows down agencies, or at least makes them operate in a fashion closer to classical understandings of separation of powers and the rule of law, the skeptic will want agencies to adhere to those norms. We can say the same for judicial doctrines that lead to similar effects, such as the appellate courts' procedural additions to informal rulemaking or the minority position in circuit courts that presumes organic statutes require formal adjudication. Tellingly, in *Mortgage Bankers v. Perez*, public interest organizations sympathetic with administrative skepticism filed amicus briefs supporting the

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[66] See Hamburger, Is Administrative Law Unlawful? (2014); Philip Hamburger, *Chevron* Bias, 84 Geo. Wash. L. Rev. 1187 (2016).

[67] Michigan v. EPA, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring).

[68] Gutierrez-Brizulea v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring); Egan v. Delaware River Port Authority, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring); see also Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150–54 (2016) (raising concerns about *Chevron* and suggesting limitations to the doctrine)

[69] See John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules, 96 Colum. L. Rev. 612 (1996).

[70] See, e.g., Decker v. Northwest Environmental Defense Center, 133 S. Ct. 1326, 1341–42 (2013) (Scalia, J., concurring in part and dissenting in part); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1215 (Thomas, J., concurring); see also Egan v. Delaware River Port Authority, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring) (questioning *Auer* along with *Chevron*).

[71] See Perez, 135 S. Ct. at 1210 (Alito, J., concurring) (noting that Justices Scalia and Thomas offer "substantial reasons why the *Seminole Rock* doctrine may be incorrect").

D.C. Circuit's *Paralyzed Veterans* rule, which the Supreme Court ultimately struck down as a procedural burden inconsistent with the APA.[72]

That said, vigorously policing an agency's adherence to procedural norms will likely be a strategic or second-best maneuver for root-and-branch critics of the administrative state. If the positive law of procedure clearly gives agencies wide sway, deference will be beside the point and the administrative state will barrel along unimpeded. Furthermore, to the extent the skeptic sees the administrative state as an unconstitutional delegation of power to agencies, punctilious attendance to statutory procedure is little more than tidying the stable after the horse has left the barn. Statutory and judicially imposed procedural constraints are at best compensating measures and, while the administrative skeptic may be thankful for such small blessings, they do not resolve the deeper problem.

One non-half measure the administrative skeptic would invoke in the realm of procedure, however, is the Due Process Clause of the Constitution. The skeptic contends that administrative adjudication denies jury trial rights, imposes the equivalent of criminal fines without ordinary criminal procedure, and more generally denies legal rights without de novo treatment by Article III courts.[73] In this respect, the skeptic would have the courts more directly engaged in ordinary administrative law, though this obviously would require serious reworking of due process jurisprudence in the administrative context.

3. Review of Agency Policymaking

Although administrative skeptics call for increased—indeed, maximal—scrutiny of agency legal interpretations, they are not likely to call for a similar remedy regarding agency policymaking decisions. More searching review or revision of agency policy choices implicates legislative *will*, not the legal judgment that is proper to the judicial duty. Accordingly, rather than heeding Judge Leventhal's call to roll up their sleeves and dive into the policy merits, or following Judge Bazelon's lead by tinkering with administrative procedures,[74] the administrative skeptic is more likely to recommend an approach that is both

[72] See, e.g., Brief of the Cato Institute, the Competitive Enterprise Institute, and the Judicial Education Project as Amici Curiae in Support of Respondent; Brief of Washington Legal Foundation and Allied Educational Foundation As Amici Curiae in Support of Respondent.

[73] See, e.g., Hamburger, Unlawful, at __. Hamburger also views *Chevron*'s bias in favor of the government as violating due process. See Philip Hamburger, Chevron Bias, 84 Geo. Wash. L. Rev. 1187, 1249 (2016).

[74] See Ethyl Corporation v. EPA, 541 F.2d 1 (D.C. Cir. 1976); Ronald J. Krotoszynski, Jr., "History Belongs to the Winners": The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action, 58 Admin. L. Rev. 995 (2006).

more radical and more modest: invalidating the provision on non-delegation grounds.[75]

This approach is radical in that it calls into question countless statutory provisions that contain wide delegations to agencies. It is modest in that it respects limits on judicial authority to fill in gaps where there is no law to apply. An example of this approach would be Justice Rehnquist's concurrence in the *Benzene* case, where he would have held that Congress's lack of guidance on risk-threshold policy was an unlawful delegation to OSHA.[76] This is not to say any uncertainty is an unlawful delegation—the framers recognized that interstitial elaboration of congressional policy was inevitable[77]—but once we cross the line between filling in small blanks and administrative legislation, the court must strike down the provision under the non-delegation doctrine.[78]

4. Jurisprudential Orientation

Administrative skepticism reintroduces classical, Diceyan constitutionalism to American administrative law. The classical commitment to ordinary courts as the ultimate arbiters of the law precludes deference to agencies on legal questions. Treating agency policymaking discretion as an unlawful delegation of legislative power insists on locating legislative supremacy only within the actual Congress, either as a conceptual matter or because the rules of the original, written Constitution preclude delegation of the legislative power to agencies.

Such an arrangement, as a contemporary critic explains, tracks Dicey's constitutionalism, which by focusing solely on courts and legislatures as legitimate legal actors and therefore "excludes the possibility that administrative institutions might wield legal authority under the constitution."[79] In fact, it is *more* purely Diceyan than the administrative law in the United Kingdom today, whose constitutionalism the British scholar originally theorized. There, while the doctrine of judicial review is more congenial to de novo review of agency legal conclusions than in the United States, courts can be quite "submissive" toward administrative decisions that exercise delegated policymaking discretion.[80]

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[75] One possible exception to this parsimony could be encouraging courts to limit agency power through deregulatory judicial presumptions, such as the *Michigan v. EPA* plurality's holding that failure to undertake cost-benefit analysis is unreasonable. Such a tack requires more judicial involvement in administrative policy, but the skeptic could justify such intervention on the grounds that it compensates for under-enforced constitutional norms aimed limited federal power and delegation. Cf. Peter B. McCutcheon, Mistakes Precedent and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best, 80 Cornell L. Rev. 1 (1994).

[76] Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J. concurring in the judgment).

[77] Id. at 674–75.

[78] See, e.g., Hamburger, Unlawful at 314–15.

[79] Lewans, [ALJD], at 20; see also Stack, Overcoming Dicey, at 296 n.8 (describing Hamburger's approach as Diceyan).

[80] Lewans, [ALJD], at 43.

### *C. Administrative Pragmatism*

A third position neither chastises the administrative state nor submits governance to its mercy. Rather, it seeks to reconcile the reality of administrative power, expertise, and political authority with broader constitutional and rule-of-law values. The primary means for doing so is Legal Process-style development of administrative common law doctrine that implements or supplements positive law like the APA or the Constitution. This is the largest and, relatedly, least precise category of approaches to administrative law I will be describing here. Adherents to this approach, which I will call administrative pragmatism, vary among themselves on particular questions, but a family resemblance nevertheless emerges. In fact, one could do reasonably well on an administrative law exam by using the pragmatist doctrinal approach as the skeleton of a study outline.

1. Review of Legal Interpretations – Substance

On questions of statutory interpretation, deference is often appropriate, but only if the agency interpretation passes certain legal tests. This can come in the form of a contextual, multi-factor approach to *Mead* like that applied Justice Breyer,[81] a more rule-like interpretation of *Mead*,[82] or through the invocation of certain exceptions, such as withholding deference on major questions or jurisdiction.[83] Like the administrative supremacist, the pragmatist recognizes that there are some underdetermined legal questions over which agencies should have ultimate legal authority either because of technical competence, political accountability, or both. Implicit in this judgment is that on unclear questions, there is no preexisting law to declare, but rather a policy choice to make among the plausible options.[84] That said, even if the agency chooses a permissible interpretation within the *Chevron* "space," a pragmatist court may nevertheless demand evidence that the agency engaged in reasoned decisionmaking to get there.[85]

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[81] See Barnhart v. Walton, 535 U.S. 212 (2002) (applying a standard-like approach to *Mead*).

[82] Cf. Thomas Merrill, The Mead Doctrine: Of Rules and Standards, Meta-Rules and Meta-Standards (describing a rule-like approach to *Mead*; see also Thomas W. Merrill and Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 Harv. L. Rev. 567 (2002) (proposing a narrower test).

[83] See King v. Burwell, 135 S. Ct. 2480 (2015) (major questions); City of Arlington, 569 U.S. 290 (2013) (rejecting jurisdictional exception).

[84] See, e.g., Laurence H. Silberman, *Chevron*—The Intersection between Law & Policy, 58 Geo. Wash. L. Rev. 821 (1989).

[85] See, e.g., Peter Strauss, "Deference" is Too Confusing: Let's Call Them "Chevron Space" and "Skidmore Weight," 112 Colum. L. Rev. 1143, 1162 (2012); Ronald M. Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253 (1997).

Like supremacists, pragmatists usually justify deference as an implied congressional delegation of lawmaking authority, though this is also usually[86] understood as a fiction that is useful for the sound allocation of decisionmaking power. Pragmatists, however, are more willing than supremacists to tailor the reach of that implied delegation so that it does not extend to situations in which the underlying justification for deference is unlikely to apply. In other words, for the pragmatists, the moderate legal realism about law's indeterminacy that justifies deference on ordinary questions of law does not extend to the meta-law of deference, where they assume courts can calibrate the amount of respect they afford agency legal interpretations.

A similar story follows for agencies' interpretations of their own regulations. Rather than heeding Justice Thomas's call to abandon *Auer* deference, pragmatists seek to domesticate the doctrine to avoid abuse and promote the purposes it serves. Hence, the emerging exceptions for interpretations of regulations that parrot statutes[87] or interpretations that are inconsistent or spring unfair surprises on the regulated community.[88] We can call this a "Footnote 4" approach to *Auer*, after the reference that qualified, but declined to overrule the doctrine in *Perez v. Mortgage Bankers Association*.[89] As with *Chevron*, the pragmatist gives *Auer* a Step Zero, not complete abolition or unfailing application.[90]

With *Auer*, the common-law character of deference doctrine is even more pronounced. The useful fiction of congressional delegation that cloaks *Chevron* deference is not so readily available when an agency delegates interpretive authority to itself.[91] One could say that when Congress delegates interpretive authority by passing unclear legislation, it is also delegating authority to decide *when* to exercise that authority, and that *Auer* deference simply allows the agency to time when to make those policy choices. But such an argument is inconsistent with *Mead*'s restrictions on the exercise of delegated authority and will unlikely appeal to most pragmatists. Furthermore, this explanation would add yet another epicycle to a theory of delegation that appears increasingly verbal. Rather, any modulation of *Auer* doctrine will turn on comparative assessments of agency competence and accountability, as well as ensuring the smooth running of judicial review and administrative procedure more generally.

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[86] But see Merrill and Tongue Watts, supra note __ (grounding deference test in actual legislative drafting conventions).

[87] Gonzalez v. Oregon, 546 U.S. 243 (2006).

[88] Christopher v. SmithKlineBeecham, 132 S. Ct. 2156 (2012).

[89] 135 S. Ct. 1208 n.4 (2015).

[90] For an example of such an inquiry, see Matthew C. Stephenson and Miri Pogoriler, *Seminole Rock*'s Domain, 79 Geo. Wash. L. Rev. 1449 (2011).

[91] Cf. Manning, Constitutional Structure, at 639 (distinguishing the different delegations in *Chevron* and *Auer*).

