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## NEOCLASSICAL ADMINISTRATIVE LAW

Jeffrey A. Pojanowski

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## NEOCLASSICAL ADMINISTRATIVE LAW

Jeffrey A. Pojanowski\*

*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, tend to give more leeway to agencies on questions of policy, and attend more closely to statutes governing administrative procedure than contemporary doctrine does. As a result, neoclassical administrative law finds a place for both legislative supremacy and the rule of law within the administrative state, without subordinating either of those central values to the other. Such an approach reconciles traditional notions of the judicial role and separation of powers within the administrative state that Congress has chosen to construct and provides a clearer, more appealing allocation of responsibilities between courts and agencies. 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 that would have courts make a substantial retreat in administrative law. It is “new” in that, unlike other more classical critiques of contemporary administrative law, it seeks to integrate those more formalist commitments with the administrative state we have today — and will have for the foreseeable future.*

### INTRODUCTION

It is never easy to theorize complex bodies of law, but the current state of administrative legal theory is particularly hard to capture.<sup>1</sup> 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

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\* Professor of Law, Notre Dame Law School. I am grateful for comments and questions from Roger Alford, Nick Bagley, Kent Barnett, Tricia Bellia, Evan Bernick, Sam Bray, Emily Bremer, Christian Burset, Bill Buzbee, Katherine Crocker, Barry Cushman, Nicole Garnett, Rick Garnett, Michael Herz, Kristin Hickman, Bruce Huber, Randy Kozel, Anita Krishnakumar, Ron Levin, John Manning, Jenn Mascott, Mark McKenna, Nina Mendelson, Aaron Nielson, Paul Noe, Jennifer Nou, Allison Orr Larsen, Nicholas Parrillo, Eloise Pasachoff, Zach Price, Connor Raso, Dan Rodriguez, Peter Shane, Glen Staszewski, Lee Strang, Peter Strauss, Cass Sunstein, Adrian Vermeule, Chris Walker, Adam White, and the participants at faculty workshops at Harvard Law School, Notre Dame Law School, and St. John’s University Law School. I am grateful for the opportunity to develop this paper with the help of conferences organized and hosted by the Center for the Study of the Administrative State and the University of Michigan Law School. Meredith Holland provided excellent research assistance. I’m especially grateful to Sarah Pojanowski.

<sup>1</sup> I expressed similar views on the current state of administrative law in my introduction to a recent symposium on administrative law hosted by the Notre Dame Law Review. See Jeffrey A. Pojanowski, *Introduction: Administrative Lawmaking in the Twenty-First Century*, 93 NOTRE DAME L. REV. 1415 (2018).

the capture era,<sup>2</sup> 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*,<sup>3</sup> administrative legal thought has been marked by an absence of any dominant tendency. More than anything, the current state of administrative law reflects a pragmatic compromise: carefully calibrated judicial deference on questions of law matched by similarly modulated freedom for agencies on questions of politics and policy. Respect for the limits of judicial capacity interweaves with concerns about agency slack or fecklessness, leading to a doctrinal fabric that is either 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. Aside from a few marginal voices condemning the entire project, administrative law and scholarship trundled along, disagreeing, for example, about when *Chevron*<sup>4</sup> deference should apply or precisely how much a reviewing court should demand from agencies in policymaking decisions.<sup>5</sup> 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 pragmatic balance that 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.<sup>6</sup>

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<sup>2</sup> See generally Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039 (1997) (describing capture theory and its rise in administrative law and scholarship).

<sup>3</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

<sup>4</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding that in a category of cases, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency”); see also *United States v. Mead Corp.*, 533 U.S. 218, 228–31 (2001) (identifying factors that indicate when *Chevron* deference applies).

<sup>5</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–44 (1983) (elaborating the scope of review under the “arbitrary and capricious” standard of the Administrative Procedure Act).

<sup>6</sup> ADRIAN VERMEULE, *LAW’S ABNEGATION* 22 (2016) (“Law has decided that it best serves its own ends by lying more or less quietly under the throne.”).

Hamburger, by contrast, sees contemporary doctrine propping up an unconstitutional Leviathan.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> Judges on the courts of appeals have followed suit.<sup>10</sup> Following up on a line of criticism voiced in concurring opinions,<sup>11</sup> the Court also

<sup>7</sup> See PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 7 (2014) ("Administrative power thus brings back to life three basic elements of absolute power. It is extralegal, suprallegal, and consolidated.").

<sup>8</sup> See Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 851 (2010) (arguing that in administrative law, conceptions of "law as discretionary command and law as reasoned resolution . . . are prominent and perhaps ineradicable in discussion of legal reasoning").

<sup>9</sup> Three current Justices, in addition to recently retired Justice Kennedy, have raised such questions. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (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); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (arguing *Chevron* is inconsistent with the Constitution and *Marbury v. Madison*); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (suggesting that the abdication of judicial power under *Chevron* could cause due process and equal protection concerns); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (claiming that "*Chevron* [itself] is an atextual invention by courts"). 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, 318–22 (2013) (Roberts, C.J., dissenting) (identifying cases where the Court has carefully scrutinized whether Congress has delegated interpretive authority). Justice Alito joined his dissent in *City of Arlington*. *Id.* at 312.

<sup>10</sup> See *Waterkeeper All. v. EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) ("An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name."); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (calling for the reconsideration of *Chevron*); 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); Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation: A Review of Richard A. Posner*, *The Federal Judiciary*, 116 MICH. L. REV. 819, 822 (2018) (book review) (criticizing "convoluted tiers of deference").

<sup>11</sup> 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. Env'tl. Def. Ctr.*, 568 U.S. 597, 616–21 (2013) (Scalia, J., concurring in part and dissenting in part); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67–69 (2011) (Scalia, J., concurring). Appellate judges have also questioned *Auer* deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that a reviewing court will uphold an agency's interpretation unless it is "plainly erroneous or inconsistent with the regulation" (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989))); see *United States v. Havis*, 907 F.3d

considered in *Kisor v. Wilkie*,<sup>12</sup> decided last Term, whether to overrule the longstanding doctrine of judicial deference to agencies' interpretations of their own regulations.<sup>13</sup> Justice Kagan cobbled together a majority to preserve such deference,<sup>14</sup> but only by reformulating the doctrine in a manner that, for most purposes, could render it practically indistinguishable from the approach recommended by its critics.<sup>15</sup>

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<sup>16</sup> (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.<sup>17</sup> One of then-Judge 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.<sup>18</sup>

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 Article proposes an alternative way forward.

It does not offer a wholesale defense of contemporary doctrine's 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. This approach accounts for, and embraces, much of the recent criticism of administrative law doctrine, while also explaining why those worries need not entail that courts

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439, 450 (6th Cir. 2018) (Thapar, J., concurring) (questioning *Auer* deference); *Egan*, 851 F.3d at 278 (Jordan, J., concurring) (calling for the reconsideration of *Auer*).

<sup>12</sup> 139 S. Ct. 2400 (2019).

<sup>13</sup> See *id.* at 2408.

<sup>14</sup> *Id.* at 2408.

<sup>15</sup> See *id.* at 2425 (Gorsuch, J., concurring in the judgment) ("The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that the Chief Justice claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled — in truth, zombified.")

<sup>16</sup> 5 U.S.C. §§ 551, 553–559, 701–706 (2018).

<sup>17</sup> *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206–10 (2015) (abrogating the holding in *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997)).

<sup>18</sup> See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, 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 *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (applying vigorous arbitrary and capricious review), and *Judulang v. Holder*, 565 U.S. 42, 52–53 (2011) (same), with *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (applying a lighter touch to arbitrary and capricious review).

police the details of regulatory policy or single-handedly undo the administrative state Congress has constructed. To make this showing, this Article pulls together strands of thought emerging in administrative law and scholarship and expands upon the pattern.<sup>19</sup> I call this alternative neoclassical administrative law.<sup>20</sup>

The neoclassical approach rejects judicial deference on legal questions while respecting the policy choices that agencies legislate in the discretionary space Congress has given them. In doing so, neoclassical administrative law finds a place for both legislative supremacy and the rule of law within the administrative state, without subordinating either of those central values to the other. Such an approach reconciles traditional notions of the judicial role and separation of powers within the administrative state that Congress has chosen to construct and provides a clearer, more appealing allocation of responsibilities between courts and agencies.

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 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 in review of agency policymaking than current doctrine suggests. 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 and its commitment to the

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<sup>19</sup> See generally, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) (offering a historical explanation of the development of judicial deference to executive interpretation); Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856 (2007) (arguing against judicial imposition of procedural requirements on informal rulemaking); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998) (criticizing judges who ignore statutory language that "under any interpretive theory, would be relevant to deciding the issue," *id.* at 152); Kavanaugh, *supra* note 9, at 2150–54 (questioning *Chevron* deference from formalist premises); Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515 (2018) (arguing that judicial interference in agency rulemaking conflicts with the text and history of the APA).

<sup>20</sup> I have used this term, albeit in a slightly different sense, in a short essay on the early twentieth-century scholar John Dickinson and his work's relationship to contemporary administrative law. See Jeffrey A. Pojanowski, *Neoclassical Administrative Common Law*, NEW RAMBLER (Sept. 26, 2016), <https://newramblerreview.com/book-reviews/law/neoclassical-administrative-common-law> [<https://perma.cc/QWP9-ZP37>]. The movement I describe here is different than the approach Professor 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. *Id.* at 594. 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's, which defends an approach along the lines of administrative pragmatism discussed below.

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separation of powers and supremacy of law. These commitments distinguish it from approaches to administrative law that would have reviewing courts beat a retreat to the margins. It is “new” in that, unlike other more classical, critical approaches 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 be 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 to questions of judicial review than does the current doctrine’s working pragmatism. This neoclassical 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. 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 to the division of labor between courts and agencies in the realms of law and policy, respectively.

The Article proceeds in three parts. *First*, I situate neoclassical administrative law by outlining three established, competing frameworks for administrative law. In doing so, I focus on those frameworks’ approaches to judicial review of questions of law and policy. *Second*, I introduce neoclassical administrative law. There I take a first pass at identifying its legal commitments and then explain how they play out along the same dimensions as the established frameworks. 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 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 sketch 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. Identifying these competing approaches to this triumvirate of questions will help situate the fourth, neoclassical alternative that has been 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, determination of who counts as an officer of the United States, the vesting of 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 when reviewing 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 questions of constitutional law directly.

#### A. *Jurisprudential Context*

Before identifying the competing approaches to judicial review of administrative action, it is first useful to situate these stances in terms of a broader jurisprudential context. A useful lens through which to view these rival approaches to American administrative law comes from, of all places, turn-of-the-twentieth-century British constitutional scholar Albert Venn Dicey. Dicey's *Introduction to the Study of the Law of the Constitution* was a seminal text for Commonwealth public lawyers and famously, or infamously, contrasted the rule of law in the common law tradition with what he saw as the despotism of Continental public law, exemplified by the French *droit administratif*.<sup>21</sup> Dicey's shadow extended to debates about administrative law in the United States. Leading "legalist" critics of the expanding administrative state in the first half of the twentieth century drew on Diceyan ideas to argue that common law courts were necessary to secure liberty and protect against arbitrary agency action.<sup>22</sup>

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<sup>21</sup> See A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 213 (Liberty Fund 1982) (1885) (arguing that the "scheme of administrative law — known to Frenchmen as *droit administratif* — . . . rests on ideas foreign to the fundamental assumptions of our English common law"). Subsequent scholars have since criticized Dicey's interpretation of French law. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 226 (1992).

<sup>22</sup> See HORWITZ, *supra* note 21, at 225–28 (explicating the Diceyan character of the "legalist" argument against the administrative state, particularly in the work of Professor Roscoe Pound); Daniel R. Ernst, *Dicey's Disciple on the D.C. Circuit: Judge Harold Stephens and Administrative Law Reform, 1933–1940*, 90 *GEO. L.J.* 787, 787–89 (2002) ("As did the eminent Oxford law professor Albert Venn Dicey, [opponent of specialized administrative tribunals] Stephens believed that freedom required that the actions of state officials be subject to effective review by 'the ordinary Courts of the land.'" *Id.* at 788–89 (quoting DICEY, *supra* note 21, at 110)).

Early modern debates about the rise and shape of the American administrative state offered a choice between a court-centric Diceyan vision and a progressive alternative that relied on the energy and expertise of agency policymakers. This argument is not of merely historical interest, however, and viewing Diceyan ideas only in terms of opposition to administrative governance obscures their enduring legacy. As insightful scholars have recently emphasized, arguments today 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.<sup>23</sup>

Professor Matthew Lewans has argued that Diceyan constitutional theory — which identifies (a) legislative supremacy and (b) the rule of law as its two foundational principles — excludes legitimate administrative authority “by stipulation.”<sup>24</sup> Under the Diceyan framework, ultimate legal authority flows from a supreme legislature<sup>25</sup> whose dictates courts authoritatively interpret, thereby preserving the rule of law.<sup>26</sup> In this 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.<sup>27</sup>

As neither ultimate lawmakers nor duly constituted courts, administrative agencies are the excluded middle under the logic of traditional, Diceyan constitutionalism.<sup>28</sup> Yet there they are. What to do about this, we shall see, is a persistent question underlying arguments today about the legitimacy of administrative governance and the relationship between courts and agencies.

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<sup>23</sup> See MATTHEW LEWANS, ADMINISTRATIVE LAW AND JUDICIAL DEFERENCE 14–41 (2016) (exploring and “rethinking” the role of the “Diceyan dialectic” in administrative law) [hereinafter LEWANS, ALJD]; 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.”).

<sup>24</sup> LEWANS, ALJD, *supra* note 23, at 15.

<sup>25</sup> In jurisdictions with entrenched, written constitutions like the United States, the legislature is not supreme, but we can readily adapt these jurisdictions to the Diceyan framework by identifying the constitution as ultimate positive law enacted by supreme lawmakers — the people who adopted it.

<sup>26</sup> See LEWANS, ALJD, *supra* note 23, at 14–15.

<sup>27</sup> *Id.* at 20.

<sup>28</sup> *Id.* (“Dicey’s conception of the rule of law . . . by definition . . . excludes the possibility that administrative institutions might wield legal authority under the constitution.”).

### B. 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 executive officials, who balance those norms' worth against other policy goals. Today, the work of Vermeule demonstrates this approach in almost platonic form.<sup>29</sup>

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 Professors Gillian Metzger<sup>30</sup> and Jon Michaels,<sup>31</sup> has antecedents in thinkers like James Landis.<sup>32</sup>

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.<sup>33</sup> This section explores such an approach to judicial review of questions of legal substance, procedure, and policymaking.

I. *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,

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<sup>29</sup> See generally VERMEULE, *supra* note 6 (arguing that the judiciary voluntarily ceded its power to the administrative state).

<sup>30</sup> See Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 77–95 (2017) (outlining the administrative state's functions and obligatoriness).

<sup>31</sup> See JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 179–201 (2017) (explaining how judicial review should “nudge[] and, if necessary, compel[] the coordinate branches to foster a well-functioning administrative separation of powers,” *id.* at 179).

