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Neoclassical Administrative Law

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Beyond Deference, Emerging Issues in Judicial Review of Agency Action

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I apologize in advance for typos and infelicitous prose.
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NEOCLASSICAL ADMINISTRATIVE LAW

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INTRODUCTION

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

Things have not been so clear ever since. Perhaps starting with the Supreme Court's decision in *Vermont Yankee*,[1] administrative legal thought is marked by an absence of any dominant tendency. If there is a dominant strain, it is pragmatic compromise: judicial deference on questions of law (but not too much and not all the time) and freedom for agencies on questions of politics and policy (but not to an unseemly degree). Respect for the limits of judicial capacity interweave with concerns about agency slack or fecklessness, leading to a doctrinal overlay that is nuanced, syncopated, or incoherent, depending on one's cast of mind. Yet, for much of this time, it would have been wrong to say that administrative law was in a state of theoretical crisis. There was disagreement around the edges—and some voices in the wilderness calling for radical change—but for the most part administrative law theory trundled along, disagreeing, for example, about when *Chevron* should apply or precisely how hard a look a reviewing court should take regarding agency policymaking decisions. 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.

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[*]Professor of Law, Notre Dame Law School. I am grateful for comments and questions from Evan Bernick, Emily Bremer, Bill Buzbee, Katherine Crocker, Jerry Ellig, Kristin Hickman, Andrew Kloster, Ron Levin, Aaron Nielson, Paul Noe, Jennifer Nou, Nicholas Parrillo, Eloise Pasachoff, Connor Raso, and Adam White. The usual disclaimers apply. I am especially grateful for the opportunity to develop this paper with the help of two conferences organized and hosted by the Center for the Study of Administrative Law.

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

In this respect, mainstream administrative law in the three decades after *Vermont Yankee* had its own version of a bipartisan Washington Consensus, perhaps we can call it the D.C. Circuit Consensus. As an administrative scholar, it was a nice place to be. Compared to other areas of public law, it was (and still is) comparatively free of partisanship and ideological bomb throwing, with heated arguments and invective as about as likely to arise in the pages of the *Administrative Law Review* as at a Brookings-AEI softball game on the National Mall. As with our politics today, 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 administrative legal doctrine has struck in the past three decades. Vermeule seeks to free administrative agencies from the lawyers who vainly seek to constrain it,[2] while Hamburger sees contemporary doctrine as a passel of half-measures embroidering an unconstitutional Leviathan.[3] Importantly, they tug at the two threads the D.C. Circuit Consensus seeks to hold together in workable tension, namely (a) the necessity of administrative governance in a complex, legal realist world and (b) the aspiration for a robust yet impersonal rule of law above administrative fiat.[4]

American administrative law's pragmatic evasion of philosophical purity[5] is facing vigorous, sustained challenges from positions that would have been ignored even ten years ago. Perhaps the "center" can hold, but that might require an account, defense, or fresh theorization of its underlying principles. It is possible that the current intellectual ferment will reinvigorate and provide a stronger foundation for D.C. Circuit Consensus; or perhaps, and to similar practical effect, a peek over the Vermeulean or Hamburgerian precipices will lead scholars and jurists to stay the pragmatic course, however imperfect it may be. Or it is possible that these new challenges will lead to a new, different synthesis than the current dispensation. In short, things are up for grabs in administrative legal thought, and it is not clear where we are going.

With an eye toward such uncertainty, and taking the opportunity to rethink settled practice, this paper proposes an alternative way forward. It does not offer a wholesale defense the D.C. Circuit Consensus's current, eclectic balancing of administrative fiat and legal reason, but neither does it embrace the wholesale rejection of the administrative state or its bureaucratic supremacy over law. Rather, it identifies, builds out, and defends an approach that returns to more formalist, classical understandings of law and its supremacy, without a complete rejection of the administrative state. To do so, it pulls together strands of thought emerging in administrative law and scholarship, unifies them in a coherent thread, and expands upon the pattern. I call this thread, for lack of a better term,

[2] Adrian Vermeule, Law's Abnegation. (2016).
[3] Philip Hamburger, Is Administrative Law Unlawful? (2014).
[4] For a more general exploration of this tension, see Jeffrey A. Pojanowski, Reason and Reasonableness in Review of Agency Decisionmaking, 104 Nw. U. L. Rev. 799 (2010).
[5] Cf. Cornell West, The American Evasion of Philosophy: A Genealogy of Pragmatism (1989).

neoclassical administrative law.[6] Neoclassical administrative legal thought 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 than current doctrine suggests on review of agency policymaking. In short, the new legalism holds that the line between law and policy is sharper than the account conveyed by much administrative legal thought, and that courts should be more vigilant in patrolling that line.