2. Review of Legal Interpretations – Procedure

Here the picture is more mixed. Tracking the supremacist's defense of deference on procedural questions, a pragmatist could argue that institutional competence, political accountability, and the tradeoffs inherent allocating resources between procedure and substance point toward deference along these lines. This explains the dominance of the D.C. Circuit's deferential approach to agency decisions on whether an organic statute prescribes formal or informal adjudication, as well as the lack of scholarly uproar along those lines. Similarly, while *Florida East Coast Railway* took no account of the pre-APA doctrine that framed the backdrop of formal rulemaking, mainstream administrative law has little problem with leaving the choice about formal rulemaking to the agency's discretion, which is to say interring formal rulemaking. Furthermore, many pragmatic theorists held no brief for the now-defunct *Paralyzed Veterans* doctrine, which sought to burden, and therefore limit, agencies' choice to modify interpretive rules.[92]

On the other hand, pragmatists should not be confused with supremacists along these lines. The pragmatists' delegation theory of *Chevron* provides little support for deference on interpretations of the APA, which no agency has particular responsibility to administer. Even with respect to organic statutes that agencies do administer, one can readily imagine a fine-grained, pragmatist approach that finds it unreasonable to infer that Congress delegated authority to administer a procedural provision of the statute with force of law.[93]

Notwithstanding *Vermont Yankee*, pragmatist courts also facilitate substantive hard look review by requiring agencies to bulk up the APA's notice of proposed rulemaking and the resulting statement of basis and purpose. As with arbitrary-and-capricious review of policymaking, discussed below, there is a connection with positive law: the APA requires judicial review, and judicial review is not meaningful without some kind of reasoned explanation that includes, among other things, responses to important objections, connections between the record facts and the chosen policy, some indication of deliberation about policy alternatives, etc.[94] Similarly, notice would be meaningless—and policy formation would veer toward irrationality—if interested parties did not have access to a detailed explanation of the proposed rule and the data upon

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[92] See, e.g., Amicus Brief of Administrative Law Scholars in Support of the Petitioners, *Perez v. Mortgage Bankers Ass'n* (2014); Richard J. Pierce, Jr., Distinguishing Legislative Rules from Interpretive Rules, 52 Admin. L. Rev. 547, 561–66 (2005) (criticizing *Paralyzed Veterans*).

[93] Cf. Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) (refusing to defer to an agency's interpretation of preemptive effect of a private right of action provision on grounds that Congress conferred that authority to the courts); Wagner Seed Company, Inc., v. Bush, 946 F.2d 918 (D.C. Cir. 1991) (Williams, J., dissenting) (same regarding reimbursement provision of statute agency generally administered).

[94] Cf. Pension Benefit Guarantee Corp. v. LTV, 496 U.S. 633 (1990) (explaining how *Overton Park*'s is consistent with *Vermont Yankee*).

which agency formed its tentative policy judgments. As with the delicate balance in substantive review between enforcing legal values respecting administrative expertise, pragmatist courts seek to optimize the mix of procedural protections and agency flexibility.[95] Courts modulate this supervision through supple doctrines like the logical outgrowth test and harmless error,[96] or by adopting rough stopping rules born of practical necessity.[97] This dadministrative common law of procedure is a hallmark of the post-New Deal mainstream of pragmatic administrative law with a long run of scholarly support.[98]

Finally, notwithstanding their rejection of *Paralyzed Veterans*, pragmatist jurists and scholars embrace nuanced tests to distinguish procedurally valid interpretative rules and policy statements from invalidly promulgated legislative rules.[99] A simpler—and discretion-enhancing—approach would have courts deprive policy statements and interpretative rules of force-of-law benefits, but pragmatic concerns about agencies using nonlegislative rules for prelitigation coercion lead pragmatist courts and scholars to supervise administrative procedure more closely here. Again, we see a judicially calibrated mixture of supervision and deference that attempts to strike a balance between the rule of law and discretion.

3. Review of Agency Policymaking

In reviewing agency policy choices, the administrative pragmatist again balances legal values with the agencies' expertise and accountability. Resisting Judge Leventhal's call to have courts flyspeck the administrative record, but unsatisfied with Judge Bazelon's purely procedural approach, the pragmatist settles on the "hard look" review that demands a reasoned explanation for agency action that connects the chosen policy with the administrative record.[100] As demonstrated by the majority opinion in *State Farm*, this review can at times

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[95] See Reytblatt v. NRC, 699 F.2d 1209, 1216 (D.C. Cir. 1983) (sufficiency of statement of basis and purpose "depends on the subject of the regulation and the nature of the comments received").

[96] See, e.g., Int'l Union, United Mine Workers v. MSHA, 626 F.3d 84 (D.C. Cir. 2010) (logical outgrowth test to repel challenge to adequacy of notice).

[97] See, e.g., Rybachek v. United States EPA, 904 F.2d 1276, 1286 (9th Cir. 1990) (seeking to avoid the "never-ending circle" that would occur if parties had the right to comment on the agency's response to other comments).

[98] See, e.g., Peter L. Strauss, Statutes That Are Not Static–the Case of the APA, 14 J. Contemp. Legal Issues 767 (2005); Harold Bruff, Legislative Formality, Administrative Rationality, 63 Tex. L. Rev. 207 (1984); Louis L. Jaffe, Judicial Control of Administrative Action 329 (1965).

[99] See, e.g., American Mining Congress v. Mine Safety & Health Administration, 995 F.2d 1106 (D.C. Cir. 1993); Pierce, Distinguishing, at 548 (praising *American Mining Congress*). For a critique of such tests, see John Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893 (2004).

[100] For an argument that current arbitrary and capricious view is a synthesis of the Leventhal-Bazelon dialectic, see Gary Lawson, Administrative Law 698–709 (7th ed. 2013)

be exacting.[101] *State Farm*'s rhetoric, however, leaves a reviewing court flexibility to approach a case with a light touch or heavier thumb, depending on the atmospherics and the general sense of whether the agency is implementing its mandate in good faith.[102] As with review of legal questions, these tests have the flavor of common law inspired, but not directly derived from, positive law. There is little interest in what, in fact, the framers of the APA meant or were understood to mean when they codified arbitrary-and-capricious review.

4. Jurisprudential Orientation

Administrative pragmatism attempts to transcend the Diceyan dichotomy, which understands public law as sharply, and exhaustively, divided between supreme legislative bodies that make law and supreme courts that preserve the rule of law through authoritative interpretation of those norms.[103] The administrative supremacist emphasizes broad lawmaking powers delegated to agencies. Inversely, the administrative skeptic rejects the notion that agencies can wield lawmaking power and would preserve courts' supreme power to interpret authentic legislation and ensure the proper allocation of constitutional authority. These contrasting approaches each favor one side of the Diceyan dichotomy to the diminution of the other, but the pragmatist seeks to recognize law-making and -interpreting power in the administrative agencies while seeking to bring both functions under the rule of law.

Professor Matthew Lewans' recent book, *Administrative Law and Judicial Deference*, is exemplary in this respect. He contends that judicial deference on questions of law and policy is appropriate given administrative agencies' political accountability, institutional competence, and the authority legislatures vest in them. This does not, however, entail the supine posture recommended by the administrative supremacist. Rather, the moral legitimacy of any exercise of political power depends on all legal institutions respecting rule-of-law values like meaningful participation in decisionmaking processes and reasoned explanations for policy choices.[104] Therefore, Lewans argues, judicial review should ensure administrative decisionmaking comports with these basic requirements of legality. Accommodating the administrative state and legality "requires judges to ensure that administrative law is both fair and substantively

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[101] Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983).

[102] Courts are more likely to be skeptical of policy decisions based on politics, as opposed to expertise, see Jody Freeman and Adrian Vermeule, *Massachusetts v. EPA*: From Politics to Expertise, 2007 Sup. Ct. Rev. 51, though this tendency has come under criticism, even from those you would not associate with the supremacist camp. See Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 119 Yale L.J. 2 (2009).

[103] Lewans, [ALJD], at 16–27 (sketching this dichotomy); see also Matthew Lewans, Rethinking the Diceyan Dialectic, 58 U. Toronto L.J. 75 (2008).

[104] Lewans, [ALJD], at 214–23.

reasonable," but it does not give judges "a plenary license to engage in correctness review."[105]

Thus emerges the hybrid nature of modern administrative governance. While the classical theory of legislative supremacy declines to explore the legislature's motives, reasoning, justifications, or consistency, under the pragmatist vision the administrative lawmaker must comply with more robust rule-of-law demands. While the classical theory of legal supremacy gives courts a monopoly on legal interpretation, the pragmatist recognizes the authority of administrative bodies to interpret the law—within the realm of reasonableness *and* so long as the agency's action complies with the rule of law requirements of fair participation and reasoned justification that accompany all other exercises of lawmaking authority.[106]

The administrative pragmatist therefore resolves Dicey's dialectic with a new synthesis that joins legislative and interpretive authority into one body whose legitimate discretion is nevertheless subject to the rule of law. If federalism "split the atom of sovereignty"[107] the modern administrative state is the nuclear fusion of Diceyan constitutional elements. This process unleashes the energy necessary for modern governance, though judicial supervision is necessary to ensure the balance and stability of the system as a whole.

## II. THE NEOCLASSICAL ALTERNATIVE

Our intellectual inheritance in public law identifies two elements of constitutional governance: legislative supremacy and the rule of law. The previous part offered three ways to reconcile that dichotomy inherited to the administrative state. One approach—administrative supremacy—emphasizes legislative supremacy vested in agencies via congressional delegation. A second—administrative skepticism—emphasizes the rule of law, insisting that courts are the guardians of legal interpretation while regarding non-congressional lawmaking as ultra vires. A third, pragmatist alternative gives neither prong primacy, but rather seeks to integrate both values into a judicially supervised and modulated administrative state.

This section presents an alternative approach, neoclassical administrative law. This approach is skeptical of judicial deference on questions of law but takes a much lighter touch on review of agencies' procedural and policymaking choices. Put another way, it combines the skeptic's understanding of the judicial role on questions of law with the supremacist's approach to questions of

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[105] Id. at 210. We can compare this approach with the judicial interventions recommended by supremacists like Landis or Michaels. A pragmatist like Lewans sees the judicial role as ensuring every decision comports with basic requirements of legality on a retail basis. For Landis or Michaels, once we are certain the proper infrastructure is in place, the court presumes on a wholesale basis that the basic requirements of legality are met.

[106] Recall, deference on questions of law here presupposes that choosing among reasonable interpretative options is an under-determined lawmaking policy choice.

[107] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

discretion and policymaking. Like administrative pragmatism, it seeks to find an equal place for politically responsible policymaking *and* the rule of law in the administrative state. Yet it rejects the pragmatist's blurring of the line between law and policy, drawing instead a sharper division of responsibility between courts and administrative agency. Neoclassical administrative law recapitulates Dicey's sharp distinction between rule of law and legislative supremacy but nests it within an administrative state that serves as a deputized lawmaker.

Like much legal scholarship, this Article's interpretive work is both descriptive and normative. It pulls together disparate strands of the jurisprudence, identifies their underlying commitments, and offers an argument for why that way of understanding administrative law is the best way to go forward.[108] I do not contend this is the only way to understand current law of judicial review of administrative action. In fact, the existing state of the law is in sufficient flux that neutrally theorizing without remainder is simply not possible here (if it ever is[109]). Nor need I establish that neoclassical administrative law is the best of all possible regimes as a matter of ideal legal and political theory. A best-of-all-possible worlds theory may be too out of step with current doctrine to be a viable theory. That said, given the contested terrain in administrative law and the plausible alternative theories on offer, I am obviously constructing this framework because I find it appealing as a matter of principle.

This descriptive and diagnostic section proceeds in two steps. This section will identify the strands of doctrine and scholarship supporting neoclassical administrative law and then identify the commitments underlying this approach to judicial review. Section III will respond to objections that the approach does not fit contemporary administrative law in a justifiable fashion.

### *A. Neoclassical Administrative Legal Doctrine*

Neoclassical administrative law, simply put, seeks to sharpen the line between law and policy in administrative law, with the consequence of increasing judicial responsibility on questions of law while decreasing it on matters policymaking discretion. Explicating neoclassical administrative law does not require one to work entirely from scratch. While it would be too much to say

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[108] The jurisprudentially inclined will see a parallel with Ronald Dworkin's "fit and justify" method, in which interpreter identifies the legal principles that pass a threshold level of fit with the existing corpus of law *and* make that body of law the best in can be. See Ronald Dworkin, Law's Empire (1986). One does not have to embrace Dworkin's more ambitious argument that all law is interpretative to find this method useful. See, e.g., Adrian Vermeule, Law's Abnegation at __ (using a Dworkinian approach to defend his theory of administrative law); John Finnis, On Reason and Authority in Law's Empire, 6 L. & Phil. 357, 457 (1987) (arguing that Dworkin "promotes reflective understanding of the practical argumentation" in legal discourse while "overestimate[ing] practical reason's power to identify options as the best and the right.").