<sup>32</sup> JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1 (1938) (championing the necessity of administrative governance); *id.* at 46 (explaining that independent “administrative power” should counterbalance a powerful executive).

<sup>33</sup> Cf. Metzger, *supra* note 30, at 4 (coining the term “anti-administrativism” to characterize the recent wave of critique of the administrative state's legitimacy).

the supremacist prescribes a “Step Zero”<sup>34</sup> similar to Justice Scalia’s dissent in *United States v. Mead Corp.*<sup>35</sup>: if the interpretation under review is the agency’s “authoritative interpretation” of the statute it administers, the *Chevron* doctrine should apply irrespective of the form in which it was proffered.<sup>36</sup> Once *Chevron* applies, the reviewing court’s scrutiny will not be searching. Unlike, say, Justice Scalia’s rigorous, textualist Step One,<sup>37</sup> 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.<sup>38</sup> 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 impression that the statute is susceptible to more than one interpretation should suffice.<sup>39</sup>

The administrative supremacist takes a similar tack on agencies’ interpretations of their own regulations. Whatever the original understanding or justifications of *Seminole Rock/Auer*<sup>40</sup> deference, 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.<sup>41</sup> Practical

<sup>34</sup> Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188, 190–91 (2006) (identifying as “Step Zero” the threshold question of whether *Chevron* deference applies).

<sup>35</sup> 533 U.S. 218 (2001).

<sup>36</sup> *Id.* at 257 (Scalia, J., dissenting).

<sup>37</sup> See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (noting that he “finds less often that the triggering requirement for *Chevron* deference exists”).

<sup>38</sup> See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 931 (2003) (suggesting that *Chevron* may allow agencies to adopt purposivist interpretations even if courts would adopt textualist ones); see also Metzger, *supra* note 30, at 40 (contending that the attack on deference “conflicts with broadly accepted legal realist insights about the frequency of legal indeterminacy, and thus of policymaking, in judicial decisionmaking”).

<sup>39</sup> See *Dole v. United Steelworkers*, 494 U.S. 26, 43 (1990) (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).

<sup>40</sup> *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); cf. Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47, 52 (2015) (using historical analysis to show “that the confidence with which courts reflexively apply *Seminole Rock* deference . . . is misplaced”); Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 GEO. J.L. & PUB. POL’Y 87, 88 (2018) [hereinafter Pojanowski, *Seminole Rock*] (“The doubts about *Auer* doctrine in its current form . . . flow from [the] generalization and extension of *Seminole Rock* beyond the interpretive framework in which it was originally at home.”).

<sup>41</sup> See Metzger, *supra* note 30, at 94 (arguing that when Congress has delegated interpretive authority, “a necessary consequence of acknowledging Congress’s power to delegate is that courts should defer to agencies’ exercise of their delegated authority”); Cass R. Sunstein & Adrian

worries about agency gamesmanship are unproven<sup>42</sup> and, largely, beside the point: if an agency seeks to use *Auer* to get around *Mead*'s restriction on *Chevron* deference, the agency is doing the good work of ameliorating the misguided<sup>43</sup> 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.<sup>44</sup> Michaels, a champion of the administrative state's legitimacy and necessity,<sup>45</sup> moreover, would calibrate deference doctrines to give agencies incentives to ensure participation of civil servants and public commentators in the policymaking process.<sup>46</sup>

2. *Review of 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 in one respect a legal question: the reviewing court is asking whether the agency correctly interpreted, say, 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.<sup>47</sup> Second, the complexity introduced by

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Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 306–07 (2017) (defending *Auer* on *Chevron*-like terms).

<sup>42</sup> See Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference's Effect on Agency Rules*, 119 COLUM. L. REV. 85, 92 (2019) (finding that "agencies did not measurably increase the vagueness of their rules in response to *Auer*").

<sup>43</sup> See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Actions*, 58 VAND. L. REV. 1443, 1445 (2005) ("Years have passed since *Mead* was decided, and we still lack a clear answer to the question when an agency is entitled to *Chevron* deference for procedures other than notice-and-comment rulemaking or formal adjudication."); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 349 (2003) ("In the trenches of the D.C. Circuit . . . *Mead*'s ambitious recasting of deference law has gone badly awry, for reasons that expose deficiencies in the decision itself.>").

<sup>44</sup> See Metzger, *supra* note 30, at 93–94 (acknowledging that deference rests on identifying a delegation).

<sup>45</sup> See MICHAELS, *supra* note 31, at 55–57 (criticizing apologetic defenses of the administrative state that mistakenly concede its constitutional legitimacy as dubious).

<sup>46</sup> *Id.* at 181–83 (proposing doctrines that encourage agencies to respect a separation of administrative powers).

<sup>47</sup> See, e.g., Melissa M. Berry, *Beyond Chevron's Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 545 (2007) ("[A]gency interpretations of their enabling statutes' procedural provisions should lie beyond '*Chevron*'s domain.'" (quoting Thomas

overlapping sources of procedural law makes these kinds of legal questions feel different from your standard *Chevron* or *Auer* problem — we carve off issues like *Chenery II*<sup>48</sup> questions into a different conceptual space even if, at some level, we are asking whether the agency's 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 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).<sup>49</sup>

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* rejected the notion that the APA provides (or that courts should craft) any substantial legal limits on the choice to proceed through rulemaking or adjudication.<sup>50</sup> 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.<sup>51</sup> Similarly, *Perez v. Mortgage Bankers Ass'n*<sup>52</sup> rejected the D.C. Circuit doctrine that required agencies to undertake notice-and-comment rulemaking before amending interpretive rules.<sup>53</sup> Less frequently mentioned, but in the same vein, is *United States v. Florida East Coast Railway Co.*'s<sup>54</sup> dispatching of agency obligations to engage in formal rulemaking,<sup>55</sup> as well as cases invoking *Chevron* to give agencies wide latitude in their choice to proceed through informal or formal adjudication.<sup>56</sup>

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W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001)); cf. William S. Jordan, III, *Chevron and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 282–320 (2009) (arguing that *Chevron* deference should not apply to an agency's determination of whether a statutory hearing requirement triggers the APA's formal adjudication procedures).

<sup>48</sup> SEC v. *Chenery Corp.*, 332 U.S. 194, 202–03 (1947) (granting agencies wide discretion to choose between rulemaking and adjudication in implementing their statutory mandates).

<sup>49</sup> FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); see GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 752–53 (6th ed. 2013) ("Modern procedural requirements are . . . driven largely by concerns about substantive review." *Id.* at 753.).

<sup>50</sup> *Chenery II*, 332 U.S. at 202–03.

<sup>51</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543–45 (1978).

<sup>52</sup> 135 S. Ct. 1199 (2015).

<sup>53</sup> *Id.* at 1206.

<sup>54</sup> 410 U.S. 224 (1973).

<sup>55</sup> *Id.* at 241–42 (holding that opportunity to present written submissions satisfies statutory criteria for a "hearing").

<sup>56</sup> See, e.g., *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1482 (D.C. Cir. 1989) (holding that under *Chevron*, "a statutory reference to a 'hearing' does not necessarily 'evinced[] an intention to require formal adjudicatory procedures"). The D.C. Circuit's position is the majority one. See, e.g.,

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.<sup>57</sup>

In these instances, the administrative supremacist is either saying that (a) the positive administrative law we have clearly does not significantly limit administrative discretion, or (b) if 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 that the APA is a compromise that hammers in place both a floor and a ceiling, at least from the perspective of judicial intervention.<sup>58</sup> The second line of argument, premised on the legal indeterminacy of the procedural materials, insists that judicial intervention in this realm is just as inappropriate as it is with substantive law. The tradeoffs inherent in deciding how many resources to spend on process in pursuit of a policy are no less value-laden than picking the proper point in the "policy space" created by ambiguity in substantive law.<sup>59</sup>

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*.<sup>60</sup> 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'

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*Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 18–19 (1st Cir. 2006) (rejecting prior presumption in favor of formal adjudication in light of *Chevron*).

<sup>57</sup> See Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1958 (2018) ("The problem is that while neither [*Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932),] nor [*United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954),] could be taken . . . to reflect the perceived morality of administrative law, neither decision offers a clear justification for the principle they announce. What source of law is involved?"; see also *id.* at 1960 (arguing that the attempt to ground *Arizona Grocery/Accardi* in the APA "may sound plausible, but it is not clearly convincing").

<sup>58</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 545–48 (1978).

<sup>59</sup> Some vocal defenders of the administrative state are more agnostic along these lines. 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 E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1354 (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.").

<sup>60</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co. (State Farm)*, 463 U.S. 29 (1983); see also Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 514 (1974).

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.<sup>61</sup>

As archetypes of this approach, we could choose Justice Marshall's dissent in the *Benzene* case,<sup>62</sup> where he would have given the agency wide latitude to operate under scientific uncertainty,<sup>63</sup> 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.<sup>64</sup> Accordingly, "thin" rationality review is the optimal role for courts.<sup>65</sup> 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.<sup>66</sup>

4. *Review of Agency Factfinding.* — Continuing with that theme, the administrative supremacist would be highly deferential to agency findings of fact. This would have two doctrinal implications. First, it would reject *Universal Camera Corp. v. NLRB*'s<sup>67</sup> insinuation that the APA requires a standard of review more searching than the jury standard.<sup>68</sup> In this respect administrative supremacy would support Justice Scalia's attempts in *Allentown Mack Sales & Service, Inc. v. NLRB*<sup>69</sup>

<sup>61</sup> See VERMEULE, *supra* note 6, at 126 ("Where uncertainty prevails, reasons run out, and an insatiable judicial demand for reasons merely inflicts harm on the legal system.")

<sup>62</sup> *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607 (1980).

<sup>63</sup> *Id.* at 690 (1980) (Marshall, J., dissenting); see also *Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 316 (D.C. Cir. 1992) (allowing agency to adopt private standard setting in the face of uncertainty).

<sup>64</sup> *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

<sup>65</sup> See Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1358 (2016) ("In contrast to thick rationality review, the thin version posits that agencies are (merely) obliged to make decisions *on the basis of reasons*. Second-or-higher order reasons may, in appropriate cases, satisfy that obligation.")

<sup>66</sup> See VERMEULE, *supra* note 6, at 157 ("[T]hin rationality review fits the bulk of the caselaw but not all of it."). As noted, some leading critics of anti-administrativists are less strident on this score. Metzger notes plausible arguments for and against hard look review. See Metzger, *supra* note 59, 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."). 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. MICHAELS, *supra* note 31, at 181–83. If the reviewing court is satisfied that the agency's procedural structure is "rivalrous, heterogeneous, and inclusive," it should give wide berth to the agency on the policy merits. *Id.* at 181; see also *id.* at 182–87.

<sup>67</sup> 340 U.S. 474 (1951).

<sup>68</sup> *Id.* at 487 (holding that the APA expresses a "mood" of scrutiny more searching than the jury standard).

<sup>69</sup> 522 U.S. 359 (1998).



to reframe the substantial evidence test along more deferential lines.<sup>70</sup> Second, it would reject as both unwise and unmanageable *Crowell v. Benson*'s<sup>71</sup> (failed) attempt to distinguish between review of ordinary factfinding under the jury standard and more searching review of jurisdictional and constitutional facts.<sup>72</sup> It would be jury standard all the way.

These positions would flow neatly from supremacist premises. Agencies have superior competence in finding facts<sup>73</sup> and de novo review frustrates the smooth operation of agencies.<sup>74</sup> At a jurisprudential level, because the line between law and fact is manipulable and policy-laden, expert and politically accountable agents should draw it, rather than courts.<sup>75</sup>

5. *Jurisprudential Orientation.* — The administrative supremacist's approach transports the restrained Thayerian approach of judicial review in constitutional law to the administrative context.<sup>76</sup> On questions of substantive law, the court is not to ask whether the agency has identified "the true construction" of the relevant law, but rather whether the agency "has acted unreasonably."<sup>77</sup> On procedure, the administrative supremacist carries the mantle of Justice Frankfurter (another committed Thayerian<sup>78</sup>), who would give agencies ample discretion to "adapt their decision-making processes to their statutory mandate."<sup>79</sup> On questions of policy, the administrative supremacist's 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 the judges, all men

<sup>70</sup> *Id.* at 377; see also *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 685–86 (D.C. Cir. 1984) (treating review of agency factfinding in informal proceedings as governed by a jury standard of substantial evidence).

<sup>71</sup> 285 U.S. 22 (1932).

<sup>72</sup> *Id.* at 57–58; VERMEULE, *supra* note 6, at 28–29, 214.

<sup>73</sup> See *Crowell*, 285 U.S. at 57 (discussing agencies' factfinding advantages).

<sup>74</sup> See DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940*, at 46, 48–49 (2014) (discussing progressive frustration with judicial scrutiny of factfinding).

<sup>75</sup> See Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 *FORDHAM L. REV.* 73, 73–74 (1950) (discussing the artificial nature of the law/fact distinction and its policy implications).

<sup>76</sup> See LEWANS, ALJD, *supra* note 23, at 94–103 (linking Thayer with deference in American administrative law); Stack, *supra* note 23, at 299 (identifying Vermeule as a Thayerian).

<sup>77</sup> Stack, *supra* note 23, at 295 (internal quotation marks omitted) (quoting James B. Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, *THE NATION*, Apr. 10, 1884, at 314).

<sup>78</sup> See LEWANS, ALJD, *supra* note 23, 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.'" (quoting FELIX FRANKFURTER *REMINISCES* 300 (Harlan B. Phillips ed., 1960))). Justice Frankfurter, however, was inclined to require more process when individual, non-economic liberty was at stake. *Id.* at 131 (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950)).

<sup>79</sup> LEWANS, ALJD, *supra* note 23, at 130 (citing *United States v. Morgan*, 313 U.S. 409 (1941)).

of sense and reflection in the community may perceive the repugnancy.<sup>80</sup> As with rationality review of legislation,<sup>81</sup> 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 in support of judicial intervention in administrative action, but with an eye toward ensuring proper separation of powers within the administrative state.<sup>82</sup> He does so, however, to restore the mid-twentieth-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 at the center of modern governance. Following Landis, whose work on internal separation of powers Michaels's resembles,<sup>83</sup> this second-generation Thayerian approach holds that once the proper administrative structures are in place, the courts should not stand in the way.<sup>84</sup>

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, one that values both (a) legislative supremacy and (b) the rule of law by courts. As neither ultimate lawmakers nor duly constituted courts, administrative agencies are the excluded

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<sup>80</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 142 (1893); see also *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (arguing courts should defer to a legislative choice unless “a rational and fair man necessarily would admit that [it] would infringe fundamental principles as they have been understood by the traditions of our people and our law”); LEWANS, ALJD, *supra* note 23, at 111.

<sup>81</sup> See *Williamson v. Lee Optical, Inc.*, 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.”).

<sup>82</sup> MICHAELS, *supra* note 31, at 179–201; see also Jeffrey A. Pojanowski, *Reconstructing an Administrative Republic*, 116 MICH. L. REV. 959, 963–64 (2018) (reviewing MICHAELS, *supra* note 31).