Importantly, and relatedly, neoclassical administrative law holds that courts should more attentive and faithful to the positive law governing the administrative state, especially the Administrative Procedure Act. It holds that closer attention to the APA can provide determinate answers that should govern review of questions of law, fact, policy, and procedure. This approach is not inherently skeptical of administrative common law or doctrine—such hostility would be incongruous with such legalist craft commitments. In fact, much of the neoclassicist reading of the APA flows from a 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 their broader jurisprudential commitments about the division of labor between courts and agencies in the realms of law and policy, respectively.

This approach is "classical" in its defense of the autonomy of law and legal reasoning, commitment to separation of powers, and the supremacy of law. These commitments distinguish it from theorists who would have courts make a complete Thayerian retreat in administrative law. It is "new" in that, unlike other more classical critics of contemporary administrative law, it seeks to integrate those more formal commitments with the administrative state we will have, and will have for the foreseeable future. Neoclassical administrative law shares features with the D.C. Circuit consensus, but seeks to pull apart, reorganize, and rationalize mainstream thinking's dual commitments to administrative fiat and legal reason, rendering those features complementary rather than competing: It recognizes a place for policy and politics in administrative governance, and it accepts the reality that the administrative state is not going anywhere anytime soon. It also recognizes the importance of legal supremacy over the administrative state. Distinctively, however, it seeks to sharpen the divide between law and policy in a way that mainstream administrative thinking does not. Thus, compared to hornbook administrative law, neoclassical administrative law is more engaged on legal questions and less active on questions of policy. This move is underwritten by a formalist commitment to the autonomy of law that will strike many as controversial or implausible, though I will argue that a number of aspects of mainstream administrative legal doctrine presuppose commitments to legal craft that are even more ambitious.

The paper will proceed in three parts. *First*, I will situate neoclassical administrative law by outlining three established, competing frameworks for administrative law. In doing so, I will focus

[6] I have used this term, albeit in a slightly different sense, in a short essay on the thought of John Dickinson and its relationship to contemporary administrative law doctrine. See Jeffrey A. Pojanowski, Neoclassical Administrative Common Law, The New Rambler (2016).

on those frameworks' approach to judicial review of questions of (i) substantive law, (ii) procedural law, (iii) policy, (iv) factfinding. *Second*, I will introduce neoclassical administrative law. There I will make a first pass in identifying its legal commitments and then explain how they play out along the same four dimensions. This is in part a work of reconstruction and speculation, because I do not yet see a critical mass of thinkers marching under this banner with a uniform program on the questions at issue. *Third*, I will address the questions and challenges it faces, a task that will further illuminate neoclassical administrative law's jurisprudential commitments.

I. Three Leading Frameworks of Administrative Law

[NB: I need to tighten this section]

At the cost of oversimplifying, we can draw a rough sketch of three prominent frameworks for thinking about administrative law and the legitimacy and shape of the administrative state today. These three sketches are ideal types and even thinkers I flag as representative of these tendencies may not agree with all the doctrinal particulars under any one heading. Identifying these three approaches will help situate the fourth, neoclassical alternative that is emerging in recent years.

A. Administrative Supremacy

This approach sees the administrative state as a natural, salutary outgrowth of modern governance. The role of courts and lawyers is, primarily, to get out of the way or at most check the most unreasonable exercises of power by administrative actors. To the extent durable, legal norms are relevant, the primary responsible for implementing then in administrative governance falls to the discretion of executive officials, who balance those norms' worth against other policy goals. Today, the work of Adrian Vermeule[7] demonstrates this approach in almost platonic form, though it has antecedents in thinkers like James Landis.[8]

1. Review of Legal Interpretations – Substance

The administrative supremacist advocates deference across the board to agency interpretations of statutes and regulations. Regarding statutes, the supremacist prescribes a Step Zero similar to Justice Scalia's dissent in *Mead*: if the interpretation under review is the agency's authoritative interpretation of the statute it administers, it should qualify for *Chevron* deference irrespective of the form in which it was proffered. Once *Chevron* applies, the reviewing court's scrutiny will not be searching. Unlike, say, Justice Scalia's rigorous, textualist Step One, the ascendant 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.[9] Similarly, a reviewing court should not scour the statutory scheme or deploy an array of canons to make an apparently unclear