[109] See Jeffrey A. Pojanowski & Kevin C. Walsh, Enduring Originalism, 105 Geo. L.J. 97 110–12 (2016) (discussing the limits of purely descriptive accounts of law); John Finnis, Natural Law and Natural Rights, Chapter 1 (same).

neoclassicism is a full-fledged movement in administrative law, there is a group of scholars and jurists whose work demonstrates this tendency. I will be drawing on their work but also, when necessary, will fill in gaps by appealing to more general guiding principles. These conclusions are tentative and, for reasons discussed below, may depend on excavating the original law created by the Administrative Procedure Act and subsequent legislation.

A quick note on doctrinal implications. The following subsection explains what neoclassical administrative law would recommend were its practitioners operating on a clean slate. A number of its conclusions clash with contemporary administrative law doctrine. As with any critical approach, there will be questions about the proper extent of reform and the pull stare decisis, but presently I will bracket those matters.

1. Review of Legal Interpretations – Substance.

The neoclassical administrative lawyer, like the skeptic, rejects deference to agency interpretations of substantive law. The neoclassicist would replace deference on questions of law with either de novo review or something like *Skidmore* deference.[110] Although the Court has not heeded calls to overrule *Chevron* or *Auer* deference, the neoclassicist can share the skeptics' enthusiasm about recent decisionmaking at the Court. An expanded Step Zero and increasingly strong Step One has blunted both of those deference doctrines' impacts.[111] It has been more than three years since the Supreme Court last invoked *Chevron* to defer to an agency's interpretation of a statute.[112] *Auer* deference has come under more withering criticism from a number of Justices and the Court recently granted certiorari on whether it should abandon the doctrine entirely.[113]

Like the skeptic, the neoclassicist may draw on constitutional arguments about the judicial power or due process and (especially) traditional conceptions of the judicial duty. What distinguishes the neoclassicists, however, is an emphasis on legislation governing judicial review. A neoclassicist is more likely to invoke the original understanding of Administrative Procedure Act and the

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[110] As a practical matter, even *de novo* review is likely to blur in something like *Skidmore* deference, as reviewing judges are likely to confer at least some mild epistemic authority on expert agencies, much in the way, for example, the Tenth Circuit likely treats Second Circuit opinions on securities litigation with more respect than that of a district judge in New Mexico.

[111] See, e.g., King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (holding that *Chevron* doctrine does not apply to a "question of deep 'economic and political significance' that is central to this statutory scheme"); Wisconsin Central Ltd. v. United States, 138 S.Ct. 2067, 2074 (2018) ("But in light of all the textual and structural clues before us, we think it's clear enough that the term "money" excludes "stock," leaving no ambiguity for the agency to fill."); Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (placing limits on when *Auer* deference applies.

[112] See Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2136 (2016).

[113] See Kisor v. Wilkie, No. 18-15 (cert granted Dec. 10, 2018).

principles of judicial review it sought to codify. *Chevron* is wrong not because (or not *just* because) it departs from the general understanding of judicial duty, but because it departs from the particular duty to attend to additional, particular positive law on judicial review, namely the APA. Here we can invoke John Duffy's critique of *Chevron* as a product of administrative common law that contradicts positive law on judicial review entrenched in the APA.[114] Similarly, Aditya Bamzai's recent historical spadework challenges *Chevron*'s claim that the decision (and, implicitly, the APA) was adopting earlier judicial practice on judicial review. He argues that the deferential language in pre-APA decisions was a product of the mandamus posture in which many administrative challenges arose. In proceedings that, as a matter of *general* procedure did not call for heightened deference, pre-APA courts conducted a more searching review of administrative legal conclusions.[115] A neoclassicist need not reject all administrative common law, but when there is statutory law on the matter, the courts should do their best to discern and follow it.

For this reason, the neoclassicist will not be persuaded by the argument that deference comports with the judicial duty to say what the law is because the law tells them to defer.[116] To be sure, a neoclassicist sympathetic to Duffy's and Bamzai's arguments will also take seriously Professors Merrill and Watts' claim about original legislative drafting conventions indicating when Congress wants courts to defer to agency interpretations of law.[117] Probing that convention and reconciling it with a non-deferential APA are interesting, important projects for the neoclassicist to pursue, as is further work on the original understanding of the APA.[118] Both might offer reasons for deference and thus require the neoclassicist to confront the larger constitutional and jurisprudential questions about deference more squarely. Nevertheless, the neoclassicist will not accept the more generalized presumption of implicit congressional delegation of interpretive authority that many *Chevron* advocates deploy. Rather, they see this as a legal fiction delicately veiling a functionalism that dare not show its face.

A similar pattern follows on judicial deference to agency interpretations of regulations. The neoclassicist might be sympathetic to claims that such agency self-delegation violates separation of powers and that deference is a dereliction of judicial duty. But another line of attack appeals to the neoclassicist interested in descending from the heights of constitutional theory. There is strong evidence that *Seminole Rock*, which gave rise to *Auer* deference today, was not understood

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[114] John Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113 (1998).

[115] See Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L.J. 908 (2016).

[116] See Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1 (1983).

[117] See Merrill and Tongue-Watts, *supra* note __.

[118] For a recent argument that the original understanding is at least open to *Chevron* doctrine, see Cass R. Sunstein, *Chevron* as Law (forthcoming Geo. L.J. 2019).

as conferring general *Chevron*-like power to agencies.[119] In fact, it is plausible to read the case as an unremarkable application of *Skidmore*-type deference: when, as in *Seminole Rock*, an agency offers a virtually contemporaneous interpretation of a regulation it just authored, that interpretation will have power to persuade, especially when courts are more inclined toward original ntentionalism than they are today.[120] Tracking Duffy's and Bamzai's argument about *Chevron* deference, the neoclassicist can contend that it is plausible to read the APA as incorporating this approach (*Seminole Rock* was handed down just before the APA's enactment), which would cast *Auer*'s expansion of the doctrine as a counter-statutory exercise of administrative common law.

Implicit in this argument is the rejection of the functionalist justification of *Chevron*. This is grounded not only in conclusions about the APA, but a greater faith in the determinacy of legal materials in hard cases. This belief challenges *Chevron*'s legal realist premise that all interpretive uncertainty involves policy choices calling for political accountability and non-legal expertise.[121] This is not to say that every statutory provision will be tractable to standard lawyers' arguments. Congress passes statutes that insist agency action be "reasonable" or maintain an "adequate margin of safety." Unless such phrases are fixed terms of art, the neoclassicists would not insist that reviewing courts have the final say as a matter of legal interpretation. Indeed, they would say there is no interpretation to be done. Rather, they would file this question as one delegated to the agencies subject to arbitrary-and-capricious review.[122]

As a practical matter, judicial review of agency interpretations of law would resemble Justice Scalia's rigorous application of *Chevron* Step One[123] and the Supreme Court's penchant in recent years to sidestep deference by pronouncing statutes clear or, in the words of a recent Justice Gorsuch opinion, "clear

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[119] See Sanne Knudson and Amy Wildermuth, Unearthing the Lost History of *Seminole Rock*, 65 Emory L.J. 47 (2015).

[120] See Jeffrey A. Pojanowski, Revisiting *Seminole Rock*, 16 Geo. J. L. & Pub. Pol'y 87 (2018).

[121] See generally Cass R. Sunstein, Beyond *Marbury*: The Executive's Power to Say What the Law Is, 115 Yale L.J. 2580 (2006) (linking *Chevron* with the legal realist's rejection of interpretive formalism).

[122] This position is perhaps reconcilable with Sunstein and Solum's recent argument that *Chevron* could be understood as requiring deference only in the "construction zone" of the interpretation/construction distinction. See Lawrence B. Solum and Cass R. Sunstein, *Chevron* as Construction (Dec. 12, 2018) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300626). Formalists disagree about the interpretation/construction distinction and even those who embrace it may disagree about the breadth of the construction zone. Solum and Sunstein contend that deciding whether, as in *Chevron*, a "source" of pollution refers to an entire facility or any of its components is a question of construction. Id. at 10. Other formalist interpreters may limit "construction" to more open-ended terms like "reasonable" or "feasible." See Brett M. Kavanaugh, Fixing Statutory Intepretation, 129 Harv. L. Rev. 2118, 2153–54 (2016) (accepting deference for agency construction of those terms).

[123] Antonin Scalia, Judicial Deference to Agency Interpretations of Law, 1989 Duke LJ 511.

enough."[124] It would involve a very strong Step One in which the judicial interpreter does not cede matters to agencies when the formal legal materials point one way—even if the interpreter appreciates that there are plausible, if less strong, arguments pointing the other way. This Step One would be paired with a dissolution of Step Two into arbitrary and capricious review on matters that are simply not tractable to formalist craft. In other words, it simply takes "Step Two" outside the realm of "legal interpretation."[125] This reformulation of judicial review without *Chevron*, which I have explained in greater length elsewhere,[126] also addresses the concerns of more recent judicial *Chevron* skeptics, such as Justice Gorsuch and Judge Kavanaugh, both of whom bristle at deferring on lawyers' questions without also insisting that judicial review doctrine should plunge courts into the weeds of regulatory policymaking.[127]

In short, the neoclassical approach to judicial review of legal questions divvies up what conventional administrative law deems "Step Two" into domains of (1) de novo or *Skidmore* review and (2) deferential review of policymaking. The neoclassicist extends the domain of "Step One" to absorb legal questions upon which reasonable parties could disagree, while shifting over to the domain of arbitrary-and-capricious review questions unamenable to formal legal craft. As noted, an approach like this resonates with recent critics of *Chevron*, but is hardly something new under the sun. As John Dickinson noted nearly a century ago, this more searching review echoes Lord Coke's bid to place the Crown under the supremacy of law.[128] Somewhat less archaically, the neoclassicist approach recalls Chief Justice Hughes' position in *Crowell v. Benson* on review of legal questions,[129] and likely is closer than contemporary doctrine to the original understanding of the Administrative Procedure Act.[130]

2. Review of Legal Interpretations – Procedure.

As with judicial review of questions of substantive law, a neoclassical approach to agencies' conclusions about their procedure would not be

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[124] Wisconsin Central Limited v. United States, 585 U.S. __, __ (2018). The Supreme Court has not reached Step Two since June 2016. See Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2136 (2016).

[125] See Randy J. Kozel and Jeffrey A. Pojanowski, Administrative Change, 59 UCLA L. Rev. 112 (2011) (drawing this distinction between "expository" (truly interpretive) and "prescriptive" (policy-based) reasoning, while recognizing its tension with received *Chevron* theory).

[126] See Jeffrey A. Pojanowski, Without Deference, 81 Mo. L. Rev. 1075 (2017).

[127] See Gutierrez-Brizulea v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring); Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150–54 (2016) (raising concerns about *Chevron* and suggesting limitations to the doctrine).

[128] See John Dickinson, Administrative Justice and the Supremacy of Law in the United States, 75, 76–104 (1927) (tracing the English historical roots of "the demand that the determination of rights should in the last analysis be a matter for the courts").

[129] Crowell v. Benson, 285 U.S. 22 (1932).

[130] Bamzai, supra note __, at 987; accord John Dickinson Administrative Procedure Act, Scope and of Broader Judicial Review, 33 Am. Bar. Ass'n J. 434 (1947).

deferential and would focus on the original law laid down by the APA and other organic statutes. Sometimes this will affirm current doctrine or even suggest agencies have more discretion than current law affords. In other circumstances, an accurate understanding procedural law may point to less freedom than courts give agencies today.

On the side of upholding existing doctrine, the neoclassicist's commitments to the original APA will likely support the Court's rulings in *Vermont Yankee* and *Perez v. Mortgage Bankers*. The standard textualist arguments about legislation striking a compromise and encouraging interpreters to respect the means the legislature chose to advance its ends[131] can readily apply to the intricate procedural scheme Congress chose when crafted the APA.[132] Indeed, *Vermont Yankee* emphasizes this point precisely when explaining that the procedural choices Congress selected are, for the courts at least, a ceiling and not a floor upon which the courts should stack additional stories.