<sup>83</sup> See Pojanowski, *supra* note 82, at 966 (noting connections between Landis and Michaels); see also LANDIS, *supra* note 32, at 46 (explaining how “administrative power” should offset “executive power”); Metzger, *supra* note 30, at 78 (embracing Landis's vision of internal administrative separation of powers as providing legitimacy).

<sup>84</sup> Cf. LANDIS, *supra* note 32, at 155 (criticizing courts that have “assume[d] to themselves expertise in matters of industrial health, utility engineering, railroad management, even bread baking”).

middle under the logic of traditional, Diceyan constitutionalism.<sup>85</sup> Administrative supremacy overcomes this dilemma, and makes space for the administrative state, through two steps. First, it recognizes the authority of the legislature to delegate its lawmaking power to administrative agencies, thus nesting them under the legislative supremacy principle of Diceyan constitutionalism.<sup>86</sup> 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.<sup>87</sup> 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.

### C. *Administrative Skepticism*

At the opposite pole of administrative supremacy, a growing body of literature criticizes the extent and legitimacy of the administrative state. Skeptics of the administrative state argue that it is illegitimate under the original understanding of the Constitution and regularly violates the common law rights that the 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 Professors Philip Hamburger,<sup>88</sup> Gary Lawson,<sup>89</sup> Theodore Lowi,<sup>90</sup> and David Schoenbrod,<sup>91</sup> as well as Bruce Frohnen and George

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<sup>85</sup> LEWANS, ALJD, *supra* note 23 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.”).

<sup>86</sup> Cf. Metzger, *supra* note 30, at 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.”).

<sup>87</sup> See *id.* at 40 (embracing the “broadly accepted legal realist insights about the frequency of legal indeterminacy, and thus of policymaking, in judicial decisionmaking”).

<sup>88</sup> See HAMBURGER, *supra* note 7, at 12 (“This book . . . reveals administrative law to be extra-legal, supra-legal, and consolidated, and thus a version of absolute power. In a more concretely legal manner, it shows administrative law to be unconstitutional.”).

<sup>89</sup> See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”)

<sup>90</sup> See THEODORE J. LOWI, *THE END OF LIBERALISM* 107 (2d ed. 1979) (“At its best [modern governance] is a hell of administrative boredom. At its worst, it is a tightly woven fabric of legitimized privilege.”).

<sup>91</sup> See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 20 (1993) (“The Supreme Court should declare unconstitutional all delegation of legislative power, or . . . it should permit only delegation of uncontroversial details.”).

Carey.<sup>92</sup> 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.

*I. 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 dubious constitutional provenance.<sup>93</sup> 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*<sup>94</sup> deference. Along these lines, Justice Thomas has questioned *Chevron*'s constitutionality,<sup>95</sup> and similar disquieted rumblings have arisen from the courts of appeals, headlined by now-Justice Gorsuch's concurrence in *Gutierrez-Brizuela v. Lynch*.<sup>96</sup>

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 both to 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.<sup>97</sup> These concerns have led Justices Scalia and Thomas to question *Auer* deference<sup>98</sup> and have given Justice

<sup>92</sup> BRUCE P. FROHNNEN & GEORGE W. CAREY, CONSTITUTIONAL MORALITY AND THE RISE OF QUASI-LAW 219 (2016) ("The question we face now is how to maintain or reestablish the rule of law at a time when our written Constitution is ignored in favor of an operational constitution impatient, at best, with formal structures, clear rules, and categorical limitations on the rulers' powers to 'do good.'"); see also JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 4 (2017) ("Administrative power and the administrative state has *always* suffered a crisis of legitimacy, because of the tension between administrative power and American constitutionalism.")

<sup>93</sup> See HAMBURGER, *supra* note 7, at 316; Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016).

<sup>94</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>95</sup> See *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring).

<sup>96</sup> 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring); see also *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment); Kavanaugh, *supra* note 9, at 2150–54 (raising concerns about *Chevron* and suggesting limitations to the doctrine).

<sup>97</sup> See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 639–40 (1996) (arguing that *Seminole Rock*'s presumption that agencies are implicitly authorized to have both lawmaking and law-interpreting powers "contradicts a core structural commitment of our constitutional scheme," *id.* at 640).

<sup>98</sup> See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring in the judgment); *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 620–21 (2013) (Scalia, J., concurring in part and dissenting in part); see also *Egan*, 851 F.3d at 278 (Jordan, J., concurring in the judgment) (questioning *Auer* along with *Chevron*).

Alito pause about the doctrine.<sup>99</sup> Most recently, Justice Gorsuch's constitutional critique of *Auer* deference in his concurring opinion in *Kisor v. Wilkie* exemplified this approach — and garnered the votes of Justices Thomas, Alito, and Kavanaugh.<sup>100</sup>

2. *Review of Legal Interpretations — Procedure.* — For the same reason the skeptics reject *Chevron* and *Auer* deference on questions of substantive law, they should 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 might want agencies to adhere to those norms.<sup>101</sup> We can say the same for judicial doctrines that lead to similar effects, such as the appellate courts' procedural additions to informal rulemaking<sup>102</sup> or the minority position in circuit courts that presumes organic statutes with the language “after hearing” require formal adjudication.<sup>103</sup> A skeptic might also want to force agencies to engage in procedurally heavy rulemaking, rather than in policymaking by ad hoc adjudication.<sup>104</sup> Tellingly, in *Perez*, public interest organizations sympathetic with administrative skepticism filed amicus briefs supporting the D.C. Circuit's *Paralyzed Veterans of America v. D.C. Arena L.P.*<sup>105</sup> rule, which the Supreme Court ultimately struck down as a procedural burden inconsistent with the APA.<sup>106</sup>

<sup>99</sup> See *Perez*, 135 S. Ct. at 1210 (Alito, J., concurring in part and concurring in the judgment) (noting that “Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect”).

<sup>100</sup> See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437–41 (2019) (Gorsuch, J., concurring in the judgment) (contending that *Auer* deference violates the separation of powers).

<sup>101</sup> Cf. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. (forthcoming 2019) (manuscript at 15–16), <https://ssrn.com/abstract=3347377> [<https://perma.cc/9537-9SPP>] (decrying how “[t]he sediment deposited by [the] accretion of procedures can channel agency action into unproductive courses or even dam it altogether”).

<sup>102</sup> See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392–95 (D.C. Cir. 1973) (requiring that agencies provide important data during the comment period and respond to “potentially significant” comments, *id.* at 394); see also KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 693 (6th ed. 2019).

<sup>103</sup> See *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1263 (9th Cir. 1977); see also Berry, *supra* note 47, at 545–46.

<sup>104</sup> See LOWI, *supra* note 90, at 302–05 (arguing that rulemaking promotes the rule of law better than agency adjudicative policymaking).

<sup>105</sup> 117 F.3d 579 (D.C. Cir. 1997).

<sup>106</sup> See, e.g., Brief of the Cato Institute et al. as Amici Curiae in Support of Respondent at 29, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015) (Nos. 13-1041, 13-1052); Brief of Washington Legal Foundation and Allied Educational Foundation as Amici Curiae in Support of Respondent at 14, *Perez*, 135 S. Ct. 1199 (Nos. 13-1041, 13-1052); see also *Perez*, 135 S. Ct. at 1206–10.

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 will be 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.<sup>107</sup> 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. Searching review or revision of agency policy choices implicates legislative *will*, not the legal judgment that is proper to the judicial duty. A skeptic will therefore be hesitant to heed Judge Leventhal's call to have courts roll up their sleeves and dive into the policy merits.<sup>108</sup> On the other hand, a skeptic might try to limit agency power through deregulatory judicial presumptions, such as the *Michigan v. EPA*<sup>109</sup> majority's holding that failure to undertake cost-benefit analysis is unreasonable.<sup>110</sup> Such a tack requires more judicial involvement in administrative policy, but the skeptic could justify such

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<sup>107</sup> See, e.g., HAMBURGER, *supra* note 7, at 154–55 (jury trial rights); *id.* at 228–30, 237–57 (criminal character of proceedings). Hamburger also views *Chevron*'s bias in favor of the government as violating due process. See Hamburger, *supra* note 93, at 1250.

<sup>108</sup> See *Ethyl Corp. v. EPA*, 541 F.2d 1, 68–69 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) (“Our present system of review assumes judges will acquire whatever technical knowledge is necessary as background for decision of the legal questions. . . . Our obligation is not to be jettisoned because our initial technical understanding may be meagre . . .”).

<sup>109</sup> 135 S. Ct. 2699 (2015).

<sup>110</sup> See *id.* at 2711–12 (holding it arbitrary and capricious for agency not to consider costs when deciding whether a regulation was “appropriate and necessary”).

intervention on the grounds that it compensates for underenforced constitutional norms aimed at limiting federal power and delegation.<sup>111</sup>

The administrative skeptic could also recommend an approach that is both more radical and more modest: invalidating legislative provisions on nondelegation grounds.<sup>112</sup> This approach is radical in that it calls into question numerous statutory provisions that contain wide delegations to agencies.<sup>113</sup> It is modest in that it respects limits on judicial authority to fill in gaps where there is no law to apply. Until recently, reviving the nondelegation doctrine appeared a fringe project, the hobbyhorse of lone rangers like Justice Thomas. Last Term's decision in *Gundy v. United States*,<sup>114</sup> where three Justices would have invalidated a provision under the nondelegation doctrine and a fourth showed interest in reviving the nondelegation doctrine in a later case, takes such arguments off the wall.<sup>115</sup> This is especially so given that Justice Kavanaugh, who later in the Term was amenable to Justice Gorsuch's skeptical critique of *Auer* deference,<sup>116</sup> did not sit for *Gundy*.<sup>117</sup>

An example of a nondelegation approach to review of policy decisions is 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.<sup>118</sup> This is not to say any

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<sup>111</sup> See Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 3 (1994) ("Where unconstitutional institutions are allowed to stand based on a theory of precedent, the Court should allow (or even require) the creation of compensating institutions that seek to move governmental structures closer to the constitutional equilibrium.")

<sup>112</sup> See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("On a future day . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."); *LOWI*, *supra* note 90, at 300–01 (calling for a revival of the nondelegation doctrine); *SCHOENBROD*, *supra* note 91, at 165–79 (same).

<sup>113</sup> See *SCHOENBROD*, *supra* note 91, at 13 ("Stopping delegation . . . would have produced the most dramatic change in government since the Civil War."); see also *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("Congress simply cannot do its job absent an ability to delegate power under broad general directives.")

<sup>114</sup> 139 S. Ct. 2116 (2019).

<sup>115</sup> See *id.* at 2148 (Gorsuch, J., dissenting) (contending that delegating to the Attorney General the power to decide retroactive effect of a statute would violate the nondelegation doctrine); *id.* at 2131 (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.")

<sup>116</sup> See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring in the judgment) ("I agree with Justice Gorsuch's conclusion that the *Auer* deference doctrine should be formally retired.")

<sup>117</sup> *Gundy*, 139 S. Ct. at 2116; see also *id.* at 2148 (Gorsuch, J., dissenting) ("In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code.")

<sup>118</sup> *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 686–88 (1980) (Rehnquist, J., concurring in the judgment).

uncertainty is an unlawful delegation — the Framers recognized the impracticability of an absolute separation of powers.<sup>119</sup> But once we cross the line between filling in small blanks and administrative legislation, the Court must strike down the provision under the nondelegation doctrine.

4. *Review of Agency Factfinding.* — The administrative skeptic also challenges deference to agency factfinding. As with previous objections, the case against deferential review turns on the Constitution. Depending on one's theory, deference to administrative factfinding may violate Article III's vesting of the judicial power in the courts, violate the courts' duty of independent judgment, or flaunt due process by depriving litigants of their rights to adjudication in common law courts and before an impartial adjudicator.<sup>120</sup> The Constitution therefore bars courts from applying the APA's "substantial evidence" review provision, regardless of whether it is as lenient as the jury standard or reflects the slightly more searching mood of *Universal Camera*.<sup>121</sup> Such objections may extend to any kind of adjudicative factfinding.<sup>122</sup> Alternatively, the objection may pertain to a narrower subset of findings, such as those affecting "core private rights to life, liberty, and property," which include fines and forfeitures, but not the withholding of privileges and rights created by public law.<sup>123</sup>

5. *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 "excludes the possibility that administrative institutions might wield legal authority under the

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<sup>119</sup> *Id.* at 673; see also *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (distinguishing the constitutional decision to delegate power to "fill up the details" from unconstitutional delegation of legislative authority (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825))).

<sup>120</sup> For an excellent overview of these objections, see Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 *GEO. J.L. & PUB. POL'Y* 27, 42–58 (2018).

<sup>121</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 485–87 (1951) (analyzing the APA's "substantial evidence" standard and holding that the APA expresses a "mood" of scrutiny more than a searching jury standard).

<sup>122</sup> See HAMBURGER, *supra* note 7, at 318–19 (suggesting blanket incompatibility between the Constitution and deference to any adjudicative factfinding by non–Article III courts).

<sup>123</sup> Bernick, *supra* note 120, at 30, 39 (emphasis removed); see Lawson, *supra* note 89, at 1246–48.



constitution.<sup>124</sup> It is *more* purely Diceyan than is modern administrative law in the United Kingdom, whose constitutionalism Dicey 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.<sup>125</sup>

#### D. 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 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. These tests could come in the form of a contextual, multifactor approach to *Mead* like Justice Breyer’s<sup>126</sup> or a more rule-like interpretation of *Mead*,<sup>127</sup> or through the invocation of certain exceptions, such as a presumption that Congress has not delegated interpretive authority on major questions or jurisdiction.<sup>128</sup> Like the administrative supremacist, the pragmatist recognizes

<sup>124</sup> LEWANS, ALJD, *supra* note 23, at 20; *see also* Stack, *supra* note 23, at 296 n.8 (describing Hamburger’s approach as Diceyan).

<sup>125</sup> LEWANS, ALJD, *supra* note 23, at 43 (quoting David Dyzenhaus, *The Politics of Deference: Judicial Review and Democracy*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 279, 286 (Michael Taggart ed., 1997)). Hamburger argues that Dicey’s concept of the rule of law was too thin, focusing only on courts and “understating the more basic point that the government could constrain subjects only through the law.” HAMBURGER, *supra* note 7, at 280. Dicey thus “did not clearly foreclose the possibility that [a breach of law] might consist of violating a statute giving effect to administrative regulations.” *Id.* at 280–81.

<sup>126</sup> *See* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (announcing a standard-like approach to *Mead*).

<sup>127</sup> *See* Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 827–30 (2002) (describing a rule-like approach to determining when Congress has delegated interpretive authority to agencies); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 472 (2002) (identifying a legislative drafting convention that indicates delegation).