[7] Adrian Vermeule, Law's Abnegation (2016).
[8] James M. Landis, The Administrative Process (1938).
[9] See Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 Mich. L. Rev. 885 (2003).

statutory provision more precise—a first, rough cut impression that the statute is susceptible to more than one interpretation should suffice.[10]

The administrative supremacist takes a similar tack on deference to agency interpretations of their own regulations. Whatever the origins of the doctrine in *Seminole Rock*,[11] the doctrine today is correct for the same that justify *Chevron* deference: the resolution of legal uncertainty requires technical and political choices that agencies, rather than courts should make.[12] Practical worries about agency gamesmanship are unproven and, largely, beside the point: to the extent agency seeks to use *Auer* as a way to get around *Mead*'s restriction on *Chevron* deference, the agency is doing the good work of ameliorating the misguided[13] 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.

2. Review of Agency Legal Interpretations – Procedure

In a similar vein, the administrative supremacist would give agencies wide sway in choosing how to go about making policy. Whether the agency followed proper policymaking procedures is in many respects a legal question: the reviewing court is asking whether the agency correctly interpreted, for example, Supreme Court due process jurisprudence, the APA, its organic statute, or its own procedural regulations. I have broken this category out from interpretations of substantive law for three reasons, however. First, some courts and commentators treat procedural provisions differently for deference purposes.[14] Second, the complexity introduced by overlapping sources of procedural law makes these kinds of legal questions feel different than your standard *Chevron* or *Auer* problem—we carve off things like *Chenery II* questions into a different conceptual space even if, at some level, we are asking whether the agencies choice to proceed by adjudication was lawful. Finally, these 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

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[10] Cf. Dole v. United Steelworkers of America, 494 U.S. 26, __ (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 __ (2006) (arguing that judges' institutional limitations suggest they should engage in clause-bound, even "wooden" approaches to statutory interpretation).

[11] Cf. Sanne H. Knudsen & Amy J. Wildermuth, Unearthing the Lost History of *Seminole Rock*, 65 Emory L.J. 47 (2015); Jeffrey A. Pojanowski, Revisiting *Seminole Rock*, forthcoming, Georgetown J. L. & Pub Pol'y, available at https://ssrn.com/abstract=2993473,

[12] See Cass R. Sunstein & Adrian Vermeule, The Unbearable Rightness of *Auer*, 84 U. Chi. L. Rev. 297 (2017).

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

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

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).[15]

Administrative supremacy in this area centers 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 constraint at all. *Chenery II*, as noted, rejects the notion that the APA gives (or that courts should craft) any substantial legal limits on the choice of whether to proceed through rulemaking or adjudication.[16] 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. Along similar lines sits a recent addition, *Perez v. Mortgage Bankers Association*, which rejected the D.C. Circuit doctrine requiring agencies to undertake notice-and-comment rulemaking before amending interpretative rules.[17] Less frequently mentioned, but within the same vein, is *Florida East Coast Railway*'s dispatching of agency obligations to engage in formal rulemaking[18] as well as cases invoking *Chevron* to give agencies wide latitude in their choice to undertake informal rather than formal adjudication.[19] 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 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.[20]

In all of these cases, the administrative supremacist is either saying that (i) the positive administrative law we have clearly does not significantly limit administrative discretion or, (ii) to the extent that there is play in the legal joints, courts ought to stay their hands, or both. The first line of argument echoes *Vermont Yankee*'s notes emphasizing how the APA is a compromise that hammers in place both a floor and a ceiling, at least from the perspective of judicial intervention. The second line of argument, premised on the legal indeterminacy of the procedural materials, insists that judicial intervention in this realm is just as inappropriate as it is with respect to substantive law. The trade-offs inherent in deciding how many resources to spend on process in pursuit of policy acuity is just no less value-laden than picking the proper point in the "policy space" created by ambiguity in substantive law.