Although courts have mostly confined *Vermont Yankee*'s principle to comment procedures in informal rulemaking, this line of argument could extend to other domains. For example, Justices Thomas and Scalia, who offered the harshest criticism of *Auer* deference in *Perez v. Mortgage Bankers Association*, had no problem rejecting the D.C. Circuit's *Paralyzed Veterans* rule on *Vermont Yankee* grounds.[133] In fact, Justice Scalia's sole misgiving about this conclusion was that *Auer* allowed agencies to game the system by sequential issuing of interpretive rules. Nevertheless, he thought that was a problem with *Auer*, not a reason to pile procedural common law atop the APA.[134] For Justice Scalia, a return to the APA on both fronts—rejecting *Auer* deference and *Paralyzed Veterans*—would set things aright.[135]

Similarly, while on the D.C. Circuit, then-Judge Brett Kavanaugh objected to his court's insistence on bulking up rulemaking procedures in the teeth of *Vermont Yankee*.[136] He has contended that additional, judicially imposed requirements for notices of proposed rulemakings and statements of basis and

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131 See Frank. H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533 (1983); John F. Manning, Second-Generation Textualism, 98 Cal. L. Rev. 1287 (2010).

132 Cf. United State v. Fausto, 484 U.S. 439 (1988).

133 135 S.Ct. at 1211 (Scalia, J) ("I agree with the Court's decision, and all of its reasoning demonstrating the incompatibility of the D.C. Circuit's *Paralyzed Veterans* holding with the Administrative Procedure Act."); *id.* at 1213 (Thomas, J.) ("I concur in the Court's holding that the doctrine first announced in [*Paralyzed Veterans*] is inconsistent with the [APA] and must be rejected.").

134 135 S. Ct. at 1211–12.

135 Ibid.

136 Similarly, on the academic front, Jack Beermann rejects Chevron doctrine while also, along with Gary Lawson, calling for the courts to apply Vermont Yankee beyond the narrow context of the comment procedures in informal rulemaking. See Jack M. Beermann, End the Failed *Chevron* Experiment Now: How *Chevron* Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 779 (2009); Jack M. Beermann and Gary Lawson, Reprocessing *Vermont Yankee*, 75 Geo. Wash. L. Rev. 856 (2006).

purpose are unmoored from the APA's text and flout *Vermont Yankee*'s teaching that administrative common law should not upset the procedural balance Congress struck in that statute.[137] The work of scholars like Kathryn Kovacs supports his argument that the layers of administrative procedure courts impose on informal rulemaking are inconsistent with the APA.[138] But do not confuse Kavanaugh with an administrative supremacist. His recent judicial and scholarly writings have *also* raised questions about *Chevron*. Like Justice Scalia in *Perez*, Judge Kavanaugh demonstrates that serious judicial scrutiny on questions of law can run together with a more restrained review of administrative procedure when the positive law points toward such discretion.[139]

But the neoclassical approach to procedure would not always promise sweetness and light for agencies. It might cast doubt on the majority position in appellate courts that agencies merit *Chevron* deference on whether they must proceed through formal or informal adjudication.[140] Along the same lines, agencies would not receive *Auer* deference on the interpretations of their own procedural regulations. There is also a solid argument that *Florida East Coast Railway* incorrectly interpreted the original law of the APA on when agencies must engage in formal, trial-type rulemaking, as opposed to notice-and-comment rulemaking.[141] Upsetting that ruling would certainly bring a shock to the administrative system—one that the meta-law of stare decisis would have to take into account before any revision—but taking the original APA and its background law seriously could remove that argument from "off the wall" status.[142]

3. Review of Agency Policymaking

Neoclassical administrative law is more forgiving than the administrative skeptic or even the administrative pragmatist on review of agency policymaking. At risk of intertemporal anachronism, we could identify Justice Thomas as an avatar of this approach. In his later writings, he is deeply skeptical of judicial deference on findings of law. On the D.C. Circuit, however, he penned an opinion (joined by then-Judge Ginsburg) that gave agencies wide latitude to

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[137] See American Radio Relay League, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

[138] See Kathryn E. Kovacs, Rules About Rulemaking, 70 Admin. L. Rev. 515, 533–46 (2018).

[139] See USTA v. FCC, 855 F.3d 381, 418–26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (arguing that *Chevron* does not apply to major rules); Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150–54 (2016) (raising more general criticisms about *Chevron* doctrine).

[140] Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989).

[141] See Kent Barnett, How the Supreme Court Derailed Formal Rulemaking, 85 Geo. Wash. L. Rev. Arguendo 1 (2017).

[142] For an argument for why, as a general matter, the procedure itself is not off the wall, see Aaron Nielson, In Defense of Formal Rulemaking, 75 Ohio St. LJ 237 (2014).

engage in policy experimentation under uncertainty.[143] Similarly, then-Judge Kavanaugh warned against expanding "*State Farm*'s 'narrow' § 706 arbitrary-and-capricious review into a far more demanding test."[144] Under a neoclassical approach, arbitrary and capricious review would be closer to the rational basis test than the more vigorous applications of hard look review. And, notwithstanding then-Judge Kavanaugh's concerns about overreach, this more deferential posture may be closer to actual judicial practice in the appellate trenches, even if agency reversals in Supreme Court cases like *State Farm* are more salient in casebooks and doctrinal rhetoric.[145]

While this simultaneous rejection of *Chevron*/*Auer* and embrace of deference on policymaking may seem incongruous, the neoclassicist can square the circle. Deference on policy questions is the flip side of non-deference of legal questions. As explained above, rejecting *Chevron* deference disaggregates the inquiry formerly known as "Step Two" into (a) questions on which lawyers' arguments cut both ways such that it was hard to say the matter was clear, even if a reviewing judge thought one interpretation was better on balance than its rival and (b) cases in which there is no surface upon which traditional lawyers' tools can have purchase, such as commands that the agency be "reasonable" or act "in the public interest" when those phrases are not terms of art. Abandoning *Chevron* would eliminate the Step Two reasonableness inquiry for questions falling under category (a), while taking a more deferential stance to agencies under category (b), which are in fact arbitrary-and-capricious questions mislabeled as unclear questions of legal interpretation.[146]

The underlying premise here is that, while courts can and should make close calls about legal questions, they lack the capacity or accountability to do more than patrol the outer bounds of reasonableness when it comes to agency policymaking. In this respect, the neoclassicist shares the supremacists' judgment about the reach of judicial craft on policy choices while rejecting the supremacists' (and the pragmatists') doubts about the autonomy and determinacy of law within its own domain.

A further argument returns to the APA. There is reason to believe, though more work is needed, that arbitrary-and-capricious review under the APA was originally closer to rational basis review under constitutional law than contemporary hard-look review.[147] The standard "restated the scope of judicial

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[143] See Center for Highway Safety v. FHA, 956 F.2d 309 (D.C. Cir. 1992) (allowing agency to adopt private standard setting in the face of uncertainty).

[144] See American Radio Relay League v. FCC, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[145] See, e.g., David T. Zaring, Reasonable Agencies, 96 Va. L. Rev. 2317 (2010); Vermeule, [Law's Abnegation], ch. 4 and 5.

[146] See Jeffrey A. Pojanowski, Without Deference, 81 Mo. L. Rev. 1075 (2017).

[147] See Metzger [Administrative Common Law] at 1299–1300 (collecting evidence to this effect).

function in reviewing final agency action,"[148] which appears to have been more lenient than hard look.[149] In line with this understanding, early arbitrary-and-capricious cases applied standards very similar to rational basis review.[150] Rational basis-type language continued into the 1960s,[151] though it declined with the rise of hard-look review in the D.C. Circuit.[152] If this understanding is correct, the neoclassicist can rely on original, positive law to set the standard of review in addition to more general ideas about the judicial role. Such an approach defies the pragmatists' post-APA administrative common law *and* the skeptics' stance that such open-ended grants of administrative authority violate the non-delegation doctrine.

### *B. The Neoclassicist's Jurisprudential Commitments*

The previous subsection has pulled together a number of doctrinal and scholarly strands: (a) growing skepticism about legal deference; (b) doubts about procedural common law whether it favors the agency or not; and (c) and arguments that reviewing courts should stay their hand in reviewing agency policy judgments. This is admittedly a composite construction: the Supreme Court is practically less deferential on law than the D.C. Circuit, which in turn likely has a lighter touch on review of policy while chafing at the Supreme Court's warnings against procedural common law. Again, current administrative law is not in a tidy state.

But this composite sketched above is not like of tracing a theory based on cases appearing in odd-numbered volumes of the United States Reports. Rather, three commitments tie together neoclassical administrative law: (i) belief in the autonomy and determinacy of legal craft; (ii) the priority of original, positive law over judicial doctrine; and (iii) hesitance to engage in judicial deconstruction of

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[148] Attorney General's Manual 108 (citing Sen. Rep. p. 44 (Sen. Doc. p. 230); Senate Hearings (1941) pp. 1150, 1351, 1400, 1437). That said, one should take citations of the Manual with a grain of salt, for it is in some respects an advocacy document that sought to tilt judicial interpretation of the APA to the government's benefit. See George B. Shepard, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 Nw. U. L. Rev. 1557, 1682–83 (1996)

[149] See Raoul Berger, Administrative Arbitrariness and Judicial Review, 65 Colum. L. Rev. 55, 82 (1965) (arguing that under the original understanding "arbitrariness consists of action that is unreasonable under all circumstances").

[150] See, e.g., Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 695 (9th Cir. 1949); NLRB v. Minnesota Mining & Manufacturing Co., 179 F.2d 323 (8th Cir. 1950).

[151] See, e.g., Carlisle Paper Box Co. v. NLRB, 398 F.2d 1, 5 (3d Cir. 1968); Eastern Central Motor Carriers Association, Inc. v. United States, 239 F. Supp. 591 (D.D.C. 1965).

[152] The strength of the rational basis test is up for debate. For an argument that APA era rational basis review was stricter than *Williams v. Lee Optical* and thus roughly within the range of standard hard look review, see Bernick, APA Originalism, at __; but see Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 n.9 (rejecting the argument that "the arbitrary-and-capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause").

the administrative state through constitutional law. The jurisprudential foundations unearthed here are in many ways more recognizable than the disparate doctrinal positions they can underwrite. In recent years the Supreme Court's center of gravity has shifted in a formalist and traditionalist direction, while its modest constitutional holdings have not tracked its anxious rhetoric about the administrative state. Neoclassical administrative law may become the equilibrium resting point of a "faint-hearted" formalist Court.[153]

1. Autonomy of Law and Legal Reasoning

The neoclassical alternative resists mainstream administrative law's working assumption that challenging legal questions are inextricably intertwined with policymaking judgments. Its faith in the autonomy and determinacy of law is closer to the interpretive formalist perspective of classical common lawyers, whose approach administrative skeptic Philip Hamburger outlined in *Law and Judicial Duty*, as well as contemporary neoformalists like Professor Lawrence Solum.[154]

This is not to say the neoclassicist denies the existence of hard questions of legal interpretation. There will be questions in which arguments from statutory text, structure, canons, purpose, history, and the like point toward more than one reasonable answer, but the neoclassicist would maintain that choosing which one is stronger is more a question of lawyerly judgment than first-order policy preferences. The corollary of this belief in the autonomy of legal reasoning is the conclusion that it is generally inappropriate, or at least beyond the central case of judicial duty,[155] for courts to engage in complicated policymaking in the way that legislators or administrators do.[156]

These presuppositions about the autonomy of legal reasoning have implications for the kinds of interpretive tools the neoclassicists favor. The

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[153] Cf. Antonin Scalia, Originalism: The Lesser Evil, 89 U. Cinn. L. Rev. 849, 861 (1989) (describing himself as a "faint-hearted originalist").

[154] See, e.g., Lawrence B. Solum, The Positive Foundations of Formalism: False Necessity and Legal Realism, 127 Harv. L. Rev. 2464 (2014); Lawrence B. Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. Pa. J. Const. L. 155 (2006); Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. Chi. L. Rev. 462 (1987).

[155] This does not mean proper interpretation never requires repair to policymaking judgment. A statute could direct an interpreter to engage in such activity and, absent an alternative, authorized decisionmaker, a court would have to develop law in the gaps. Nevertheless, the further we move from judgment to will, the less comfortable the formalist is about the allocation of authority. This will have implications for judicial review of agency policymaking, when there *is* an alternative decisionmaker.