<sup>128</sup> *See* King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (major questions); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (same); City of Arlington v. FCC, 569 U.S. 290, 296–301 (2013) (rejecting exception for jurisdictional questions).

that there are some underdetermined legal questions over which agencies should have ultimate legal authority 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.<sup>129</sup> 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.<sup>130</sup>

Like supremacists, pragmatists usually justify deference as an implied congressional delegation of lawmaking authority, though this is also usually<sup>131</sup> understood as a fiction that is useful for the sound allocation of decisionmaking power.<sup>132</sup> Pragmatists, however, are less willing to extend that implied delegation 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 metalaw of deference, where courts can calibrate the 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,<sup>133</sup> 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<sup>134</sup> or interpretations that are inconsistent or spring unfair surprises on the regulated community.<sup>135</sup> 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*.<sup>136</sup> As with *Chevron*, the pragmatist gives *Auer* a Step Zero, rather than unflinchingly applying it or abolishing

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<sup>129</sup> See, e.g., Laurence H. Silberman, *Chevron — The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) (“[W]hoever interprets [unclear legislation] will often have room to choose between two or more plausible interpretations. That sort of choice implicates and sometimes squarely involves policy making.”).

<sup>130</sup> Peter L. Strauss, “Deference” Is Too Confusing — Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1162 (2012); see also Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1270–71 (1997) (arguing that Step Two should resemble arbitrary and capricious review).

<sup>131</sup> But see Merrill & Watts, *supra* note 127, at 472 (grounding deference in legislative drafting conventions).

<sup>132</sup> Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2009, 2013 (2011).

<sup>133</sup> See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1225 (2015) (Thomas, J., concurring in the judgment).

<sup>134</sup> See *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (“An agency does not acquire special authority to interpret its own words when . . . it has elected merely to paraphrase the statutory language.”).

<sup>135</sup> See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012) (withholding deference to inconsistent interpretation that resulted in “unfair surprise”).

<sup>136</sup> See 135 S. Ct. at 1208 n.4 (listing exceptions to *Auer* deference).

it altogether.<sup>137</sup> Exemplary here is Justice Kagan's majority opinion preserving *Auer* in *Kisor v. Wilkie*, which framed the argument for deference in *Chevron* terms and provided threshold tests for its applicability.<sup>138</sup>

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.<sup>139</sup> 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 in tension with *Mead* and its progeny, which often require a fine-grained inquiry into whether it is reasonable to presume a delegation of authority. A blunt presumption of delegated authority will be unappealing to many 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 on ensuring the smooth operation of judicial review and administrative procedure more generally.

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 in allocating resources between procedure and substance point toward deference along these lines. This explains the strong trend toward the D.C. Circuit's deferential approach to agency decisions on whether an organic statute prescribes formal or informal adjudication,<sup>140</sup> as well as the lack of scholarly uproar in response to that deferential approach.<sup>141</sup> Similarly, while *Florida East Coast Railway* took no account of the pre-APA

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<sup>137</sup> See Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1467–1503 (2011) (identifying and evaluating potential threshold tests for applying *Auer* deference).

<sup>138</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412–14 (2019) (justifying *Auer* in terms of *Chevron*-like presumptions of delegation for reasons of institutional competence and regulatory uniformity); *id.* at 2416–18 (identifying limits on *Auer*'s application); see Christopher J. Walker, *What Kisor Means for the Future of Auer Deference: The New Five-Step Kisor Deference Doctrine*, YALE J. ON REG.: NOTICE & COMMENT (June 26, 2019), <https://yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine> [<https://perma.cc/EA6S-2GGV>] (summarizing *Kisor*'s “*Chevron*-ization of *Auer* deference” and its “independent and substantially narrowing steps that are reminiscent of, though not identical to, the Court's development of a step zero for *Chevron* deference”).

<sup>139</sup> Cf. Manning, *supra* note 97, at 639 (distinguishing the delegations in *Chevron* and *Auer*).

<sup>140</sup> See *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1481–83 (D.C. Cir. 1989); see also *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 18–19 (1st Cir. 2006); Berry, *supra* note 47, at 545–46.

<sup>141</sup> But see Berry, *supra* note 47, at 545–46.

doctrine that framed the backdrop of formal rulemaking,<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup>

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.<sup>145</sup>

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, and some indication of deliberation about policy alternatives.<sup>146</sup> 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 which the agency formed its tentative policy judgments.<sup>147</sup> As with the

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<sup>142</sup> *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973).

<sup>143</sup> See LAWSON, *supra* note 49, at 287 ("Indeed, since *FECR* was decided . . . formal rulemaking has virtually disappeared as a procedural category.")

<sup>144</sup> See, e.g., Amicus Curiae Brief of Administrative Law Scholars in Support of the Petitions at 7, 9, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015) (Nos. 13-1041, 13-1052); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 561-66 (2000) (criticizing *Paralyzed Veterans*).

<sup>145</sup> Cf. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (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 Co. v. Bush*, 946 F.2d 918, 925-28 (D.C. Cir. 1991) (Williams, J., dissenting) (arguing that the court should not defer to an agency's interpretation of whether an amendment to a statute under which the agency had been delegated authority applies retrospectively or only prospectively).

<sup>146</sup> Cf. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654-55 (1990) (explaining how *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), is consistent with *Vermont Yankee*).

<sup>147</sup> See *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 528, 530 (D.C. Cir. 1982) (stating that because the "process of notice and comment rule-making is not to be an empty charade," *id.* at 528, it is essential for agencies to provide wide disclosure of proposed rules and supporting data, as well as fulsome explanation for their decisions and responses to comments).

delicate balance in substantive review between enforcing legal values and respecting administrative expertise, pragmatist courts seek to optimize the mix of procedural protections and agency flexibility.<sup>148</sup> Courts modulate this supervision through supple doctrines like the logical outgrowth test and harmless error,<sup>149</sup> or by adopting, out of practical necessity, stopping rules that limit notice and comment.<sup>150</sup> This administrative common law of procedure is a hallmark of the post–New Deal mainstream of pragmatic administrative law and maintains a long run of scholarly support.<sup>151</sup>

Finally, notwithstanding their rejection of *Paralyzed Veterans*, pragmatist jurists and scholars embrace nuanced tests to distinguish procedurally valid interpretive rules and policy statements from invalidly promulgated legislative rules.<sup>152</sup> A simpler — and discretion-enhancing — approach would have courts deprive policy statements and interpretive 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 agency’s expertise and accountability. Resisting Judge Leventhal’s call to have courts scrutinize the administrative record, but unsatisfied

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<sup>148</sup> See *Reyblatt v. U.S. Nuclear Regulatory Comm’n*, 105 F.3d 715, 722 (D.C. Cir. 1997) (noting that the sufficiency of a statement of basis and purpose “depends on the subject of the regulation and the nature of the comments received” (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983))).

<sup>149</sup> See, e.g., *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 993 (9th Cir. 2012) (holding that agency’s procedural error at the notice phase of rulemaking was harmless); *Int’l Union, United Mine Workers v. Mine Safety & Health Admin.*, 626 F.3d 84, 94–95 (D.C. Cir. 2010) (stating that a change between proposed and final rules is permissible when it is a “logical outgrowth” of the original notice, and expounding on what qualifies as such an outgrowth).

<sup>150</sup> See, e.g., *Rybachek v. 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).

<sup>151</sup> Peter L. Strauss, *Statutes that Are Not Static — the Case of the APA*, 14 J. CONTEMP. LEGAL ISSUES 767, 768 (2005) (arguing that “whenever the Supreme Court is considering a return to original understandings [of procedural statutes] it should accord substantial weight to contemporary consensus the profession and lower courts have been able to develop in interpreting law”).

<sup>152</sup> See, e.g., *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (offering a four-question test for whether a purported interpretive rule is in fact a legislative rule); see also *Pierce*, *supra* note 144, at 548 (praising *American Mining Congress*). For a critique of such tests, see John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 894–97, 914–27 (2004) (“Given the level of generality at which the D.C. Circuit articulates such criteria, it is difficult, at best, to draw meaningful distinctions between interpretive and legislative rules.” *Id.* at 922.).

with Judge Bazelon's purely procedural approach,<sup>153</sup> 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. As demonstrated by the majority opinion in *State Farm*, this review can at times be exacting.<sup>154</sup> *State Farm's* rhetoric, however, leaves a reviewing court flexibility to approach a case with a light or heavy touch, depending on the stakes and the general sense of whether the agency is implementing its mandate in good faith.<sup>155</sup> As with review of legal questions, these tests have the flavor of common law inspired by, but not directly derived from, positive law. There is little interest in what the framers of the APA meant or were understood to mean when they codified arbitrary and capricious review.<sup>156</sup>

4. *Review of Agency Factfinding.* — The pragmatist neither questions the constitutionality of agency factfinding nor advocates for a supine posture across the board. Rather, *Universal Camera's* whole-record rule,<sup>157</sup> applied with a mood somewhat less forgiving than the jury standard, suffices for review of agency facts. That said, informal

<sup>153</sup> Compare *Ethyl Corp. v. EPA*, 541 F.2d 1, 66–67 (D.C. Cir. 1976) (en banc) (Bazelon, C.J., concurring) (contending that patrolling agency procedure suffices to ensure reasoned administrative decisionmaking), with *id.* at 68–69 (Leventhal, J., concurring) (arguing reviewing courts should be more willing to engage with the merits of agency policy). Lawson has argued that the current arbitrary and capricious review incorporates both types of concerns — that is, procedural and substantive. See Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 318–19 (1996).

<sup>154</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–57 (1983) (closely scrutinizing the agency's interpretation of the record data).

<sup>155</sup> See *id.* at 43 (listing a number of factors that courts can consider in determining whether an agency rule is arbitrary or capricious). There is some indication that the Court is likely to be more skeptical of policy decisions based on politics than those based on expertise. See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 93–96. This tendency has come under criticism, even from those not associated with the supremacist camp. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009) (“[W]hat count as ‘valid’ reasons under arbitrary and capricious review should be expanded to include certain political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and transparently disclosed in the agency’s rulemaking record.”).

<sup>156</sup> See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 400 n.95 (D.C. Cir. 1973) (“There are contexts, however, contexts of fact, statutory framework and nature of action, in which the minimum requirements of the Administrative Procedure Act may not be sufficient.” (quoting *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972))); Beermann & Lawson, *supra* note 19, at 857 (“Beginning in the late 1960s . . . judges on the Court of Appeals for the District of Columbia Circuit — with considerable support from the surrounding political and academic communities — decided that the procedures for informal rulemaking provided by the APA were inadequate to allow effective legal control of agencies that were widely perceived as vulnerable to industry capture. Accordingly, in the 1960s and 1970s, the lower federal courts essentially rewrote the APA’s notice-and-comment rulemaking provisions to require extensive procedural machinery . . .”).

<sup>157</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951) (holding that the APA requires judicial deference to agency findings “if supported by substantial evidence on the record considered as a whole” (quoting Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136, 148 (1947))).

patterns or practices could emerge, such as a likelihood of heightened scrutiny when an agency head overrides an administrative judge's factual finding.<sup>158</sup> Furthermore, the *Universal Camera* test applies across policymaking formats, not just for formal adjudication,<sup>159</sup> even though there are reasonable arguments that the APA prescribes a more nuanced treatment in other contexts. The distinctions among policymaking formats fall by the wayside in the face of the pragmatic concern over providing a less searching review for informal rulemaking, which affects far more people than formal adjudications but for which the APA might require more deference to agencies.<sup>160</sup> Ensuring a rough, sensible balance between administrative prerogative and legal values across the system is more important than parsing those legal weeds.

5. *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.<sup>161</sup> 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 lawmaking and interpretive powers in the administrative agencies while bringing both functions under the rule of law.

Lewans's 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 the authority democratically elected legislatures vest in agencies.<sup>162</sup> This does not, however, entail a supine judicial posture. 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

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<sup>158</sup> See, e.g., *Kimm v. Dep't of Treasury*, 61 F.3d 888, 892 (Fed. Cir. 1995); LAWSON, *supra* note 49, at 481–82.

<sup>159</sup> See, e.g., *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) (finding the arbitrary and capricious test for factfinding under informal rulemaking basically identical to the substantial evidence test for factfinding under formal adjudication).

<sup>160</sup> Cf. *id.* at 685 (warning about the “seemingly upside-down application of varying standards” that would apply if factfinding in informal rulemaking received less scrutiny than formal adjudication).

<sup>161</sup> LEWANS, ALJD, *supra* note 23, at 16–21 (sketching this dichotomy). See generally Matthew Lewans, *Rethinking the Diceyan Dialectic*, 58 U. TORONTO L.J. 75 (2008) (critiquing the Diceyan dichotomy).

<sup>162</sup> See LEWANS, ALJD, *supra* note 23, at 221–22.

processes and reasoned explanations for policy choices.<sup>163</sup> Therefore, Lewans argues, judicial review should ensure administrative decisionmaking comports with these basic requirements of legality.<sup>164</sup> Accommodating the administrative state and the requirements of legality “requires judges to ensure that administrative law is both fair and substantively reasonable,” but it does not give judges “a plenary licence to engage in correctness review.”<sup>165</sup>

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.<sup>166</sup>

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,”<sup>167</sup> 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 has offered three ways to reconcile that dichotomy as it exists within 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

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<sup>163</sup> *Id.* at 221–23.

<sup>164</sup> *See id.*

<sup>165</sup> *Id.* at 210. We can compare this approach with the judicial interventions recommended by a supremacist 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 agency has met the basic requirements of legality. *See, e.g.,* MICHAELS, *supra* note 31, at 180.

<sup>166</sup> Recall, deference on questions of law here presupposes that choosing among reasonable interpretive options is an underdetermined lawmaking policy choice.

<sup>167</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).



legal interpretation while regarding noncongressional 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 Part 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 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 agencies. 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 forward.<sup>168</sup> I do not contend this is the only way to understand the 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<sup>169</sup>). 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 contender.

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. Neoclassical administrative law preserves the supremacy of law by ensuring courts have the final say on questions of legal interpretation, an ambit

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<sup>168</sup> The jurisprudentially inclined will see a parallel with Professor Ronald Dworkin's "fit and justify" method, in which the interpreter identifies the legal principles that pass a threshold level of fit with the existing corpus of law *and* make that body of law a justified whole. See RONALD DWORKIN, *LAW'S EMPIRE* 65–68 (1986). One does not have to embrace Dworkin's more ambitious argument that all law is interpretive to find this method useful. See, e.g., VERMEULE, *supra* note 6, at 8–9 (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, 357 (1987) (arguing that Dworkin "promotes reflective understanding of the *practical argumentation*" in legal discourse while "overestim[ing] practical reasoning's power to identify options as the best and the right").

<sup>169</sup> See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3–22 (2d ed. 2011) (discussing the limits of purely descriptive accounts of law); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 110–12 (2016) (same).

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that extends beyond the bounds that conventional deference doctrines presently contemplate. At the same time, it upholds legislative supremacy by conferring greater respect for the policy choices of Congress and its administrative delegates. Such an approach will conform administrative doctrine to a classical understanding of separation of powers and legal interpretation, but without encouraging courts to wade into vexed questions of regulatory policy or deconstruct the administrative state single-handedly.