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[15] See Gary Lawson, Federal Administrative Law 752–53 (6th ed.) (2013).
[16] 332 U.S. 194 (1947).
[17] 135 S. Ct. 1199 (2015)
[18] United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973).
[19] See, e.g., Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989). The D.C. Circuit's position is the majority one. See Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12 (1st Cir. 2006) (rejecting its prior presumption in favor of formal adjudication in light of *Chevron* and the majority approach in *Chemical Waste*).
[20] See Cass R. Sunstein and Adrian Vermeule, The Morality of Administrative Law (preliminary draft of Oct. 4, 2017), at 25–26 ("The problem is that neither *Arizona Grocery* nor *Accardi* offers a clear justification for that idea. What source of law is involved?"); see also id. at 27 (describing an argument ground *Arizona Grocery/Accardi* in the APA as "plausible, but not clearly convincing").

3. Review of Agency Policymaking

Administrative supremacist presses against the "hard look" doctrine originating in the D.C. Circuit and blessed by the Supreme Court in *State Farm*. As a normative matter, administrative supremacy claims that rigorous judicial scrutiny is unwise and illegitimate. Courts have neither the technical expertise nor the political accountability to redo the agencies' handiwork. They are more likely to introduce policy errors than to correct them. Furthermore, the demand for extensive reason-giving slows down administrative policymaking and may ask for more than agencies can provide when they operate under uncertainty.[21] As archetypes of this approach, we could choose Justice Marshall's dissent in the *Benzene* case, where he would have given the agency wide latitude to operate under scientific uncertainty,[22] 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.[23] Accordingly, "thin" rationality review is the optimal role for courts and, as a matter of fact, may be more representative of the daily work of courts, notwithstanding textbooks featuring rigorous hard-look cases.[24] [I might build this sub-part out a bit.]

4. Review of Fact Finding

For similar reasons, the administrative supremacist would have courts take a very deferential stance in reviewing agency fact finding. This would have two doctrinal implications. First, it would reject *Universal Camera*'s insinuation that the APA requires a standard of review more searching than the jury standard.[25] In this respect administrative supremacy would support Justice Scalia's attempts in *Allentown Mack* to reframe substantial evidence test along those lines.[26] Second, it would reject as both unwise and unmanageable *Crowell v. Benson*'s (failed) attempt to retain more searching review of jurisdictional facts. It would be jury standard all the way through.[27] [I might build this sub-part out a bit.]

B. Administrative Skepticism

At the opposite pole, there is a growing body of literature criticizing the extent and legitimacy of the administrative state. The administrative state is illegitimate under the original understanding of

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

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

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

[24] See Vermeule, Law's Abnegation, ch. 5.

[25] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[26] Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359 (1998). See also Association of Data Processing Serv. Orgs, Inc. v. Board of Governors of the Federal Reserve System, 745 F.2d 677 (D.C. 1984) (Scalia, J.) (treating review of agency factfinding in informal proceedings as governed by a jury standard of substantial evidence).

[27] Crowell v. Benson, 285 U.S 22 (1932); see Vermeule, Law's Abnegation at 214.

the Constitution and regularly violates the common law rights it sought to protect. Even further, the administrative state may instantiate the evils of British monarchism that the framers sought to avoid by founding a new republic. Leading figures here are Philip Hamburger,[28] Gary Lawson,[29] Theodore Lowi,[30] David Schoenbrod,[31] as well as Bruce Frohnen and George Carey.[32] 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 administrative state we have become accustomed to.

1. Review of Legal Interpretations – Substance

The administrative skeptic rejects deference to agency interpretations of law. Deference shirks the judicial duty to say what the law is and introduces a pro-government bias of dubious constitutional provenance.[33] On questions of statutory interpretation, the Court should reject *Chevron* deference and not tarry with half-measures like a *Mead* threshold test or even across-the-board *Skidmore* deference. Along these lines, Justice Thomas has questioned *Chevron*'s constitutionality[34] and similar disquieted rumblings have arisen from the courts of appeals, headlined by now-Justice Gorsuch's concurrence in *Gutierrez-Brizulea*.[35]

Deference to agency interpretations of their own regulations share the same flaw, with the added transgression of violating classical understandings of the separation of powers. Drawing on Locke and Montesquieu, critics of *Auer* deference argue that gathering the power to both promulgate and interpret the law is the *ne plus ultra* of the legal tyranny the framers sought to avoid, and that deference to agency interpretation allows agencies to do just that.[36] These concerns have led Justice Scalia and Thomas to call for a wholesale abandonment of *Auer* deference[37] and have given Justice Alito pause about the doctrine.[38]