[156] The development of common law norms, when legitimate and necessary, also implicates normative judgment, especially on the margins or in cases of first instance. That said, even when judges engage in first-order reasoning as opposed to formal interpretation, there are important distinctions between their reasoning and straightforward policymaking. See John Finnis, The Fairy Tale's Moral, 115 Law Q. Rev. 170 (1999).

neoclassicist is more likely to see the text's original meaning, statutory context and structure, linguistic canons, and perhaps[157] historical intent as appropriate tools for interpretation, rather than normative canons or legislative purpose at a high level of generality.[158] Legal interpretation (as opposed to policymaking) will tend toward formalism and originalism. In turn, neoclassical administrative law will be skeptical of interpretive tools that require predictions about consequences or direct assessment of contemporary norms. The more consequences, purpose (especially at a high level of generality), and contemporary values enter the interpretive picture, the less tenable the distinction between law and policymaking.[159] For courts deploying those tools, *Chevron* deference would be more acceptable, if not inevitable, since there are strong arguments that agencies are better suited to "making" this law in the gaps rather than "finding" the better of the competing arguments.[160]

These considerations shed light on previous attempts to distinguish between judicial review of law and policy. In *Crowell v. Benson*,[161] the Hughes Court sought to draw such a sharp distinction, insisting on rigorous judicial review of questions of law and deference on agency policy decisions. As Vermeule has ably catalogued, that compromise collapsed over time.[162] He contends that this collapse was inevitable, but the neoclassicist offers an important qualification to that story. *Crowell*'s distinction between review of law and policy was unstable only so long as it rested on the interpretive antiformalism that dominated at the time of the New Deal and the subsequent Legal Process era. The neoclassicist's legal formalism, however, marks a return to the pre-legal realist thought that, while aware of the blurriness in the lines between making, executing, and interpreting law, nevertheless insisted that the division of these activities was coherent in theory and a salutary goal in practice.[163] To be sure, the tenability of

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[157] There are those who think legislative intent is not a myth *and* that it can at times provide rules of decision that can dictate results in a formalist fashion. See, e.g., Richard Ekins, The Nature of Legislative Intent (2012) (defending a formalist approach to intentionalism). Though a formalist intentionalist might also look to legislative intent at a low level of generality. See generally Richard Ekins, The Nature of Legislative Intent (2012); see also Harlan G. Cohen, Intentionalism Justice Scalia Could Love, 30 Const. Comm. 89 (2015) (noting affinities between Ekins' intentionalism, which is skeptical of legislative history, and traditional textualism).

[158] The question of what to do about normative or substantive canons is important here. To the extent a second-order "law of interpretation" structures the use and priority of normative canons, they might be able to enter the formalist's toolbox. To the extent they are little different than friends you pick out in a crowd, they either need to be excluded from the de novo inquiry or shunted into an agency-deferential arbitrary and capricious review where deference is, from the perspective of legal craft, a "doctrine of desperation," or at least a tie-breaker.

[159] See generally Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863 (1930).

[160] See Jeffrey A. Pojanowski, *Dunsmuir*: A View from South of the Border, 31 Can. J. Admin. L. & Practice 203, 204–05 (2018).

[161] 285 U.S. 22 (1932).

[162] See Vermeule, Law's Abnegation ar 25–37.

[163] See Jeffrey A. Pojanowski, Without Deference, 81 Mo. L. Rev. 1075, 1089–90 (2017).

such a classical approach to the legal craft in a post-Realist world is an important challenge neoclassical administrative lawyers must address.[164] But if it stands, the theory has better resources to patrol the line between law and policy than the strong purposivists who founded—and lost—the *Crowell v. Benson* regime.

2. The Priority of Original, Positive Law

A second feature that emerges is the neoclassicist's prioritization of original, positive law over judge-made doctrines. The neoclassicist takes the APA and other organic statutes seriously and is inclined to reject judicial doctrines that depart from legislative instructions on point. When combined with the neoclassicist's interpretive formalism, this leads to "APA originalism."[165] The neoclassicist will look to the original understanding of the APA and, in the event the APA prescribes concrete rules of decision, favor treating those instructions as fixed, enduring law, not a springboard for common law that contradicts that entrenched understanding.[166]

This is not to say that neoclassical administrative law views all administrative common law as inherently suspect. Positive law has priority, not exclusivity. Administrative common law might exist as a freestanding rule of decision in the absence of legislation on point[167] and it can work as a backdrop that informs the contours of codified administrative law.[168] In fact, the neoclassicist understanding of what the APA requires for judicial review of legal questions may be informed by the background administrative common law of review that Congress incorporated in the statute upon enactment.[169] In this respect, the neoclassicist approach to the APA resembles "original methods" or "original law" approaches to constitutional originalism.[170]

Recognition of the hierarchy of statutory law over judicial doctrine, not skepticism about legal craft, motivates the neoclassicists' closer attention to the

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[164] See Part III infra.

[165] For a thorough and thoughtful defense of this position, see Evan D. Bernick, Envisioning Administrative Procedure Act Originalism, 70 Admin. L. Rev. __ (forthcoming 2018) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184813); see also Aditya Bamzai, The 'Administrative Process' in the 1940's Court, *3 (coining phrase "APA originalism.")(available at https://www.hoover.org/sites/default /files/pages/docs/ bamzai__ admin_in_the_1940s_court_.pdf).

[166] For a normative defense of this approach in the constitutional setting, see Jeffrey A. Pojanowski and Kevin C. Walsh, Enduring Originalism, 105 Geo. L.J. 97 (2016).

[167] Cf. Caleb Nelson, A Critical Guide to Erie Railroad Co. v. Tompkins, 54 Wm. & Mary L. Rev. 921 (2013) (discussing how under the pre-*Erie* framework general law existed but could be displaced or further specified by enacted law).

[168] Cf. Stephen E. Sachs, Constitutional Backdrops, 80 Geo. Wash. L. Rev. 1813 (2012).

[169] Bamzai at 991–95 (review of statutory interpretation); Pojanowski [Revisitng Seminole Rock] at 98 (review of regulatory interpretation).

[170] Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J. L. & Pub. Pol'y 817 (2015); John O. McGinnis & Michael B. Rappaport, Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction, 103 Nw. L. Rev. 751 (2009).

original APA or other legislation on procedure and judicial review. It is the neoclassicists' faith in interpretation that gives them confidence that an (often open-ended) statute like the APA can offer interpretive guidance. Therefore, these two commitments to legal craft and original positive law are not only compatible, but mutually reinforcing. But just as "original law" or "original methods" originalism in constitutional law is distinct from living or common law constitutionalism, neoclassical administrative law is skeptical of judicial doctrine that contravenes the original law laid down in the APA or other governing organic statutes.

3. Constitutional Modesty

It is possible that an originalist approach to our original Constitution condemns much of the contemporary administrative state, APA and all, to the dustbin of 18th Century history. Hence, the administrative skeptics, who share many of the neoclassicists' interpretive commitments, call for the revival of the non-delegation doctrine, question the legitimacy of administrative adjudication, condemn independent agencies and insulated administrative law judges, and launch constitutional arguments against *Chevron* and *Auer* deference.

The neoclassical approach, however, turns down the constitutional temperature. It is more resolutely focused on reforming ordinary administrative law doctrine in light of classical legal thought while accepting as a given a legal order that may be difficult to square with the classical understanding of our original Constitution. Although the Supreme Court has turned up the heat on deference doctrines and curtailed common law encrustations on administrative procedure in recent years, it has dodged[171] or rejected[172] non-delegation challenges, and its separation-of-powers interventions have been weak on practical consequences, even if they are occasionally strong on rhetoric.[173] This tendency to avoid large-scale constitutional engagement with the administrative state is what puts the "neo" in neoclassicism. Whether this third facet is something we can square with the first two commitments is another challenge for the neoclassicist.[174]

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[171] See Department of Transportation v. Association of American Railroads, 135 S.Ct. 1225 (2015) (avoiding question of delegation to a private entity by holding that Amtrak is a governmental body for regulatory purposes).

[172] Whitman v. American Trucking Assns., Inc., 531 U.S. 457 (2001).

[173] See FEF v. PCAOB, 561 U.S. 477 (2010) (finding double layer of for-cause removal for Board members unconstitutional while leaving in place for-cause protections of supervising SEC Commissioners); Lucia v. SEC, 138 S.Ct. 2044 (2018) (narrowly holding that an SEC ALJ is an Officer of the United States and therefore unconstitutionally appointed under precedent law, yet avoiding the question of for-cause removal).

[174] See Part III.C, infra.

### *C. The Neoclassical Vision of Public Law*

As in Section I, we can map this doctrinal approach and its presuppositions onto the categories of Diceyan constitutionalism. Neoclassical administrative law recapitulates the Diceyan dichotomy in which courts are supreme in finding or identifying the law but defer to the political branches in the formulation and enactment of that law. This classicism, however, comes with a twist that justifies the *neo* prefix.

First, the classical dimension. Neoclassical administrative law follows Dicey's insistence on judicial responsibility for the rule of law by rejecting deference to agency interpretations of ordinary substantive and procedural law. In interpreting organic statutes, procedural legislation, or administrative regulations with the force of law, courts have the final say without deference. As noted above, this orientation implies a formalist approach to statutory interpretation, since it presupposes a sharper line between legal judgment and lawmaking will. Strongly purposive or dynamic approaches to interpretation directly challenge that line in a way that textualist or more formal flavors of intentionalism do not. For Dicey, as for Blackstone, the courts are the oracles of the law.

Neoclassical administrative law also echoes the Diceyan principle of legislative supremacy, in which courts are loath to question the political branches' discretionary lawmaking choices. Neoclassical administrative law's constitutional modesty accepts Congress's choice to confer policymaking discretion upon agencies. Furthermore, the neoclassicist's skepticism of hard-look review recognizes a form of delegated legislative supremacy. Such thin rationality review acknowledges that agencies have been given sovereign authority to exercise discretion so long as their choices do not countermand the positive law that frames their ambit of power.

The twist here has two interrelated aspects. First, and most obviously, legislative supremacy here pertains not only to Congress but also to the administrative agencies that receive delegated power from that supreme legislature. Whereas the classical Diceyan picture excludes as a conceptual matter discretionary authority outside the supreme legislature, neoclassical administrative law recognizes the innovation of delegated legislative power. It respects exercises of administrative lawmaking within the ambit of the agency's discretion because the law recognizes that the superior legislature gave the inferior agencies this power and, even though agencies are inferior to legislatures, it is not the office of the courts to exercise legislative will.

Such deference is also consistent with judicial supremacy on questions of law. An agency's lawmaking discretion does not extend to overstepping the authority the legislature has conferred on it or the positive law the agency has legislated for itself. This is not to reintroduce the language of "jurisdictional"

exceptions to deference,[175] but rather to recognize that the scope of the agency's authority is a question of law and, under the classical Diceyan perspective, a question for the court to decide. The scope may be broad, such as requiring an agency to act "in the public interest," and in those cases there may be very little law to apply. But when the legislative instructions to the agency are more amenable to formal, lawyerly argument, such as whether tobacco is a drug,[176] if a "source" of pollution refers to a smokestack or the facility as a whole,[177] or whether the National Labor Relations Act overrides the Federal Arbitration Act's solicitude for arbitration,[178] the agency cannot expand or narrow its authority beyond the court's best interpretation of what the legislature gave them.

The second, related aspect of the neoclassical twist pertains to constitutional law. Unlike Dicey's England, the United States has an entrenched, written constitution. As noted, it is possible, indeed likely, that the formalist approaches to legal interpretation favored by neoclassical theorists could lead a court to conclude that the original Constitution precludes the delegation of legislative and procedural discretion to administrative agencies. This is not a conceptual objection; one can imagine a constitution that authorizes the legislature to delegate limitless power to agencies. Rather, the objection pertains to the actual, positive law constituting the powers our government's separated branches and the limits thereof. Because of our particular, original Constitution, the neoclassical administrative lawyer's accommodation of legislative supremacy may collide with her interpretive formalism and commitment to the rule of law.

Whether this tension is fatal to neoclassical administrative law will be discussed below. In the meantime, it is worth comparing neoclassical administrative law's reconciliation of the two Diceyan principles with its competitors'. Unlike the administrative pragmatist's hybridization, which subjects administrative lawmaking to hard-look review and imposes moderate judicial scrutiny on legal questions, neoclassical administrative law distinguishes and institutionally separates legislative supremacy and rule of law. Unlike supremacism, which marginalizes Diceyan rule of law through courts, and unlike skepticism, which rejects the possibility of administrative lawmaking power, the neoclassical approach maintains a place for both principles in administrative governance. In short, we see classical Diceyan public law theory adapted and persisting in a new regulatory environment.