The descriptive and diagnostic discussion proceeds in two steps. This Part will identify the strands of doctrine and scholarship supporting neoclassical administrative law and then identify the commitments underlying this approach to judicial review. Part III will make a case for these commitments and 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 involving policymaking discretion. Explicating neoclassical administrative law does not require one to work entirely from scratch. While neoclassicism is by no means 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 section 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 of *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.<sup>170</sup> Although the Court has not heeded calls to overrule *Chevron*

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<sup>170</sup> As a practical matter, even *de novo* review is likely to blur into 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 those of a district judge in New Mexico.

or *Auer* deference, the neoclassicist can share the skeptic's enthusiasm about recent decisionmaking at the Court. An expanded Step Zero and increasingly strong Step One have blunted both of those deference doctrines' impacts.<sup>171</sup> It has been more than three years since the Supreme Court invoked *Chevron* to defer to an agency's interpretation of a statute.<sup>172</sup> *Auer* deference has come under more withering criticism from a number of Justices, with four calling for its outright reversal in *Kisor v. Wilkie* and the Chief Justice standing by the doctrine in part because the *Kisor* majority's reformulation of *Auer* conceded so much to its critics.<sup>173</sup>

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 neoclassicist, however, is an emphasis on legislation governing judicial review. A neoclassicist is more likely to invoke the original understanding of the Administrative Procedure Act and the 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 Professor John Duffy's critique of *Chevron* as a product of administrative common law that contradicts positive law on judicial review entrenched in the APA.<sup>174</sup>

Similarly, Professor 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.<sup>175</sup> In most non-mandamus proceedings, however, courts were much less deferential, although they did give respect to contemporaneous and

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<sup>171</sup> See, e.g., *Wis. Cent. 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."); *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (holding that the *Chevron* doctrine does not apply to a "question of deep 'economic and political significance' that is central to this statutory scheme" (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014))); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (placing limits on when *Auer* deference applies).

<sup>172</sup> See *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016).

<sup>173</sup> See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring in the judgment) (contending, along with Justices Thomas, Alito, and Kavanaugh, that the Court should overrule *Auer*); *id.* (Roberts, C.J., concurring in part) ("[C]ases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation.")

<sup>174</sup> John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193-99 (1998) (offering an APA-based critique of a common law *Chevron* doctrine).

<sup>175</sup> Bamzai, *supra* note 19, at 958.

customary interpretations.<sup>176</sup> Bamzai argues that the most plausible interpretation of the APA's judicial review provision incorporates this non-deferential background law, a conclusion that would provide support in the positive law for the neoclassicist's resistance to *Chevron*-style deference.<sup>177</sup> Not all administrative common law is suspect, 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 finds unpersuasive the argument that deference comports with the judicial duty to say what the law is because the law tells them to defer.<sup>178</sup> To be sure, a neoclassicist sympathetic to Duffy's and Bamzai's arguments will also take seriously Professors Thomas Merrill and Kathryn Watts's claim about original legislative drafting conventions indicating when Congress wants courts to defer to agency interpretations of law.<sup>179</sup> Probing such conventions and reconciling them with a nondeferential APA are interesting, important projects for the neoclassicist to pursue, as is further work on the original understanding of the APA.<sup>180</sup> Any of these inquiries 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, the neoclassicist sees this explanation 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, was not understood as conferring general *Chevron*-like power to agencies.<sup>181</sup> In fact, it is plausible to read the case as an unremarkable application of *Skidmore*-type deference:

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<sup>176</sup> *Id.* at 943–47, 969–71 (tracing the persistence of the approach over time). Although the Court was more likely to defer after the New Deal, *see id.* at 977–81, Bamzai argues there was a reversion to the traditional approach in the backlash that led up to the APA, *see id.* at 985–87.

<sup>177</sup> *See id.* at 985–89.

<sup>178</sup> *See* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 1–3 (1983).

<sup>179</sup> *See* Merrill & Watts, *supra* note 127, at 472–74; *see also* Duffy, *supra* note 174, at 199–200 (suggesting that particular grants of authority in organic statutes could justify deference).

<sup>180</sup> For a recent argument that the “original meaning” is at least open to the *Chevron* doctrine, *see* Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1657 (2019).

<sup>181</sup> *See* Knudsen & Wildermuth, *supra* note 40, at 52–53 (“*Seminole Rock* began as a doctrine with significant constraints, at a vastly different moment in administrative law. . . . Over the course of thirty years, *Seminole Rock* became completely divorced from these modest and restrained origins.”).

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 intentionalism than they are today.<sup>182</sup> Tracking Duffy's and Bamzai's arguments 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. Justice Gorsuch's concurrence in *Kisor* took just this tack before also raising the constitutional concerns animating the administrative skeptic's critique of *Auer*.<sup>183</sup>

Implicit in this argument is the rejection of the functionalist justification of *Chevron*. This is grounded not only in conclusions about the APA, but also in 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 nonlegal expertise.<sup>184</sup> 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.<sup>185</sup>

As a practical matter, judicial review of agency interpretations of law would resemble Justice Scalia's rigorous application of *Chevron* Step

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<sup>182</sup> See Pojanowski, *Seminole Rock*, *supra* note 40, at 88 (summarizing this argument).

<sup>183</sup> See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432–37 (2019) (Gorsuch, J., concurring in the judgment) (arguing that *Auer* is inconsistent with the original meaning of the APA); *id.* at 2428–29 (contending that *Auer*'s progenitor, *Seminole Rock*, was originally understood as an application of *Skidmore*-style deference).

<sup>184</sup> See generally Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2597–99 (2006) (linking *Chevron* with the legal realist's rejection of interpretive formalism).

<sup>185</sup> This position is perhaps reconcilable with Professors Lawrence Solum and Cass Sunstein's recent argument that *Chevron* requires deference only in the "construction zone" of the interpretation/construction distinction. Lawrence B. Solum & Cass R. Sunstein, *Chevron* as Construction 4–6 (Dec. 12, 2018) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3300626](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300626) [<https://perma.cc/W3FZ-XHBN>]. 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 4. Other formalist interpreters may limit "construction" to more open-ended terms like "reasonable" or "feasible." See Kavanaugh, *supra* note 9, at 2153–54 (accepting deference to agency construction of those terms).

One<sup>186</sup> 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 enough."<sup>187</sup> 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 weaker, 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 would simply take Step Two outside the realm of legal interpretation, properly so called.<sup>188</sup> This reformulation of judicial review without *Chevron*, which I have explained at greater length elsewhere,<sup>189</sup> also addresses the concerns of more recent judicial *Chevron* skeptics, such as Justices Gorsuch and 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.<sup>190</sup>

Put another way, the neoclassical approach to judicial review of legal questions divvies up what conventional administrative law deems "Step Two" into domains of (a) legal questions reviewed de novo or under the *Skidmore* standard and (b) policymaking choices subject to the more deferential arbitrary and capricious review.<sup>191</sup> Orthodox teaching on *Chevron* denies any such line between legal interpretation and policymaking on unclear questions, filing both types of uncertainties under the broader label of "interpretation."<sup>192</sup> A more precise account separates the two based on the modes of reasoning characteristic of the inquiries. As Professor Randy Kozel and I have argued, it is useful to distinguish between what we call "expository reasoning" — the search for an authoritative text's original public meaning or intent — and "prescriptive reasoning" — normative and empirical inquiries about the best choice

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<sup>186</sup> See Scalia, *supra* note 37, at 516 ("An ambiguity in a statute . . . can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency. When the former is the case, what we have is genuinely a question of law, properly to be resolved by the courts. When the latter is the case, what we have is the conferral of discretion upon the agency, and the only question of law presented to the courts is whether the agency has acted within the scope of its discretion . . .").

<sup>187</sup> *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). The Court has not reached Step Two since June 2016. See *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142–46 (2016).

<sup>188</sup> See Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 115 (2011).

<sup>189</sup> See Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1085–87 (2016).

<sup>190</sup> See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring); Kavanaugh, *supra* note 9, at 2150–54 (raising concerns about *Chevron* and suggesting limitations to the doctrine).

<sup>191</sup> See Kozel & Pojanowski, *supra* note 188, at 161–62.

<sup>192</sup> See *id.* at 141–46 (explaining that *Chevron* "is often read as collapsing the distinction between explication and policymaking," *id.* at 143).

to make within the ambit of one's discretion.<sup>193</sup> Under this approach, which entails the commitment to formalism discussed below,<sup>194</sup> expository reasoning is the best understanding of what legal interpretation is, in contrast to the policy judgments sometimes also lumped under *Chevron* Step Two. For the neoclassicist, legal questions are meaningfully distinguishable from policy questions and are reserved for courts.<sup>195</sup>

Justice Kavanaugh's concurring opinion in *Kisor* captures this distinction. In explaining how the majority's preservation of *Auer* ceded central ground to the doctrine's critics, he explained that "[i]f a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue."<sup>196</sup> Consequently, "the court then will have no need to adopt or defer to an agency's contrary interpretation."<sup>197</sup> On the other hand, Justice Kavanaugh conceded, "some cases involve regulations that employ broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.'"<sup>198</sup> Because those terms "afford agencies broad policy discretion,"<sup>199</sup> the proper response for a reviewing court is to "allow an agency to reasonably exercise its discretion to choose among the options allowed by the text of the rule. But that is more *State Farm* [review of policy] than *Auer*."<sup>200</sup>

The neoclassicist therefore 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. An approach like this resonates with recent critics of *Chevron* and *Auer* deference who worry about courts ceding the power to say what the law is. The neoclassical approach here embraces one of the most prominent skeptical critiques of administrative law doctrine in recent years. Still, it is hardly something new under the sun. As Professor John Dickinson noted nearly a century ago, this more searching review echoes Lord Coke's bid to place the Crown under

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<sup>193</sup> *Id.* (identifying and defending the cogency of this distinction).

<sup>194</sup> See *infra* sections II.B.1, pp. 895–98, and III.A, pp. 903–08.

<sup>195</sup> For another argument along these lines, see Larry Alexander, *The Constitutional Limits of Chevron Deference: Meaning Versus Policy 2* (Univ. of San Diego Sch. of Law, Legal Studies Research Paper No. 18-359, 2018), <https://ssrn.com/abstract=3247186> [<https://perma.cc/SUH7-9GZ4>] ("The basic distinction is between deference to an agency's interpretation of Congress' meaning, which is constitutionally forbidden, and deference to an agency's delegated policy choice, which, within limits, is constitutionally permitted.")

<sup>196</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring in the judgment).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 2448–49.

<sup>200</sup> *Id.*

the supremacy of law.<sup>201</sup> Somewhat less archaically, the neoclassicist approach recalls Chief Justice Hughes's position in *Crowell v. Benson* on review of legal questions,<sup>202</sup> and is likely closer than contemporary doctrine to the original understanding of the APA.<sup>203</sup> As we shall see, however, this particular rejection of legal deference does not lead to a broader rejection of the administrative state. The neoclassicist seeks to restore the judicial role while stopping short of a constitutional revolution. In this respect, judges who are uneasy about deference but do little more than nibble at the edges of the administrative state are neoclassicists in practice, if not in theory.

2. *Review of Legal Interpretations — Procedure.* — As with judicial review of questions of substantive law, a neoclassical approach to agencies' conclusions about procedure would not be deferential and would focus on the original law laid down by the APA and 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 of 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*. The standard textualist arguments about legislation striking a compromise and encouraging interpreters to respect the means the legislature chose to advance its ends<sup>204</sup> can readily apply to the intricate procedural scheme Congress chose when it crafted the APA.<sup>205</sup> Indeed, *Vermont Yankee* emphasized 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.<sup>206</sup>

Although courts have mostly confined *Vermont Yankee*'s principle to comment procedures in informal rulemaking, this line of argument could extend further. For example, Justices Scalia and Thomas, who offered the harshest criticism of *Auer* deference in *Perez*, had no problem rejecting the D.C. Circuit's *Paralyzed Veterans* rule, which served as a

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<sup>201</sup> See JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 75–104 (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 alone,” *id.* at 75).

<sup>202</sup> See 285 U.S. 22, 45–46 (1932).

<sup>203</sup> See Bamzai, *supra* note 19, at 987. See generally John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434 (1947) (illustrating contemporaneous understanding of the APA).

<sup>204</sup> See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540–41 (1983); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1290 (2010).

<sup>205</sup> Cf. *United States v. Fausto*, 484 U.S. 439, 448 (1988) (holding that the comprehensive nature of the statutory regime entailed the exclusion of unmentioned remedies and procedures).

<sup>206</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 542–46 (1978).



procedural check on *Auer* deference.<sup>207</sup> In fact, Justice Scalia's sole misgiving about overruling the rule was that *Auer* allowed agencies to game the system by sequentially issuing interpretive rules.<sup>208</sup> Nevertheless, he thought that was a problem with *Auer*, not a reason to pile procedural common law atop the APA.<sup>209</sup> For Justice Scalia, a return to the APA on both fronts — rejecting *Auer* deference and *Paralyzed Veterans* — would set things aright.<sup>210</sup>

Similarly, while on the D.C. Circuit, then-Judge Kavanaugh objected to his court's insistence on bulking up rulemaking procedures in the teeth of *Vermont Yankee*.<sup>211</sup> Specifically, he contended that additional, judicially imposed requirements for notices of proposed rulemaking and statements of basis and 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.<sup>212</sup> The work of scholars like Professor Kathryn Kovacs supports his argument that the layers of administrative procedure courts impose on informal rulemaking are inconsistent with the APA.<sup>213</sup> But Justice Kavanaugh is no administrative supremacist. His recent judicial and scholarly writings have *also* raised questions about *Chevron*.<sup>214</sup> Like Justice Scalia in *Perez*, Justice 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.

But the neoclassical approach to procedure would not always promise sweetness and light for agencies. It might cast doubt on the emerging

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<sup>207</sup> *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment) (“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., concurring in the judgment) (“I concur in the Court’s holding that the doctrine first announced in *Paralyzed Veterans* . . . is inconsistent with the Administrative Procedure Act (APA) and must be rejected.” (citations omitted)).

<sup>208</sup> *See id.* at 1211–12 (Scalia, J., concurring in the judgment).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 1211–13.

<sup>211</sup> Similarly, on the academic front, Professor Jack Beermann rejects *Chevron* doctrine while also, along with 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, 782–84 (2010) (offering ten reasons to overturn *Chevron*); Beermann & Lawson, *supra* note 19, at 860 (“There are, however, a significant number of important administrative law doctrines that do seem to fly squarely in the face of all but the most unreasonably narrow understandings of the *Vermont Yankee* decision. These doctrines . . . are all ripe for reconsideration.”).

<sup>212</sup> *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>213</sup> *See* Kovacs, *supra* note 19, at 533–46.

<sup>214</sup> *See U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 418–26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (arguing that *Chevron* should not apply to major rules); Kavanaugh, *supra* note 9, at 2150–54 (raising more general criticisms about *Chevron* doctrine).

tendency in appellate courts to give agencies *Chevron* deference on whether they must proceed through formal or informal adjudication.<sup>215</sup> Under the same logic, agencies would not receive *Auer* deference on interpretations of their own procedural regulations. There is also an 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.<sup>216</sup> Upsetting that ruling would certainly bring a shock to the administrative system — one that the metalaw 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.<sup>217</sup>

3. *Review of Agency Policymaking.* — A neoclassicist is more forgiving than the administrative skeptic or even the administrative pragmatist on review of agency policymaking. At risk of 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.<sup>218</sup> On the D.C. Circuit, however, he penned an opinion (joined by then-Judge Ginsburg) that gave agencies latitude to engage in policy experimentation under uncertainty.<sup>219</sup> Similarly, then-Judge Kavanaugh warned against expanding “*State Farm’s* ‘narrow’ § 706 arbitrary and capricious review into a far more demanding test.”<sup>220</sup> 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.<sup>221</sup> And, notwithstanding then-Judge Kavanaugh’s concerns about overreach, this more deferential posture may be closer to actual judicial

<sup>215</sup> See *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 17–18 (1st Cir. 2006) (citing *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1480–82 (D.C. Cir. 1989)) (overruling circuit precedent presuming formal adjudication to adopt *Chevron* approach); see also Berry, *supra* note 47, at 545–46.

<sup>216</sup> See Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 8–10 (2017).

<sup>217</sup> For an argument for why the procedure itself is not off the wall as a matter of policy, see Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 241 (2014). Nielson argues: “If applied in appropriate circumstances, formal rulemaking — with its emphasis on accuracy and transparency — could improve the administrative process.” *Id.*

<sup>218</sup> See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring).

<sup>219</sup> See *Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 316 (D.C. Cir. 1992) (holding that “an agency has some leeway reasonably to resolve uncertainty, as a policy matter, in favor of more regulation or less”).

<sup>220</sup> *Am. Radio Relay League, Inc. 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).

<sup>221</sup> *Cf. Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (holding “a court may not reject an agency’s stated reasons for acting simply because the agency might also have had other unstated reasons”). *But see id.* at 2575 (stating that a decision is arbitrary and capricious when “an explanation for agency action . . . is incongruent with what the record reveals about the agency’s priorities and decisionmaking process”).

practice in the appellate trenches, even if agency reversals in cases like *State Farm* are more salient in casebooks and doctrinal rhetoric.<sup>222</sup>

For the neoclassicist, deference on policy questions is the corollary of nondeference on legal questions. As explained above, rejecting *Chevron* deference disaggregates the inquiry formerly known as “Step Two” into (a) cases in which lawyers’ arguments cut both ways such that it is hard to say the matter was clear, even if a reviewing judge thinks one interpretation is 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. Returning to the distinction above, judgments about the exposition of an authoritative legal text — its public or intended meaning — are distinct from reasoning about what norms ought to govern within a space of delegated discretion.<sup>223</sup> The latter requires empirical and normative reasoning beyond the legal formalist’s interpretive toolkit, which leads such an interpreter toward deferential judicial review.

Abandoning *Chevron* would eliminate the Step Two reasonableness inquiry for questions falling under category (a), while taking a more deferential stance toward agencies under category (b), which includes arbitrary and capricious questions mislabeled as unclear questions of legal interpretation.<sup>224</sup> The underlying premise here is that, while courts can and should make close calls about legal questions, they lack the capacity and accountability to do more than patrol the outer bounds of reasonableness when it comes to agency policymaking. In this respect, the neoclassicist shares the supremacist’s judgment about the reach of judicial craft on policy choices while rejecting the supremacist’s (and the pragmatist’s) doubts about the autonomy and determinacy of law within its own domain.

A further argument returns to the APA. There is reason to believe that arbitrary and capricious review was understood when the APA was enacted as closer to rational basis review under constitutional law than contemporary hard look review.<sup>225</sup> The standard “restate[d] the scope of judicial function in reviewing final agency action,”<sup>226</sup> which appears

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<sup>222</sup> See, e.g., VERMEULE, *supra* note 6, at 165 (citing David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010)) (describing empirical findings that “courts do not seem to be engaging in ‘hard look’ analysis” when they review rationality of agency decisions).

<sup>223</sup> See *supra* pp. 888–89.

<sup>224</sup> See Pojanowski, *supra* note 189, at 1086–87.

<sup>225</sup> See Metzger, *supra* note 59, at 1299–1300 (collecting evidence to this effect).

<sup>226</sup> U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947) (first citing S. REP. NO. 79-752, at 230 (1945); and then citing *Administrative Procedure: Hearings Before a Subcomm. of the Comm. on the Judiciary on S. 674, S. 675, and S. 918*, 77th Cong. 1150, 1351, 1400, 1437 (1941)); see also *NLRB v. Minn. Mining & Mfg. Co.*, 179 F.2d 323, 326 (8th Cir. 1950) (stating that APA did not make “any material change in

to have been more lenient than hard look.<sup>227</sup> In line with this understanding, early arbitrary and capricious cases under the APA applied standards similar to rational basis review.<sup>228</sup> Rational basis-type language continued into the 1960s,<sup>229</sup> though it declined with the rise of hard look review in the D.C. Circuit.<sup>230</sup> If this understanding is correct, then, in addition to more general ideas about the judicial role, the neoclassicist can rely on original, positive law to set the standard of review. 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 nondelegation doctrine.

4. *Review of Agency Factfinding.* — As a matter of first principles, there are interesting open questions about how a neoclassical approach would regard factfinding by agencies. While it is unclear what form of pre-APA judicial review is the best analogue to modern judicial review of agency factfinding,<sup>231</sup> the neoclassicist can set that question aside by looking to the APA itself. For this reason, a neoclassical approach could

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the scope of review"). One should take citations to the *Attorney General's Manual* with a grain of salt, for it was in the author's interest to tilt judicial interpretation of the APA to the government's benefit. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1682–83 (1996).

<sup>227</sup> See LAWSON, *supra* note 49, at 700 (stating that the APA "clearly intended to codify pre-existing law, which consistently interpreted the phrase 'arbitrary or capricious' to permit only the most minimal judicial review of agency decisions" (citation omitted)).

<sup>228</sup> See, e.g., *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 695 (9th Cir. 1949) ("The question of 'reasonableness' [under the APA] reduces itself to whether the order is a rational conclusion and not so 'unreasonable' as to be capricious, arbitrary or an abuse of discretion."); see also *Minn. Mining & Mfg. Co.*, 179 F.2d at 326 (linking arbitrary and capricious standard with substantial evidence standard, both of which are satisfied if "the decision has a rational and substantial basis in the evidence and the law").

<sup>229</sup> See, e.g., *Carlisle Paper Box Co. v. NLRB*, 398 F.2d 1, 6 (3d Cir. 1968) ("Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis." (quoting *NLRB v. Jas. H. Matthews & Co., Indus. Marking Prods. Div.*, 342 F.2d 129, 131 (3d Cir. 1965)); *E. Cent. Motor Carriers Ass'n v. United States*, 239 F. Supp. 591, 594 (D.D.C. 1965) ("'Arbitrary' and 'capricious' are to be understood in their legal sense . . . . Accordingly these words mean 'without rational basis.'").

<sup>230</sup> The strength of the rational basis test is up for debate. For an argument that APA-era rational basis review was stricter than how constitutional rational basis review is generally understood today, and thus roughly within the range of standard hard look review, see Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 849 (2018). Current doctrine does not equate arbitrary and capricious and constitutional rational basis review. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983).

<sup>231</sup> The most obvious framework is *Crowell's* approach, which provides jury-standard review for ordinary facts and greater scrutiny of factfinding that implicates jurisdictional and constitutional questions. 285 U.S. 22, 57–58 (1932). Even setting aside questions about whether those distinctions are manageable, see VERMEULE, *supra* note 6, at 28–29, 214, the less deferential review the Court of Chancery may have applied to the findings of special masters or delegated trials may be a better starting point for a neoclassical approach than review of agency factfinding by a court at law, cf. John H. Langbein, *Fact Finding in the English Court of Chancery: A Rebuttal*, 83 YALE L.J. 1620, 1620 (1974) ("[T]he Court of Chancery did indeed have and exercise fact finding power. . . . [W]hen the court delegated factual disputes for trial at law, the verdict was advisory and nonbinding.").

resemble the Court's recent approach in *Biestek v. Berryhill*.<sup>232</sup> There, in interpreting the term "substantial evidence" in the Social Security Act, both Justice Kagan in the majority and Justice Gorsuch in dissent read the term to resemble the jury standard. Justice Kagan cited *Consolidated Edison Co. v. NLRB*,<sup>233</sup> a pre-APA case whose reading of substantial evidence is similar to the jury standard.<sup>234</sup> Justice Gorsuch stated that Congress borrowed the substantial evidence standard "from civil litigation practice" for review of jury verdicts.<sup>235</sup> If the APA incorporated that standard, that would provide a positive-law basis for substantial deference based on the whole record.<sup>236</sup> If, on the other hand, the Court in *Universal Camera* was correct about Congress wanting a more searching "mood" of review, the more rigorous standard of review would instead govern.<sup>237</sup>

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

The previous section has pulled together a number of doctrinal and scholarly strands: (a) growing skepticism about legal deference; (b) doubts about whether procedural common law favors the agency or not; and (c) arguments that reviewing courts should stay their hands in reviewing agency policy judgments. This is admittedly a composite construction; current administrative law is not in a tidy state, after all.

But the composite sketched above is not like tracing a theory based on cases appearing in odd-numbered volumes of the U.S. Reports. Rather, three commitments tie together neoclassical administrative law: (a) belief in the autonomy and determinacy of legal craft; (b) the priority of original, positive law over judicial doctrine; and (c) hesitance to engage in judicial deconstruction of 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.<sup>238</sup>

*i. Autonomy of Law and Legal Reasoning.* — The neoclassical alternative resists mainstream administrative law's working assumption that

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<sup>232</sup> 139 S. Ct. 1148 (2019).

<sup>233</sup> 305 U.S. 197 (1938).

<sup>234</sup> *Biestek*, 139 S. Ct. at 1155 (citing *Consolidated Edison*, 305 U.S. at 229).

<sup>235</sup> *Id.* at 1159 (Gorsuch, J., dissenting).

<sup>236</sup> See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 367 (1998) (treating the APA as incorporating the jury standard); U.S. DEP'T OF JUSTICE, *supra* note 226, at 109–10.

<sup>237</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

<sup>238</sup> Cf. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–62, 864 (1989) (describing most originalists as "faint-hearted" originalists, *id.* at 862).

challenging legal questions are inextricably intertwined with policy-making 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 that of neoformalists like Professor Lawrence Solum. Hamburger contends that the classical English understanding of law consists in identifying the authoritative lawmaker's intention, an act that is different from engaging "in a sort of moral and political discernment of verities beyond the law of the land."<sup>239</sup> Solum contends that formal legal materials play a much larger role than the casual legal realism of the American academy suggests, resolving the vast majority of contested cases.<sup>240</sup>

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. The neoclassicist, however, 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,<sup>241</sup> for courts to engage in complicated policymaking in the way that legislators or administrators do.<sup>242</sup>

These presuppositions about the autonomy of legal reasoning have implications for the kinds of interpretive tools the neoclassicists favor. The neoclassicist is more likely to see the text's original meaning,

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<sup>239</sup> PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 116 (2008); see *id.* at 48 ("[Classical English lawyers] found legal obligation in the will or intent of their lawmaker. Not surprisingly, common lawyers rapidly assimilated the view that intent rather than eternal justice was the measure of legal obligation . . . focusing not merely on the intent of the lawmaker, but more specifically on the intent of legislative acts.").

<sup>240</sup> See Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and Legal Realism*, 127 HARV. L. REV. 2464, 2487–88 (2014) (book review) ("The data strongly suggest that law and legal preferences play an important role in explaining judicial behavior."); *id.* at 2476 ("[T]he failure of legal variables to explain the outcomes in the reported decisions of the Supreme Court would be perfectly consistent with the hypothesis that the law clearly determines the proper legal characterization of almost all of the events and occurrences that make up our social world.").

<sup>241</sup> 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 legal judgments to policymaking decisions, 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.

<sup>242</sup> The development of common law norms, when legitimate and necessary, also implicates broader 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, *On Reason and Authority in Law's Empire*, 6 LAW & PHIL. 357, 376 (1987) (arguing that "such a judgment will be both constrained and shaped by existing law in a way quite unlike any other moral judgment").

statutory context and structure, linguistic canons, and perhaps historical intent<sup>243</sup> as appropriate tools for interpretation, rather than normative canons or legislative purpose at a high level of generality.<sup>244</sup> 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 assessments of contemporary norms. The more that 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.<sup>245</sup> 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.<sup>246</sup>

These considerations shed light on previous attempts to distinguish between judicial review of law and policy. In *Crowell v. Benson*, the Court sought to draw such a sharp distinction, insisting on rigorous judicial review of questions of law while generally deferring on factual findings and determinations of what we would now call questions of policy.<sup>247</sup> Formally, the Court addressed the distinction between law and fact, reviewing the latter with deference unless factfinding implicated jurisdictional or constitutional questions.<sup>248</sup> *Crowell* preceded the rise of legislative rulemaking and presumed most administrative

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<sup>243</sup> 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 RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 9 (2012) (“Legislative intent . . . is an intelligible idea, instantiated in countless legislative acts and central to how one should interpret the statutes the legislature enacts.”); Hillel Y. Levin, *Intentionalism Justice Scalia Could Love*, 30 CONST. COMMENT. 89, 96–98 (2015) (reviewing EKINS, *supra*) (noting affinities between Professor Richard Ekkins’s intentionalism, which is skeptical of legislative history, and traditional textualism).

<sup>244</sup> 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. Cf. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1127–28 (2017) (contending that substantive canons may be part of the positive but unwritten law governing legal interpretation). A neoclassical court’s willingness to deploy such substantive canons will depend on the character of the reasoning such canons require and the determinacy of that metalaw of interpretation.

<sup>245</sup> See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 878 (1930).

<sup>246</sup> See Jeffrey A. Pojanowski, *Dunsmuir: A View from South of the Border*, 31 CAN. J. ADMIN. L. & PRAC. (SPECIAL ISSUE: A DECADE OF DUNSMUIR) 197, 198–99 (2018).

<sup>247</sup> *Crowell v. Benson*, 285 U.S. 22, 45–47 (1932) (holding that agency findings on questions of law “are without finality,” *id.* at 45, and subject to plenary judicial review).