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[175] See City of Arlington v. F.C.C., 569 U.S. 290 (2013) (rejecting as incoherent a *Chevron* exception for questions of agencies' jurisdiction).

[176] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[177] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[178] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

## III. CHALLENGES AND PROSPECTS

Administrative law struggles to reconcile the competing principles of legislative supremacy and the rule of law. Like the pragmatist—and unlike the supremacist and skeptical approach—the neoclassicist refuses to subordinate either of the two basic principles. In contrast to the pragmatist, however, the neoclassicist endeavors to maintain a neater, more formal separation of powers within the context of modern governance.

Section II sketched the basic features of neoclassical administrative law and suggested how this approach to judicial review would play out on the ground. Thus far this Article captures a "mood," if not a movement, emerging in contemporary administrative law, and brings it forward for more systematic consideration. One could do so to condemn such a nascent approach before it takes hold, but that is not my intention. Rather, the neoclassical approach is worth exploring and merits a place as a serious contender in administrative law and theory. This final section seeks to establish as much, working through of the neoclassical theory's basic presuppositions.

No theory of any interest lacks vulnerabilities, and this Section will begin to address challenges facing neoclassical administrative law. The defense will draw both on descriptive claims about existing doctrine and normative argument to show that the neoclassical approach has a substantial, and justified, foothold in existing administrative law. Even if critics remain unconvinced, understanding the neoclassicists' commitments and their departure from the alternatives illuminates how other approaches to judicial review negotiate our inherited commitments to legislative supremacy and the rule of law.

### *A. Autonomy of Law and Legal Reasoning*

Neoclassical administrative law adopts rigorous review on questions of law. It grounds that position on a formalist approach to interpretation that presumes a sharper line between law and policy than much administrative law and scholarship.[179] The objection to this stance, leveled in varying degrees by supremacists and pragmatists, is that the this faith in the autonomy of law is deluded, naïve, or at least excessive: any interesting question of legal interpretation gives rise to linguistic ambiguity; canons of interpretation are indeterminate; appeals to purpose require a value-laden choice regarding the level of generality; and choosing an interpretation based on whatever purpose you select requires expertise judges lack.[180]

If this is so, *Chevron* and *Auer* suit judicial review to a tee. Step One gives courts the power to resolve the litigated cases that are quite clear.[181] At the same

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[179] See Section II.B.1, supra.

[180] See generally, Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863 (1930).

[181] Radin, supra note __, at 886 ("Words are not crystals, as Mr. Justice Holmes has wisely and properly warned us, but they are after all not portmanteaus. We can not quite put anything we like into them.").

time, deference doctrines allow politically accountable agencies to make the value choices associated with sorting out dueling canons, identifying the level of generality of statutory or regulatory purpose, and making the consequentialist predictions necessary for implementing the chosen statutory policy. If this is so, more stringent review of legal questions is a misguided power grab by unaccountable, unequipped judges. Relatedly, the neoclassicist's rejection of administrative common law in favor of deriving rules of decision from the APA is implausible if we cannot extract determinative meaning from that statute.

One of the neoclassicists' challenges going forward is addressing and rebutting this realist skepticism at the jurisprudential level. Candidly, much here turns on interpretive method. The extent to which appeal to craft determinacy is plausible goes a long way toward deciding whether neoclassicism is promising or misguided. Furthermore, if interpretive formalism is inferior to strong purposivism or dynamic statutory interpretation, the case for deference is far stronger. Those methods explicitly, and to a greater degree, call for interpreters to consider policy consequences and evolving public values alongside, and sometimes above, formalist tools. The more those values infuse legal interpretation, the stronger the bite of arguments for deference based on political accountability and technical expertise.[182] It is possible to construct an argument for judicial supremacy on nonformalist interpretive premises—and many nonformalists do in the constitutional context—but it would be different than the one presented here.[183] Nevertheless, it is not surprising that the sharpest critics of judicial deference—Justices Thomas, Gorsuch, and Kavanaugh—and the Justice with the most aggressive Step One—the late Justice Scalia—are interpretive formalists.

Adjudicating these deeper questions of interpretive method and legal determinacy is a matter of a separate paper—or, indeed, research agenda—and given the influence of Legal Realism, the burden of persuasion may fall on the neoclassical administrative lawyer.[184] With that said, the neoclassicists' problems here are not theirs alone. Mainstream administrative law doctrine is only sensible with a belief in the autonomy and determinacy of law. At times, that leap of faith required in those contexts is even more daunting than the one neoclassical formalism presents.

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[182] See Jeffrey A. Pojanowski, *Dunsmuir*: A View from South of the Border, 31 Can. J. Admin. L. & Practice 203, 204–05 (2018).

[183] See Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 500–01 (1989) (challenging *Chevron* deference while rejecting the notion that "the shaping of public policy is so foreign to the judiciary's proper task that courts must avoid responsibility for resolving policy questions whenever possible"); cf. Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 377, 382 (1986) (arguing that judicial review should be more searching than strong-form *Chevron*, while nevertheless concluding that deference is sometimes merited).

[184] For a recent argument along these lines, see Stephen E. Sachs, Finding Law, __ Cal. L. Rev. __ (forthcoming 2019).

For example, ordinary doctrinal science finds it coherent to ask whether an agency pronouncement is a valid interpretive rule or illegitimate legislative rule in the guise of interpreting a regulation. Doing so requires a court to distinguish (i) mere interpretation of a norm from (ii) policymaking in the norm's linguistic gaps. Notwithstanding academic encouragement to abandon the hunt for that jurisprudential snipe,[185] the courts press on, albeit with some *Chevron*-induced embarrassment.[186]

The structure of *Chevron* itself rests on pre-Legal Realist assumptions that pragmatists and supremacists ostensibly reject. To stipulate that a question can be clear or not presupposes a stable measure with which to judge clarity. If that baseline is entirely or primarily policy-laden, it's not clear what Step One is for; if it's policy all the way down, let the politically accountable experts at the agency handle it. If courts can register clarity—declare the law—for Step One purposes without appealing to policy, however, it's not clear why the choice between two plausible readings along that same metric reduces to a policy choice, as opposed to legal judgment.[187] Because *Chevron* assumes Step One is not policy-laden, the doctrine's structure presupposes greater legal determinacy than it or its practitioners admit. On this ground, deference on legal questions should be a "doctrine of desperation"[188] when interpretive arguments are nearly in equipoise or simply do not provide enough material to work with, such as when statutes command agencies to operate "in the public interest." In the former context, informal consideration of the agency's view as an epistemic authority might be warranted,[189] whereas the latter is truly an arbitrary-and-capriciousness question mischaracterized as a legal one.

The pragmatists' more general embrace of administrative common law also a stronger belief in law's autonomy and determinacy than their *Chevron*-inflected Legal Realism lets on. Consider for comparison the stance of classical English common lawyers. Sensitive to the current texture of the law, they would extend, develop, and even modify its principles to accommodate developments in society and its norms. They would do so through a traditionalist method of "artificial reason" that would maintain coherence in legal doctrine and ensure the corpus juris was roughly congruent with the society's shared sense of

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[185] See, e.g., John F. Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893 (2004).

[186] See, e.g.., Syncor Int'l Corp. v. Shalala, 127 F.3d 90 (D.C. Cir. 1997); Am. Min. Cong. v. MSHA., 995 F.2d 1106 (D.C. Cir. 1993); Hoctor v. U.S. Dep't of Agric., 82 F.3d 165 (7th Cir. 1996) (Posner, J.).

[187] Cf. Breyer, supra note __, at 379 ("It is difficult, after having examined a legal question in depth with the object of deciding it correctly, to believe both that the agency's interpretation is legally wrong, *and* that its interpretation is reasonable.").

[188] INS v. Cardoza-Fonseca, 480 U.S. 421, 454, (1987) (Scalia, J. concurring).

[189] Cf. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

reasonableness.[190] It is questionable whether judges are as suited to this role in regulated industries as they are in contracts, so it is telling that much of the "common law" of administrative law today pertains to procedure and allocation of decisionmaking authority, matters which are more comfortably considered lawyers' questions.[191] Hence we argue about *Chevron*'s domain, what is required for a reasoned agency explanation, and when agencies must engage in rulemaking. And, like common lawyers, we do so with little attention to the text of the Administrative Procedure Act itself.

The pragmatist echoes the classical common lawyer's faith in the artificial reason of the law—a reason whose method gives its practitioners tools to develop law with only indirect engagement with intractable moral disputes. Yet it remains a tall task. Consider the pragmatist's inquiry whether *Chevron* applies to a particular question. After *Mead*, the question of whether Congress delegated interpretive authority to the agency is a complex reconstruction of "what a hypothetically 'reasonable' legislator would have wanted" in light of the statute's structure and purpose, the nature of the question, and assessments of comparative institutional competence.[192] Even before *Mead* and its progeny, critics recognized that such an inquiry would pose a "formidable, if not an impossible task."[193] The complexity and unpredictability of *Chevron* Step Zero doctrine in the wake of *Mead* confirms this worry. Deciding whether "source" refers to a single smokestack or an entire facility is simple by comparison.

Faith in the autonomy and determinacy of metalaw also surrounds judicial calibration of agency procedure. The administrative common lawyer who seeks to supplement the APA's provisions must strike the right balance between procedural rigor and policy flexibility while translating constitutional values into the administrative setting. Again, in comparison to the neoclassicist, who simply insists that courts can identify the most plausible interpretation of a statute or regulation, the pragmatist is taking a path that implies a more demanding faith in law.[194] If they lacked such faith, the more responsible course would be to development administrative common law in the direction of Vermuele's administrative supremacy, where, for good lawyerly reasons, law largely departs the field out of a recognition of its own limits.

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[190] See generally, Gerald J. Postema, Classical Common Law Jurisprudence, Part I, 2 Oxford U. Commonwealth L.J. 155 (2002); Gerald J. Postema, Classical Common Law Jurisprudence, Part II, 3 Oxford U. Commonwealth L.J. 1 (2003).

[191] Cf. William N. Eskridge Jr. and Philip P. Frickey, The Making of *The Legal Process*, 107 Harv. L. Rev. 2031, 2044 (1993) ("In a government of dispersed power and diverse views about substantive issues, frequently 'the substance of decision cannot be planned in advance in the form of rules and standards,' but 'the procedure of decision commonly can be.") (quoting Henry M. Hart Jr. and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 173 (1958)).

[192] Breyer, supra note __, at 370.

[193] Farina, supra note __, at 469.

[194] See Pojanowski, Neoclassical Administrative Law, The New Rambler (2016).

From this perspective, neoclassicism resembles a reformed or refined version of administrative pragmatism. Both the neoclassicist and the pragmatist believe there are statutory questions upon which the law runs out, hence the neoclassicist's distinction between legal questions (no or little deference) and arbitrary-and-capricious questions (rationality review). Compared to the pragmatist, however, the neoclassicist believes that interpretive tools can stretch much further before reaching the domain of policy: adjudicating disagreements over "lawyer's questions" (text, structure, canons, etc.) is not policy-laden in the way deciding whether a regulation is "in the public interest." On the other hand, the pragmatist has greater faith in the courts' capacity to develop administrative common law, while neoclassicists are more inclined to rely on the APA and other review statutes, which they (unsurprisingly) believe are more determinate than the pragmatist does. Either way, the lawyer's faith endures, even amid the bewildering complexities of regulatory state.

### *B. The Priority of Original, Positive Law*

Those convinced by the neoclassical commitment to law's autonomy may remained dissatisfied or uncertain about its prioritization of original, positive law like the APA and other procedural statutes over judge-made doctrines. The central concern here is that that privileging the positive law upsets the delicate balance courts have struck in updating administrative law to a landscape the APA's framers did not imagine.

For example, an administrative pragmatist will note that neoclassicism might dial back judicial review of policymaking choices and erase a number of agency procedural requirements. These changes could be substantial. The APA did not envision the explosion of informal rulemaking we have today, though this is in part a product of the Court's drive-by dispatching of formal rulemaking. In this context, the APA might require *some* minimal kind of explanation, but a pure neoclassical approach will not likely require heightened rulemaking procedures or the intense instantiations of hard-look review.[195] Similarly, although blackletter law gives mixed signals about the scrutiny with which courts should review agency policymaking decisions, the arbitrary-and-capricious test requires more than the rationality review courts afford ordinary regulatory legislation.