<sup>248</sup> *Id.* at 46–47 (prescribing deferential review unless said review implicates “constitutional rights to be appropriately enforced by proceedings in court,” *id.* at 46); *id.* at 54–55 (providing a similar carve-out for jurisdictional facts).

policymaking would occur through formal adjudication.<sup>249</sup> *Crowell* did not neatly separate factfinding and policymaking, a category that would crystallize with the APA's sharp distinction between questions of law, fact, and policy. This distinct category of policymaking would become more salient with agencies promulgating broad, forward-looking, legislative rules. Nevertheless, the reasons *Crowell* saw for fact-deference track the competencies we associate with agency policymaking. Deference provided a "prompt, continuous, expert, and inexpensive method" for resolving questions "peculiarly suited to examination and determination by an administrative agency specially assigned to that task."<sup>250</sup>

Therefore, although *Crowell* predates the tripartite law-fact-policy distinction we discuss today, its logic points toward deference on policymaking. In this light, *Crowell* suggests a division between (a) questions of law (for courts) and (b) questions of policy and most questions of fact (for agencies). As Vermeule has ably catalogued, that compromise collapsed over time.<sup>251</sup> He contends that this collapse was inevitable, a product of a distinction between law, fact, and policy that is inherently unstable.<sup>252</sup>

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 insist[ed] that the division of these activities was coherent in theory and estimable in practice."<sup>253</sup> To be sure, the tenability of such a classical approach to the legal craft in a post-realist world is an important challenge neoclassical administrative lawyers must address.<sup>254</sup> 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* 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

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<sup>249</sup> See VERMEULE, *supra* note 6, at 32 (arguing that *Crowell* "essentially neglected the central role of legislative rulemaking in the modern administrative state" and "presupposes that adjudication . . . would be a principal method, or even the principal method, of administrative decision-making").

<sup>250</sup> *Crowell*, 285 U.S. at 46; see also *id.* at 47 (invoking the agency's "sound practical judgment" and stating that finality of factfinding is necessary for the efficiency of the legislative scheme).

<sup>251</sup> See VERMEULE, *supra* note 6, at 25–37.

<sup>252</sup> See *id.* at 28 ("What would happen if the arguments that persuaded Hughes to commit factfinding to administrative tribunals — arguments from justice, the inadequacy of the common law, expertise, and efficiency — also applied to law-interpretation, for example?").

<sup>253</sup> See Pojanowski, *supra* note 189, at 1089–90.

<sup>254</sup> See *infra* Part III, pp. 903–18.



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."<sup>255</sup> The neoclassicist will look to the original understanding of the APA and, in the event that 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.<sup>256</sup>

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 free-standing rule of decision in the absence of legislation on point and can work as a backdrop that informs the contours of codified administrative law. 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.<sup>257</sup> In this respect, the neoclassicist approach to the APA resembles "original methods" or "original law" approaches to constitutional originalism.<sup>258</sup>

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

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<sup>255</sup> For a thorough and thoughtful defense of this position, see Bernick, *supra* note 230; and also see Michael E. Herz, *Breaking News: New Form of Superior Agency Guidance Discovered Hiding in Plain Sight*, JOTWELL (Feb. 16, 2017), <https://adlaw.jotwell.com/breaking-news-new-form-of-superior-agency-guidance-discovered-hiding-in-plain-sight/> [<https://perma.cc/89M5-5KfV>] (describing the phenomenon of "APA originalism").

<sup>256</sup> Cf. Pojanowski & Walsh, *supra* note 169 (providing a normative defense of this originalist approach in the constitutional setting).

<sup>257</sup> See Bamzai, *supra* note 19, at 990–95 (review of statutory interpretation); Pojanowski, Seminole Rock, *supra* note 40, at 98 (review of regulatory interpretation).

<sup>258</sup> See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 769 (2009) (arguing that "the proper positive interpretive approach for the United States Constitution requires reference to the [uncodified] interpretive rules, including the legal interpretive rules, that were applicable to that Constitution" at the time of enactment); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 849–50 (2015) (explaining how unwritten background law can inform or be incorporated into a regime of positive law).

3. *Constitutional Modesty.* — It is possible that an originalist approach to our Constitution condemns much of the contemporary administrative state, APA and all, to the dustbin of eighteenth-century history. Hence, the administrative skeptics, who share many of the neoclassicists' interpretive commitments, call for the revival of the nondelegation 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<sup>259</sup> or rejected<sup>260</sup> nondelegation challenges, and its separation of powers interventions have been weak on practical consequences, even if they are occasionally strong on rhetoric.<sup>261</sup> 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.<sup>262</sup>

4. *The Neoclassical Vision of Public Law.* — As in Part 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,

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<sup>259</sup> See *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1233–34 (2015) (avoiding question of delegation to a private entity by holding that Amtrak is a governmental body for regulatory purposes).

<sup>260</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465, 474 (2001) (holding that a statute instructing agency to set standard “requisite to protect the public health” with an “adequate margin of safety,” *id.* at 465 (quoting 42 U.S.C. § 7409(b)(1) (2012)), did not violate the nondelegation doctrine).

<sup>261</sup> See *Lucia v. SEC*, 138 S. Ct. 2044, 2050 n.1, 2053–54 (2018) (holding that an SEC ALJ was an officer of the United States and was therefore unconstitutionally appointed, thus avoiding the question of for-cause removal); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483, 492 (2010) (finding double layer of for-cause removal for Board members unconstitutional while leaving in place for-cause protections of supervising SEC Commissioners).

<sup>262</sup> See *infra* section III.C, pp. 912–17.

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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.<sup>263</sup>

Neoclassical administrative law also echoes the Diceyan principle of legislative supremacy, under 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 or question 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 — that is, the regulations — the agency has legislated for itself. This is not to reintroduce the language of “jurisdictional” exceptions to

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<sup>263</sup> On questions of fact, Diceyan thinking on the role of courts, juries, and separation of powers appears unclear, or at least less strident in its support for the jury than other classical common approaches. See Ian Christopher Fletcher, “*This Zeal for Lawlessness*”: A. V. Dicey, *The Law of the Constitution, and the Challenge of Popular Politics, 1885–1915*, 16 *PARLIAMENTARY HIST.* 309, 316 (1997) (“Dicey was no Blackstonian, at least with regard to this legal institution.”). Dicey explained that the “law of England now knows nothing of exceptional offences punished by extraordinary tribunals” without juries. DICEY, *supra* note 21, at 127. On the other hand, he explained that, while a New Zealand statute abolishing trial by jury would violate the common law of England, it would nonetheless be valid because Parliament passed a statute indicating that colonial legislation should not be held void simply because it was repugnant to English law. See *id.* at 49–51.

deference,<sup>264</sup> 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,<sup>265</sup> whether a "source" of pollution refers to a smokestack or the facility as a whole,<sup>266</sup> or whether the National Labor Relations Act overrides the Federal Arbitration Act's solicitude for arbitration,<sup>267</sup> the agency cannot expand or narrow its authority beyond the court's best interpretation of what the legislature delegated.

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 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 of 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 is discussed below. In the meantime, it is worth comparing neoclassical administrative law's reconciliation of the two Diceyan principles with its competitors'. Unlike the 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 the 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 to and persisting in a new regulatory environment.

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<sup>264</sup> See *City of Arlington v. FCC*, 569 U.S. 290, 296–301 (2013) (rejecting as incoherent a *Chevron* exception for questions of agencies' jurisdiction).

<sup>265</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131 (2000).

<sup>266</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

<sup>267</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (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 skeptic — 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.

Part II has 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 Part seeks to establish as much, working through some of the neoclassical theory’s basic presuppositions.

No theory of any interest lacks vulnerabilities, and this Part will begin to address challenges facing neoclassical administrative law. The defense will draw on both 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.<sup>268</sup> The objection to this stance, leveled in varying degrees by supremacists and pragmatists, is that 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 that judges lack.<sup>269</sup>

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<sup>268</sup> See *supra* section II.B.1, pp. 895–98.

<sup>269</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (listing dueling

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.<sup>270</sup> At the same 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 a nonstarter 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.<sup>271</sup> 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.<sup>272</sup> 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 for a separate paper — or, indeed, research

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canons of statutory interpretation); Radin, *supra* note 245, at 878 (describing the policy choices inherent in purposive interpretation).

<sup>270</sup> Cf. Radin, *supra* note 245, at 866 (“Words are certainly 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.”).

<sup>271</sup> See Pojanowski, *supra* note 246, at 199.

<sup>272</sup> 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,” *id.* at 500); 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).

agenda — and given the influence of legal realism, the burden of persuasion may fall on the neoclassical administrative lawyer. That said, it is not clear that the neoclassicist must demonstrate that legal realism is entirely wrong about formalism. Neoclassicism may survive even under a regime of “tame” legal realism in which courts can resolve most, but not all, legal questions without appealing to first-order policy judgments.<sup>273</sup> Even if the law underdetermines a small fraction of the litigated cases posing legal questions, it does not follow that we should structure the entire system of judicial review based on those exceptional cases. A comparatively blunt rule of nondeference might overinclude cases where a realist might prefer deference. One still has to balance that against the errors and systematic distortions of a broader deference regime, including: the complexities and satellite litigation about whether to apply the framework and whether a statute is sufficiently clear; the risk of judicial punting or inconsistency in the search for clarity; and the effect of encouraging agencies to pursue what the law arguably allows rather than identifying what the law truly requires.

But even if neoclassical administrative law has a whiff of pre-realist naïveté about it, it is not alone. Mainstream administrative law doctrine is sensible only with a belief in the autonomy and determinacy of law. At times, the leap of faith required in mainstream contexts is even more daunting than the one neoclassical formalism presents. 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.<sup>274</sup> Doing so requires a court to distinguish between (a) mere interpretation of a norm and (b) policy-making in the norm’s linguistic gaps. Notwithstanding academic encouragement to abandon the hunt for that jurisprudential snipe,<sup>275</sup> the courts press on,<sup>276</sup> albeit with some *Chevron*-induced embarrassment.<sup>277</sup>

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<sup>273</sup> Cf. Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 750 (2013) (describing the “taming” of legal realism through such an argument).

<sup>274</sup> See *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 135 S. Ct. 2051, 2055–56 (2019) (distinguishing between interpretive and legislative rules and remanding for a determination of “the legal nature,” *id.* at 2055, of the order under review).

<sup>275</sup> See Manning, *supra* note 152, at 924 (“In view of the intellectual developments associated with [*Chevron*], the present framework for distinguishing interpretive from legislative rules reduces to an unmanageable question of degree.”).

<sup>276</sup> See, e.g., *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 93–95 (D.C. Cir. 1997) (seeking to distinguish legislative rules, interpretive rules, and policy statements); *Hector v. USDA*, 82 F.3d 165, 170 (7th Cir. 1996) (holding that an interpretive rule must “be derived from the regulation by a process reasonably described as interpretation” in a fashion that is closer to “the narrow sense [of] the ascertainment of meaning” than to policymaking choices); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (offering a test to distinguish interpretive and legislative rules).

<sup>277</sup> See, e.g., *Shalala*, 127 F.3d at 94; *Am. Mining Cong.*, 995 F.2d at 1110.

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.<sup>278</sup> 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”<sup>279</sup> reserved for 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 epistemic authority might be warranted,<sup>280</sup> whereas the latter is truly an arbitrary and capricious question mischaracterized as a legal one.

The pragmatists' more general embrace of administrative common law also implies a stronger belief in law's autonomy and determinacy than their *Chevron*-inflected legal realism lets on. As I have written elsewhere, it is illuminating to compare the pragmatists' stance to that of classical English common lawyers.<sup>281</sup> “[S]ensitive to the current texture of the law,” those common lawyers “would extend, develop, and even modify its principles to accommodate developments in society and its norms. They would do so through a traditionalist, artificial method of reason that would maintain coherence in legal doctrine and ensure doctrine was roughly congruent with the society's shared sense of reasonableness.”<sup>282</sup> Now, judges may not feel equipped for such work in areas of complex regulatory policy as they would in torts or contracts, so it is telling that much contemporary administrative common law concerns not substance, but lawyerly, second-order questions about

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<sup>278</sup> Cf. Breyer, *supra* note 272, 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.”).

<sup>279</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring in the judgment).

<sup>280</sup> Cf. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>281</sup> See Pojanowski, *supra* note 20.

<sup>282</sup> *Id.* For a discussion of classical common law understandings of “artificial reason,” see Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1, 1–11 (2003).



procedure and comparative institutional competence.<sup>283</sup> Pragmatists therefore “argue about *Chevron*’s domain, what is required for a reasoned agency explanation, and when agencies must engage in rulemaking.”<sup>284</sup> And, like common lawyers, pragmatists “do so with little attention to the text of the [APA] itself.”<sup>285</sup>

Following in the steps of the classical common lawyer, the pragmatist keeps “faith in the artificial reason of the law,” which aspires to help its practitioners develop law with only indirect engagement with challenging substantive disputes.<sup>286</sup> Yet it remains a tall task. Consider the pragmatist’s inquiry on 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.<sup>287</sup> Even before *Mead* and its progeny, critics recognized that such an inquiry would pose “a formidable, if not an impossible, task.”<sup>288</sup> The complexity and unpredictability of *Chevron* “Step Zero”<sup>289</sup> doctrine in the wake of *Mead* confirms this worry. Deciding whether “source” refers to a single smokestack or an entire facility seems 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.<sup>290</sup> Without such faith, the more responsible course would be to develop administrative common law in the direction of Vermeule’s administrative supremacy, where, for good lawyerly reasons, law retreats out of a recognition of its own limits.<sup>291</sup>

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<sup>283</sup> Cf. William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2044 (1994) (“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. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 173 (1958)).

<sup>284</sup> Pojanowski, *supra* note 20.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> Breyer, *supra* note 272, at 370.

<sup>288</sup> Farina, *supra* note 272, at 469.

<sup>289</sup> Sunstein, *supra* note 34, at 188, 190–91 (identifying as “Step Zero” the threshold question of whether *Chevron* deference applies).

<sup>290</sup> See Pojanowski, *supra* note 20.

<sup>291</sup> See VERMEULE, *supra* note 6, at 31.

From this perspective, neoclassicism resembles a reformed or refined version of administrative pragmatism. Both the neoclassicist and the pragmatist believe there are statutory questions where 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, and so forth) is not policy-laden in the same way as 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."<sup>292</sup>

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

Those convinced by the neoclassical commitment to law's autonomy may remain dissatisfied or uncertain about its prioritization of original, positive law like the APA and other procedural statutes over judge-made doctrines. The concern here is that privileging the positive law upsets the delicate balance courts have struck in adapting administrative law to a landscape that 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.<sup>293</sup> The APA did not envision the explosion of informal rulemaking, though this is in part a product of the Court's drive-by dispatching of formal rulemaking.<sup>294</sup> The APA might require *some* minimal kind of explanation, but a pure neoclassical approach will likely not require heightened rulemaking procedures or the intense instantiations of hard look review.<sup>295</sup> Similarly, although black letter law gives mixed signals about the scrutiny with which courts should review agency

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<sup>292</sup> Pojanowski, *supra* note 20.

<sup>293</sup> See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392–95 (D.C. Cir. 1973) (requiring agencies to satisfy numerous judicially imposed requirements during the notice and comment process).

<sup>294</sup> See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 238 (1973) (concluding that the phrase "after hearing" in the Interstate Commerce Act did not trigger formal rulemaking procedures).

<sup>295</sup> See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (grounding the reasoned explanation requirement in 5 U.S.C. § 706(2)(A)); *Portland Cement*, 486 F.2d at 392–95 (imposing substantial duties on agencies regarding notice of proposed rulemaking and explanation of rulemaking decisions).

policymaking decisions, the arbitrary and capricious test requires more than the rationality review courts afford ordinary regulatory legislation.<sup>296</sup>

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 more easily than legislatures, and might do their jobs better with procedures more elaborate than the APA's bare bones suggest. At a deeper level, whether phrased in terms of ensuring traditional Anglo-American ideals about the rule of law take root in the administrative state<sup>297</sup> or avoiding the creation of a *Rechtsstaat*,<sup>298</sup> there's a concern about ensuring the rule of law extends to the operations of all officials, especially administrative officials exercising delegated state power.<sup>299</sup>

There are, of course, powerful counterarguments that judicial additions to the APA cause more harm than good.<sup>300</sup> But this is not simply about first-order questions on the wisdom of procedural additions to informal rulemaking<sup>301</sup> or a more rigorous approach to arbitrary and capricious review.<sup>302</sup> 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; *Pension Benefit Guaranty Corp. v. LTV Corp.*<sup>303</sup> may suggest as much in its ratification of *Citizens to Preserve Overton Park, Inc. v. Volpe*.<sup>304</sup> 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.

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<sup>296</sup> Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1761–63, 1761 n.75 (2007) (outlining the increased rigor of judicial review of administrative policymaking over the last 50 years).

<sup>297</sup> Cf. LEWANS, ALJD, *supra* note 23, at 207–21 (explaining how administrative law doctrine can comport with broader notions of fairness and legitimacy).

<sup>298</sup> On Ernst Freund's unsuccessful bid to introduce the continental notion of the *Rechtsstaat* to American administrative law, see ERNST, *supra* note 74, at 9–27.

<sup>299</sup> Cf. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1250–56 (2017) (discussing the categories of legal norms within administrative agencies).

<sup>300</sup> See, e.g., Bagley, *supra* note 101 (manuscript at 78) (“Many well-intentioned efforts to promote good governance [through heightened procedures] can — and do — drain agencies of their legitimacy, impair their responsiveness to the public, and expose them to capture.”); Kovacs, *supra* note 19, at 545–66 (discussing the unintended negative consequences of administrative common law in this domain).

<sup>301</sup> See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392–95 (D.C. Cir. 1973).

<sup>302</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–57 (1983); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851–53 (D.C. Cir. 1970).

<sup>303</sup> 496 U.S. 633 (1990).

<sup>304</sup> 401 U.S. 402 (1971); see also *Pension Benefit*, 496 U.S. at 654–55.

Thus, even if an originalist reading of the APA leads to less scrutiny of agency policymaking judgments, and therefore bad consequences, the neoclassicist would bite the bullet. The justifications for APA originalism track general defenses of originalism in other constitutional and statutory contexts,<sup>305</sup> and 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 Professor Lon Fuller's internal morality of law.<sup>306</sup> As Professors Cass Sunstein and Adrian Vermeule have argued, however, there is a threshold question about where and when those rule-of-law principles should supervene upon ordinary administrative law.<sup>307</sup> Along with that issue come questions of institutional competence to determine the scope of the morality of administrative law's domain.<sup>308</sup> 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.<sup>309</sup> 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.<sup>310</sup>

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 in resolving those challenges.<sup>311</sup> 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.<sup>312</sup> 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

<sup>305</sup> See Bernick, *supra* note 230, at 834–35.

<sup>306</sup> Sunstein & Vermeule, *supra* note 57, *passim*.

<sup>307</sup> *Id.* at 1967–71.

<sup>308</sup> *Id.* at 1975–77.

<sup>309</sup> See *id.* at 1968 (citing LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969)).

<sup>310</sup> See *id.* at 1969.

<sup>311</sup> See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978).

<sup>312</sup> See 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"); Kovacs, *supra* note 19, at 545–47 ("Courts are not well positioned to adjust the benefits and burdens of the regulatory state." *Id.* at 545.).

managerial direction by the administrative entity whose operations we ideally would like to see harmonized with the rule of law.<sup>313</sup>

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 pragmatist's desire to bring administrative governance into harmony with the internal morality of law. It simply differs with pragmatism as to means.<sup>314</sup> 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.

These considerations 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 agencies were allowed to dispense with the paper hearing and give more minimalist explanations for their decisions in informal rulemaking. (Or, on the converse, if agencies had a harder time avoiding formal rulemaking.) As with any revisionary argument, courts need to take transition 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 APA's original, bare-bones requirements, which emphasize adjudication and ignore complex rulemaking, are simply inadequate. 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, designing procedural regimes is complex and polycentric. Judges should not be overconfident that new common law will strike the proper balance between competing commitments, especially because

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<sup>313</sup> Cf. Stack, *supra* note 23, at 310 ("[D]oes inviting courts to police [an] agency's compliance with rule-of-law values provide too great a practical temptation for them to reassert their roles as deciders?").

<sup>314</sup> For cognate arguments in the constitutional and human rights context, see generally GREGOIRE WEBBER ET AL., *LEGISLATED RIGHTS* (2018); GREGOIRE C.N. WEBBER, *THE NEGOTIABLE CONSTITUTION* (2009); Pojanowski & Walsh, *supra* note 169. Canadian scholar Matthew Lewans, who has offered an elegant argument that judicial review should ensure that the internal morality of law thrives in administrative governance, see LEWANS, *ALJD*, *supra* note 23, 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, see, e.g., Province of Ontario Statutory Powers Procedure Act, R.S.O. 1990, c S.22 (Can.), there is no national equivalent of the APA in Canada.

that balance is deeply normative and warrants legislative input. It is strange that 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.<sup>315</sup> A Congress speaking to a neoclassical judiciary could have more confidence that its legislative efforts would be worthwhile.<sup>316</sup> As a corollary, neoclassical administrative lawyers should 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, agencies do not always want to act in a rash, arbitrary, or Delphic fashion. They 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. By 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, it may be that post-APA judicial doctrines undermine this rule-of-law sensibility within the agencies.<sup>317</sup>

### C. *Constitutional Modesty*

Although pragmatists and supremacists may charge that neoclassicism's approach to legal interpretation is radical and old-timey, the administrative skeptic may charge that it is milquetoast and too newfangled. It is fine 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 rational basis review of policymaking that abandons judicial duty and enables unconstitutional delegations.<sup>318</sup> Neoclassical administrative law is in the apparently awkward position of being formalist, originalist, and reformist in statutory interpretation while remaining passive and pragmatic in

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<sup>315</sup> See Kovacs, *supra* note 19, at 554 (“[T]he courts’ willingness to make law has enabled Congress’s inaction.”).

<sup>316</sup> See *id.* (“Instead of making Congress’s decisions for Congress, the courts should make decisions that inspire Congress to deliberate.”).

<sup>317</sup> See Metzger & Stack, *supra* note 299, at 1288.

<sup>318</sup> Similar concerns drive criticism of deference to agency factfinding. See Bernick, *supra* note 120, at 30 (“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.”).

constitutional interpretation. There are a number of answers that could justify, or at least render plausible, this apparently paradoxical approach.

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 approach to constitutional interpretation.<sup>319</sup> He contends that neither (a) the majoritarian or rights-based conceptions of democracy nor (b) the democratic deliberation-forcing justifications for originalist textualism apply in constitutional interpretation as they do in the statutory context.<sup>320</sup> As a matter of theory, living constitutionalism can coexist with statutory formalism.

The differences between the positive law of regulatory legislation and the Constitution could also provide practical justifications for neoclassicism's divergent attitudes toward statutory and constitutional interpretation. 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, may be more determinate, or are at least more susceptible to lawyers' arguments, than are 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 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 could silently narrow *Chevron* via a strong Step One but would not rigorously enforce the nondelegation doctrine in cases like *Whitman v. American Trucking Ass'ns*.<sup>321</sup>

This defense of divergence is plausible but may not be satisfactory on neoclassical terms. 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

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<sup>319</sup> Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 4–5 (2004) (arguing that democratic 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," *id.* at 4).

<sup>320</sup> *Id.* at 5.

<sup>321</sup> 531 U.S. 457, 474 (2001).

pragmatic justification for divergent interpretation in the constitutional and statutory domains.<sup>322</sup> Though the above explanations may satisfy many of neoclassicism's critics, there are further justifications at hand.

Another response would deny any 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. Professor John Manning argues, for example, that the Necessary and Proper Clause gives Congress wide latitude in structuring the administrative state in the absence of clear constitutional text to the contrary.<sup>323</sup> Perhaps one could mount a similar originalist defense of neoclassicism through Professor Jack Balkin's framework originalism<sup>324</sup> by pointing to substantial delegations in the Founding era<sup>325</sup> or by recalling recent evidence that the nondelegation doctrine was nowhere near as potent as originalist critics suppose.<sup>326</sup> Without endorsing any item in this litany of defenses, I nevertheless note that originalist investigation could defuse some of the squibs against the administrative state.

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 one could draw on Professor Steven Calabresi's originalist critique of libertarian originalist theories that require active judicial engagement.<sup>327</sup> Even if the original understanding of the Constitution contradicts the administrative state we have, it also rejects rigorous judicial enforcement of originalist norms over and above the decisions of the political branches. The Constitution's text, structure, and history militate

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<sup>322</sup> See Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015).

<sup>323</sup> John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 53 (2014) (“[T]he text of the Necessary and Proper Clause, read against the constitutional structure as a whole, requires deference to Congress’s reasonable judgments about how to implement not only its own powers, but also those of the coordinate branches.”).

<sup>324</sup> See JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

<sup>325</sup> JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 5 (2012).

<sup>326</sup> See Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 381 (2017).

<sup>327</sup> See Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1083 (2005) [hereinafter Calabresi, *Reply to Barnett*] (reviewing RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004)). Calabresi has since revised his position to call for greater judicial enforcement of the Constitution. See Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419, 1427–42 (2019) (providing an originalist case for stronger judicial review).



against a powerful role for the Court.<sup>328</sup> Conferring such revisory power to the institution creates a sweeping countermajoritarian power for which the courts are not well suited, and which the Framers never contemplated.<sup>329</sup> 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.

A neoclassicist can further justify her constitutional modesty by noting that theories of constitutional *interpretation* do not always track theories of constitutional *adjudication*.<sup>330</sup> Even originalists recognize that the best interpretation of a clause of the Constitution does not necessarily entail that such an interpretation govern judicial review.<sup>331</sup> 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 Solum's recent discussion of originalism and precedent, for example, we can identify two reasons for constitutional passivity.<sup>332</sup>

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.<sup>333</sup> Blowing up the administrative state would hardly promote the “predictability, certainty, stability,” or “uniformity”<sup>334</sup> that 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 judgments about the rapidity with which they could be

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<sup>328</sup> See Calabresi, *Reply to Barnett*, *supra* note 327, at 1092 (“There is simply no way to read the bare-bones language 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 the defenders and protectors of the federal Constitution.”).

<sup>329</sup> See *id.* at 1094 (discussing countermajoritarian difficulty); *id.* at 1096–97 (noting the institutional constraints of the judiciary). Although Calabresi raises these worries in the context of policy-laden decisions about the reasonableness of substantive state incursions on liberty, see *id.* at 1082–83, inquiries about whether an agency policy judgment is sound or a congressional delegation is too large are similar.

<sup>330</sup> On the distinction between theories of interpretation and full-fledged theories of adjudication, see Pojanowski & Walsh, *supra* note 169, at 149.

<sup>331</sup> See *id.* at 155. The fact that a constitutional norm may be underenforced in adjudication does not impugn its validity. To the contrary, Congress and the executive branch could be better positioned to give it practical force. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1226–28 (1978).

<sup>332</sup> See Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451 (2018) (reviewing RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* (2017)).

<sup>333</sup> See *id.* at 461–62.

<sup>334</sup> *Id.* at 460.

effected without damage to the rule of law.”<sup>335</sup> 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, constitutional modesty has much to offer — and does so in a way that can promote the values underlying the original constitutional order.<sup>336</sup> 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.<sup>337</sup> 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. Much of the modern administrative state rests on 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 approach may be advisable and could be required — *stare decisis* is part of the law as well.<sup>338</sup>

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,<sup>339</sup> but further reflection supports inverting the conventional wisdom. So much of the judicial common law governing judicial

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<sup>335</sup> *Id.* at 462.

<sup>336</sup> *See id.* at 462–63.

<sup>337</sup> *See* FROHNEN & CAREY, *supra* note 92, at 219; *cf.* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 708 (1997) (praising the Supreme Court decision to refrain from intervening on “questions of morality and social policy”).

<sup>338</sup> *See* Bernick, *supra* note 230, at 847 (discussing the role of precedent in implementing APA originalism).

<sup>339</sup> *See* *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (stating that *stare decisis* is 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 (1932) (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).

review and administrative procedure is so loosely tethered to the text of the relevant statutes that it is hard to say statutory stare decisis comes into play at all.<sup>340</sup> There are also powerful arguments against giving interpretive methodologies like *Chevron* deference stare decisis effect.<sup>341</sup>

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 full 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 requirement that large swaths of administrative adjudication flow through Article III courts. Moreover, whether trimming back rulemaking procedure is good<sup>342</sup> or bad,<sup>343</sup> 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 then 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 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.<sup>344</sup>

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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

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<sup>340</sup> See Metzger, *supra* note 59, at 1311 (“Notably, however, the statutory tether for administrative common law is often loose and quite attenuated from doctrinal substance.”). *But cf.* 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).

<sup>341</sup> See Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1128–29 (2019); see also Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1595 (2014); Metzger, *supra* note 59, at 1311.

<sup>342</sup> See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–62 (1995) (describing the current state of bulked-up rulemaking as a problem in need of solving).

<sup>343</sup> See Daniel Farber, *Kavanaugh's Threat to Government and Transparency and Accountability*, CTR. FOR PROGRESSIVE REFORM: CPRBLOG (July 19, 2018), <http://progressivereform.org/CPRBlog.cfm?idBlog=00A51DF0-D300-CAC0-0144F641CD1B18F8> [<https://perma.cc/TR74-WGXJ>] (noting then-Judge Kavanaugh's APA originalist concurrence in *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008), would “give agencies much more ability to hide the ball”).

<sup>344</sup> See *supra* section III.B, pp. 908–12.

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 norms have not been erased by intervening practice,<sup>345</sup> 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 and recognize 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.<sup>346</sup>

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 can 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. Such an approach 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”<sup>347</sup> 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 has laid down, and that political officials, not courts, should make hard policy choices when there is no law to apply. 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 practicable realization of traditional legal arrangements to the presently unmovable demands of modern governance.

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<sup>345</sup> See Pojanowski & Walsh, *supra* note 169, at 152–53.

<sup>346</sup> Cf. Sager, *supra* note 331, at 1263 (“The federal courts comprise a crucial bulwark against evulsive depredations of constitutional values; but against scattered erosion they are relatively powerless. . . . We thus depend heavily upon other governmental actors for the preservation of the principles embodied in these constitutional provisions.”).

<sup>347</sup> Cf. Solum, *supra* note 332, at 462.

## 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 politically accountable officials. Any vision of the administrative state more complex than rote application of clear legislative norms was excluded by this constitutional logic. Yet there the administrative state is. So much argument in administrative law revolves around reconciling the 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 recognizes 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 politically 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 and more skeptical of legal deference and judicial common law in administrative procedure, and yet unwilling to 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 that Congress has chosen to construct.