It is easy to understand why administrative common law has evolved toward hard-look review and bulked-up informal rulemaking. Agencies are at best indirectly accountable to voters, can change policy much easier than legislatures, and could very well do their jobs better with procedures more elaborate than the APA's bare bones suggest. At a deeper level, whether we phrase it terms of ensuring something like Fuller's internal morality of law takes root in the

[195] See Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 655 (1990) (grounding the reasoned explanation requirement in 5 USC § 706(2)(A)); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) (imposing substantial duties on agencies regarding notice of proposed rulemaking and explanation of its rulemaking decisions).

administrative state[196] or the creation of a *Rechtsstaat*,[197] the core concern is ensuring the rule of law extends to the operations of all officials, especially administrative officials exercising delegated state power.[198]

There are, of course, powerful counterarguments that judicial additions to the APA cause more harm than good as a matter of policy.[199] But this is not simply about first-order questions on the wisdom of *Portland Cement*'s procedural additions to informal rulemaking or the *Greater Boston Television/State Farm* approach to arbitrary-and-capricious review. The neoclassicist's commitment to legislative supremacy need not preclude administrative common law *a fortiori*, but it does require courts stay their hands when Congress has enacted positive law on a question. It is possible that the APA supports something like hard-look review; *PBGC v. LTV* may suggest as much in its ratification of *Overton Park*.[200] The neoclassicist, however, would contend that the inquiry should begin by seeking the best reading of the APA or the agency's governing statute, not asking whether common law developed to optimize the administrative policymaking process can be reconciled with a colorable reading of such legislation.

Thus, even if an originalist reading of the APA leads to less scrutiny of agency policymaking judgments, and therefore bad consequences, the neoclassicist would be willing to bite the bullet. The justifications for APA originalism tracks general defenses of originalism in other constitutional and statutory contexts, but those arguments are particularly strong here. As noted, much contemporary administrative common law is best understood as judicial attempts to instantiate the principles inherent in Lon Fuller's internal morality of law.[201] As Cass Sunstein and Adrian Vermeule have argued, however, there is threshold question about where and when those rule-of-law principles should supervene upon ordinary administrative law. Along with that comes questions of institutional competence to determine the scope of morality of administrative law's domain. These questions are particularly challenging because, as Fuller acknowledges, the internal morality of law is scalar and can never be perfectly realized along all its dimensions. Rather, the goal is to strike a workable compromise among competing values and ensure the legal system's inevitably imperfect attempts to achieve those aspirations do not fail completely.

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196 Cf. Lewans, [ALJD], at 184–223.

197 On Ernst Freund's unsuccessful bid to introduce the Continental notion of the *Rechtstaat* to American administrative law, see Daniel Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940 9–28 (2014).

198 Cf. Gillian Metzger and Kevin Stack, Internal Administrative Law, 115 Mich. L. Rev. 1239 (2017) (discussing the pervasiveness of legal norms within administrative agencies)

199 See, e.g., Kovacs, supra note __, at 544–65 (discussing the unintended negative consequences of administrative common law in this domain).

200 Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 655 (1990).

201 Sunstein and Vermeule, The Morality of Administrative Law (forthcoming Harvard Law Review).

The systemic complexity of implementing the internal morality of law recalls another Fullerian trope, namely polycentric problems and the limits of adjudicative forms of ordering to resolve those challenges.[202] Although a thoroughgoing common-law system of administrative procedure (like a common law constitution) is possible, Fullerian thinking points to the limits of making adjudication the *primary* source of legal ordering here.[203] Against the administrative supremacist, who might argue that managerial direction would be the best form for operationalizing the internal morality of law in the administrative state, the neoclassical administrative lawyer can contend that systemic, durable, legislated norms are both (a) more promising than judicial supervision through case-by-case adjudication and (b) more legitimate than managerial direction by the administrative entity whose operations we ideally would like to see harmonized with the rule of law.[204]

The APA, while imperfect and by no means gapless, offers such direction. People may reasonably differ on whether its particular provisions strike the optimal balance, but as with constitutions, creating a durable system of fair cooperation and coordination is not a matter of scientific precision. If the code is *good enough*, the moral benefits of fixed, enduring positive law recommend adhering to the original law struck by the statute's framers. Thus, the neoclassicist's commitment to original, positive law can be sympathetic to the pragmatists' desire to bring administrative governance into harmony with the internal morality of law. It simply differs with them as to means.[205] When Congress has legislated a systematic, durable framework for administrative governance under the rule of law, there should be a strong presumption in favor of fidelity to the proffered solution to that polycentric problem.

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[202] See Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978).

[203] See Kovacs, supra note __, at 544–47 ("Courts are note well positioned to adjust the benefits and burdens of the regulatory state."); id. at 544–46 (discussing those limits); Nicholas Bagley, The Puzzling Presumption of Reviewability, 127 Harv. L. Rev. 1285, 1330 (2014) (arguing that when statutes balance "a host of incommensurate values…courts have no constitutional authority to revise that judgment and no epistemic basis for thinking they can make a better one").

[204] See also Stack, Overcoming Dicey, at 310 ("[D]oes inviting courts to police [an] agency's compliance with the rule of law provide too great a practical temptation for them to reassert their roles as deciders?").

[205] For cognate arguments in the constitutional and human rights context, see generally Pojanowski and Walsh, Enduring Originalism, supra note __; G. Webber, P. Yowell, R. Ekins, M. Köpcke, F.J. Urbina, and B.W. Miller, Legislating Rights: Securing Human Rights through Legislation (2018); Gregoire Webber, The Negotiable Constitution: On the Limits of Rights (2009). Canadian scholar Matthew Lewans, who has offered an elegant argument that judicial review should ensure the internal morality of law thrives in administrative governance, see Lewans, [ALJD] at 184–223, does not confront the possibility that supreme legislation can or should strike that balance. Although a few individual provinces have codes of administrative procedure, there is no national equivalent of the APA in Canada.

Considerations along these lines also shed light on the transition costs that will accompany any return to a less-procedurally demanding APA regime. One can imagine the shock, if not uproar, if agencies were allowed to dispense of the paper hearing and give more minimalist explanations for their decisions in informal rulemkaing. (Or, on the converse, what would happen if agencies had a harder time avoiding formal rulemaking.) As with any revisionary argument, a court needs to take such transitions costs into account when deciding whether and how fast to return to what it understands as the best reading of the law. Further complicating the matter is the sense that the original, bare bones requirements, which emphasize adjudication and ignore complex rulemaking, are simply inadequate to modern governance. Do we turn to the original when the (purportedly illegitimate common law) strikes a better balance?

As a matter of first principles, the neoclassical commitment to legislative supremacy points to "yes" and blunts the normative argument against the old regime with three interlocking observations. First, as noted above, there is the complex, polycentric character of designing procedural regimes and the caution that judges not be too confident that new common law will strike the proper balance of competing commitments—a balance that itself is deeply normative and should be open to legislative input. It is strange for a polity that manages its civil procedure, criminal procedure, appellate procedure, and rules of evidence through legislatively approved codes should leave the procedures governing the lion's share of its governance to pre-modern common law procedure.

Second, and relatedly, in the event that a return to stripped-down procedures is a shock to the polity, it is not inconceivable that Congress could intervene and add to the rules agencies must follow or heighten the scrutiny of administrative policymaking. In fact, administrative common law might be a source of legislative passivity in the face of a changing statutory and regulatory landscape.[206] A Congress speaking to a neoclassical judiciary could have confidence that its legislative efforts would be worthwhile.[207] As a corollary, neoclassical administrative lawyers might also need to commit themselves to building a structure and process for the ongoing supervision and revision of the rules of administrative procedure, much like is the case with the other federal rules.

Third, it is also far from clear that agencies *always* want to act in a rash, arbitrary, or Delphic fashion. Agencies also want to gather information to make good policy choices, communicate with regulated parties and the public, and organize their actions in an orderly fashion. In doing so, they can develop internal legal norms and sensibilities that the originalist approach to the APA does not displace. In fact, while the story and its implications are complicated,

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[206] See Kovacs, supra note __ at 553 ("[T]he courts' willingness to make law has enabled Congress's inaction.").

[207] See id. at 553 ("Instead of making Congress's decisions for Congress, the courts should make decisions that inspire Congress to deliberate.").

there is some indication that post-APA judicial doctrines have undermined this rule-of-law sensibility within the agencies.[208]

### *C. Constitutional Modesty*

Although pragmatists and supremacists charge that neoclassicism's approach to legal interpretation is radical and old-timey, the administrative skeptic may charge that it is milquetoast and too new-fangled. It is all well and good to believe that courts can identify the best meaning of statutes and be originalist about the APA, the skeptic argues, but applying that legal craft to the original Constitution *also* entails that rational basis review of policymaking abandons judicial duty and enables unconstitutional delegations.[209] Neoclassical administrative law is in the odd position of being formalist, originalist—and reformist—in statutory interpretation while passive and pragmatic in constitutional interpretation. Is that a defensible position for anybody?

One plausible response would embrace divergence between statutory and constitutional interpretation. Professor Kevin Stack has argued, for example, that justifications for originalist textualism in statutory interpretation do not support a similar method in constitutional interpretation.[210] He contends that neither the (a) the majoritarian or rights-based conceptions of democracy nor the (b) democratic deliberation-forcing justifications for originalist textualism apply in constitutional interpretation as they do in the statutory context.[211] As a matter of theory, living constitutionalism can coexist comfortably with statutory formalism.

The differences in the positive law of regulatory legislation and the Constitution could also provide practical justifications for such divergence. Originalist, formalist legal craft may be more amenable to judicial application in the statutory context than in the constitutional domain. The particularities of regulatory legislation, including organic statutes and the APA, are more determinate, or are at least more susceptible to lawyers' arguments, than decisions over whether a delegation to an agency is simply "too big" or "too important" and therefore unconstitutional. In this respect, the neoclassical administrative lawyer's distinction between legal interpretation (active) and arbitrary-and-capricious review (passive) recapitulates at the level of

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[208] See Gillian Metzger and Kevin Stack, Internal Administrative Law, 115 Mich. L. Rev. 1239 (2017).

[209] Similar concerns are in play against deference to agency factfinding. See Evan D. Bernick, Is Judicial Deference to Agency Fact-Finding Unlawful?, 16 Geo. J. L. & Pub. Pol'y 27, 30 (2018) ("I conclude that judicial deference to agency fact-finding is unconstitutional in cases involving deprivations of what I refer to as core private rights to life, liberty, and property.")

[210] Kevin M. Stack, The Divergence of Constitutional and Statutory Interpretation, 75 Colo. L. Rev. 1, 4 (2004) (arguing that democractic values and the rule of law "do not require interpretive convergence, and further that these foundations in fact suggest that constitutional and statutory interpretation diverge").

[211] Id. at 4–5.

constitutional review. From the perspective of judicial capacity and role, the nondelegation doctrine is the constitutional equivalent of a legislative command that an agency must regulate "within the public interest." This perspective also makes sense of how a rigorous textualist like Justice Scalia pared away *Chevron* as a practical matter via a strong Step One but was unwilling to enforce the non-delegation doctrine in cases like *Whitman*.[212]

This defense of divergence is plausible but does strike me ultimately as unsatisfactory. The practical case is contingent: the defense erodes if, say, the APA is no less opaque than the Constitution, or if the original law of the Constitution is clear and emphatic in its condemnation of most delegations of authority to administrative agencies. At a theoretical level there is tension between the classical, conceptual defense of interpretive formalism—which is sympathetic to the notion that there is something that legal interpretation just is—and the pragmatic justification for divergent interpretation in the constitutional and statutory domain.[213] If the reader is satisfied with such an approach, I have carried my burden. Nevertheless, having flagged this possibility, it is worth pursuing others.

Another angle of response is to deny that there is, in fact, a conflict between originalist constitutional interpretation and the administrative state we have. Originalism, the argument goes, does not require rigorous enforcement of the nondelegation doctrine, permits judicial deference on questions of policy, and gives Congress wide latitude to calibrate agency procedure and structure. Perhaps one could make such arguments through Jack Balkin's framework originalism[214] or point to substantial delegations in the founding era.[215] It is not wise to reject that kind argument out of hand, especially given the rich and contested literature at play. Nevertheless, while some items on the administrative skeptics' bill of particulars may be consistent with originalism, it would be surprising if the original law of the Constitution dismissed every worry of importance. Therefore, for purposes of a more complete reply, I will assume that the administrative practice we have today clashes at some important point with the best interpretation of the original Constitution.

A related justification for constitutional modesty here would not rest on compatibility between the original Constitution and current practice, but rather the original understanding of the judicial role. Here we can take a page from Professor Steven Calabresi's originalist critique of libertarian originalist theories that require active judicial engagement.[216] Even if the original understanding of

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[212] Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001).

[213] Cf. Cass R. Sunstein, There is Nothing That Interpretation Just Is, 30 Const. Comment. 193 (2015).

[214] Jack Balkin, Living Originalism (2014).

[215] Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of Administrative Law (2012).

[216] Steven G. Calabresi, The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Barnett, 103 Mich. L. Rev. 1081 (2005).

the Constitution contradicts the administrative state we have, it also rejects rigorous judicial enforcement of those norms over and above the decisions of the political branches. The Constitution's text, structure, and history militate against a powerful role for the Court[217] and conferring such revisory power to the institution creates a sweeping countermajoritarian power to which the courts are not well-suited, and which the framers never contemplated.[218] Although Calabresi raises these worries in the context of policy-laden decisions about the reasonableness of substantive state incursions on liberty, inquiries about the soundness of an agency policy judgment or whether a congressional delegation to an agency is too large are similar. Formalist and vigorous judicial review of the ordinary positive law Congress and agencies laid down—and can more readily revise—does not raise similar problems.

Even if an understanding of the judicial role like Calabresi's is not the best interpretation of our Constitution's original law, a neoclassicist can draw on cognate concerns and justify her constitutional modesty by noting that theories of constitutional *interpretation* do not always track theories of constitutional *adjudication*.[219] Even originalists recognize that the best interpretation of a clause of the Constitution does necessarily entail that such an interpretation governs judicial review. A fleshed-out theory of adjudication will include a theory of stare decisis and related prudential considerations that caution against seamlessly and immediately translating the original law of the Constitution into the legal content of a particular decision. Drawing on Professor Lawrence Solum's recent discussion of originalism and precedent, for example, we can identify two reasons for constitutional passivity.[220]

First, to the extent that one is an originalist for rule-of-law reasons, disrupting the entire administrative law edifice runs headlong into those underlying justifications.[221] Blowing up the administrative state with Hamburgerian dynamite would hardly promote the "predictability, certainty, stability" or "uniformity"[222] that also inspire some originalists to adhere to the original Constitution. For that reason, transitions back toward the original Constitution need to be incremental, and the "length of the transition period would depend on the extensiveness of the changes required by originalism and

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[217] See id. at 1092 ("There is simply no way to read the bare bones of Article III…and conclude that the Framers meant the Court to be a powerful institution….Nor does the bare text of the Constitution suggest that the federal courts have a distinct role as defenders and protectors of the federal Constitution.").

[218] See id at 1094 (discussing countermajoritarian difficulty) and 1096–97 (noting the institutional constraints of the judiciary).

[219] On the distinction between theories of interpretation and full-fledged theories of adjudication, see Pojanowski and Walsh, [Enduring Originalism] at 149.

[220] Lawrence B. Solum, Originalist Theory and Precedent, __ Const. Comm. __ (forthcoming 2018).

[221] Solum, supare note __, at SSRN p. 9.

[222] Id. at 10.

judgments about the rapidity with which they could be effected without damage to the rule of law."[223] Given the breadth and depth of the administrative state's departure from the original Constitution, it is hardly unreasonable to urge caution on judicial reconstruction of the constitutional order.

Second, to the extent one is an originalist for reasons of popular sovereignty, neoclassical administrative law's constitutional modesty has much to offer—and does so in a way that can promote the values underlying the original constitutional order. The neoclassicist's hesitance about becoming a full-blown administrative skeptic could flow from a recognition that our country's political morality has shifted such that a judicially imposed return to the original settlement is presently impossible.[224] The judiciary lacks the institutional capital and perhaps even the capacity to turn the aircraft carrier around on a dime. This is not simply a matter of counting to five votes on the Court; it is also a question of preserving the judiciary's legitimacy in the eyes of a public that would view major restructuring of the constitutional regime as incomprehensible today.

Of course, it is fair to ask why the prudential and precedential arguments discouraging the neoclassical administrative lawyer from a constitutional "big bang" do not also apply to the statutory context. As noted, much of the modern administrative state is built around doctrinal presumptions about procedure and judicial review that an originalist approach to the APA would disturb. Thus, a neoclassicist could avoid a shock in ordinary administrative law by adopting a "this-far-and-no further" approach, respecting stare decisis on administrative common law but not creating further departures from positive administrative law. Alternatively, a neoclassical court could chip away at administrative common law to ease the transition. This may be advisable and could be required—stare decisis is part of the law as well.[225]

That said, there are good reasons for greater caution at the constitutional level. This may sound odd, given the standard argument that stare decisis has a weaker pull in the constitutional setting than with respect to statutes,[226] but further reflection supports inverting this conventional wisdom here. First, much of the judicial common law governing judicial review and administrative procedure is so loosely tethered to the text of the relevant statutes that it is hard

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[223] Id. at 11.

[224] See Bruce Frohnen and George Carey, Constitutional Morality and the Rise of Quasi-Law (2016); cf. Michael W. McConnell, The Right to Die and the Jurisprudence of Tradition, 1997 Utah L. Rev. 665 (1997).

[225] See Bernick [Envisioning Administrative Procedure Act Originalism], at 29–30 (discussing the role of precedent in implementing APA originalism).

[226] See Payne v. Tennessee, 501 U.S. 808, 828 (stating that stare decisis more flexible "in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (Brandeis, J., dissenting)); Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (observing that stare decisis has "special force" in the statutory context).

to say statutory stare decisis comes into play at all.[227] Second, there are powerful arguments for giving interpretive methodologies like *Chevron* deference stare decisis effect.[228]

Beyond those considerations, the effects of departing from stare decisis in the statutory context here are less dramatic than an originalist rejection of large portions of the administrative state. If the original APA requires courts to trim back an agency's obligation to provide fulsome notices and responses to comments in rulemaking, that would be a sharp change from current practice. It would, however, be less destabilizing than a robust revival of the nondelegation doctrine, restriction of the commerce power, or requiring that large swaths of administrative adjudication to flow through Article III courts. Moreover, whether trimming back rulemaking procedure is good[229] or bad,[230] Congress has the ability to correct course there in a way it cannot if the Supreme Court ruled familiar features of the administrative state unconstitutional. There's congressional gridlock, and there's constitutional amendments—or, more realistically, efforts to control the White House and Senate so as to appoint non-originalist Supreme Court justices, thus adding administrative law as yet another battlefield in the confirmation wars consuming our political energy. In any event, Congressional action on administrative procedure here would be welcome in any event for, as noted above, the complexity, normative tradeoffs, and need for systematicity involved in developing procedural systems suggests the superiority of legislation over common law in setting the agenda in this domain. [231]

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Beyond ordinary stare decisis, the neoclassicist's constitutional modesty may simply reflect a deeper sense that, at least for now, basic features of our constitutional order are simply incapable of judicial revision. As defenders and critics of the administrative state will agree, the development and rise of the Fourth Branch was a three-branch enterprise. Even if the original constitutional

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[227] See Metzger [Administrative Common Law], at 1311 ("Notably, however, the statutory tether for administrative common law is often loose and quite attenuated from doctrinal substance."); but see Flood v. Kuhn, 407 U.S. 258, 283–84 (1972) (refusing to overturn major league baseball's antitrust exemption in the face of congressional acquiescence).

[228] See id.; Evan J. Criddle and Glen Staszewski, Against Methodological Stare Decisis, 102 Geo. L.J. 1573 (2014); but see Abbe R. Gluck, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism, 119 Yale L.J. 1750 (2010).

[229] See Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 Admin L. Rev. 59 (1995) (describing the current state of bulked-up rulemaking as a problem in need of solving).

[230] See Dan Farber, Kavanaugh's Threat to Government and Transparency, Center for Progressive Reform CPRBlog, (July 19, 2018), available at https://tinyurl.com/ychwhtr5 (noting Judge Kavanaugh's APA originalist concurrence in *American Radio Relay League* would "give agencies much more ability to hide the ball").

[231] See Part III.B, supra.

norms have not been erased by intervening practice,[232] any durable return to that original law will also have to be a three-branch project, and one that depends on a change in the political culture. One way for the judiciary to play a principled and constructive role in that cultural return is to both insist on its supremacy on questions of ordinary law while recognizing the limits of its capacity to resolve questions of policy. With the constitutional nettle too sharp to grasp today, the courts can nevertheless demonstrate their proper, limited role in a system of separated powers on questions of statutory interpretation and regulatory policy.

Furthermore, by abstaining from the administrative common law that seeks to smooth the operation of the administrative state, the courts would make the consequences of other branches' choices clearer. When Congress writes blank legislative checks to agencies, it could no longer count on the judiciary to serve as moderating trustees. In that respect, a neoclassicist court could heighten the contradictions of our constitutional disorder while pointedly and publicly limiting itself to its original, proper role in ordinary judicial review. This may offer a better object lesson in constitutional restoration than trying to anathematize the administrative state one 5-4 vote at a time—a bid for a constitutional "big bang"[233] that is more likely to blow up in the face of its initiators than restore the constitutional order.

Yet even if neoclassical administrative law is not likely to bring us closer to the original order and even if—or especially if—one does not want to sign up for such a reform project, this approach has an appeal that draws deeply on our legal traditions. It contends that courts, not political officials, should have the last word on the meaning of law, that courts and officials should do their best to follow the procedures the legislature laid down, and that political officials, not courts, should make hard policy choices when there is no law to apply (as opposed to hard legal questions). It adapts the basic elements of Diceyan constitutionalism to the modern administrative state, respecting both the rule of law and political responsibility for lawmaking without collapsing the two into each other. For a legal formalist, neoclassical administrative law is the most faithful translation of traditional legal arrangements to the presently unmovable demands of modern governance.

## CONCLUSION

Classical legal thought understood public law as reducing to two principles associated with two institutions: the rule of law upheld by ordinary courts and supreme legislation promulgated by political accountable officials. Any vision of the administrative state more complex than rote application of clear legislative norms was an excluded by this constitutional logic. Yet there the administrative state is. So much argument in administrative law revolves around reconciling the

[232] See Pojanowski and Walsh, [Enduring Originalism] at 152–53.
[233] Cf. Solum, Originalist Theory and Precedent, at p. 10.

contemporary regulatory state with this classical definition, separation, and assignment of political powers.

Two different approaches resolve the dilemma by largely dissolving it. Resurgent skepticism of the administrative state seeks to solve the problem by reintroducing a classical framework that deprives agencies of law-interpreting and lawmaking power. The opposite, supremacist tack grants agencies law-interpreting power on any question of interest and recognize wide, discretionary power to make law; there, both ordinary courts and traditional legislatures retreat from a scene where interpretation and lawmaking merge. A third, pragmatic approach accommodates the administrative state to traditional concepts of rule of law and politically responsible government by giving agencies moderated and modulated power to interpret and make law. Like the supremacist, the pragmatist recognizes a fusion of interpretation and lawmaking power in administrative governance, but at the same time seeks to ensure that courts play a supervisory role in securing the rule of law in that new domain.

Neoclassical administrative law rearranges the pieces of this puzzle differently. At an ideal level, it has a greater faith in the separation of law and policy than its pragmatist and supremacist rivals, and it insists that ordinary courts be the ultimate arbiters of legal questions. Unlike classical skepticism of administrative power, neoclassicism expands its notion of political responsive legislative supremacy to include administrative agencies. In doing so it confers on agencies similar respect it would give to a legislature, provided that the authorizing legislature does not require more scrutiny as a matter of law. We can see glimmers of this approach in recent Supreme Court jurisprudence, which is increasingly formalist, more skeptical of legal deference and judicial common law in administrative procedure, and yet unwilling dismantle the administrative state wholesale. Neoclassical administrative law is the natural resting point for a legal formalist who accepts the necessity, or at least the ongoing existence, of the administrative state Congress has constructed.