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[28] Is Administrative Law Unlawful? (2014).
[29] Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231 (1994).
[30] Lowi, The End of Liberalism (1979).
[31] Power Without Responsibility: How Congress Abuses the People Through Delegation (1993).
[32] Frohnen & Carey, Constitutional Morality and the Rise of Quasi-Law (2016). See also Joseph Postell, Bureaucracy in America: The Administrative State's Challenge to Constitutional Governance (2017).
[33] See Hamburger, Is Administrative Law Unlawful?; Philip Hamburger, *Chevron* Bias, 84 Geo. Wash. L. Rev. 1187 (2016).
[34] Michigan v. EPA, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring).
[35] Gutierrez-Brizulea v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring); Egan v. Delaware River Port Authority, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring); see also Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150–54 (2016) (raising concerns about Chevron and suggesting limitations to the doctrine)
[36] See John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules, 96 Colum. L. Rev. 612 (1996).
[37] See, e.g., Decker v. Northwest Environmental Defense Center, 133 S. Ct. 1326, 1341–42 (2013) (Scalia, J., concurring in part and dissenting in part); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1215 (Thomas, J., concurring); see also Egan v. Delaware River Port Authority, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring) (questioning *Auer* along with *Chevron*).
[38] See Perez, 135 S. Ct. at 1210 (Alito, J., concurring) (noting that Justices Scalia and Thomas offer "substantial reasons why the *Seminole Rock* doctrine may be incorrect").

2. Review of Legal Interpretations – Procedure

For the same reason the skeptics reject *Chevron* and *Auer* deference on questions of substantive law, they resist any judicial thumb on the scale in favor the agency on procedure. If anything, giving agencies the right to tilt the law in their favor on procedure—the very rules they must follow in executing policy—cuts closer to the heart of the rule of law. Furthermore, where the positive law of procedure slows down agencies, or at least makes them operate in a fashion closer to classical understandings of separation of powers and the rule of law, the skeptic will want agencies to adhere to those norms. We can say the same for judicial doctrines that lead to similar effects, such as the appellate courts' procedural additions to informal rulemaking or the minority position in circuit courts that presumes organic statutes require formal adjudication. Tellingly, in *Mortgage Bankers v. Perez*, public interest organizations sympathetic with administrative skepticism filed amicus briefs supporting the D.C. Circuit's *Paralyzed Veterans* rule, which the Supreme Court ultimately struck down.[39]

That said, vigorously policing an agency's adherence to procedural norms will likely be a strategic, or at least second-best, matter for most 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 extension and delegation of power to federal agencies, punctilious attendance to statutory procedure may 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 grateful for such small blessings, they do not strike to the heart of the 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.[40] In this respect, the skeptic would have the courts be more directly engaged in ordinary administrative law, though this obviously would require serious reworking of due process jurisprudence in the administrative context.

3. Review of Agency Policymaking

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

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

[40] See, e.g., Hamburger, Unlawful, at __. Hamburger also views *Chevron*'s bias in favor of the government as violating due process. See *Chevron Bias*.

with administrative procedures, the administrative skeptic is more likely to take approach that is both more radical and more modest at the same time: invalidating the provision as violating the non-delegation doctrine.[41]

This is approach is radical in that it calls into question countless statutory provisions that contain wide delegations to agencies. It is modest in that it respect the limits of judicial authority to fill in substantial gaps where there is no law to apply. An example of this approach would be Justice Rehnquist's concurrence in the *Benzene* case, where he would have held that Congress's utter lack of guidance on risk-threshold policy was an unlawful delegation to OSHA.[42] This is not to say any uncertainty is an unlawful delegation—the framers recognized that interstitial elaboration of congressional policy was inevitable[43]—but once we cross the line between filling in small blanks and legislative punting, the court must strike down the provision under the non-delegation doctrine.[44]

4. Review of Factfinding

The administrative skeptic also challenges deference to agency fact-finding. As with previous objections, the case against deferential review turns on the Constitution. Depending on one's theory, deference to administrative fact-finding 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.[45] 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*. Objections of these kind may extend to any kind of adjudicative fact-finding.[46] Alternatively, the objection may pertain to a narrower subset of findings, such as those affecting "core privet rights to life, liberty, and property," which include fines and forfeitures, but not the withholding of privileges and rights created by public law. [47]

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[41] One possible exception to this parsimony could be encouraging courts to limit agency power through deregulatory judicial presumptions, such as the *Michigan v. EPA* plurality's holding that failure to undertake cost-benefit is unreasonable. Such a tack requires more judicial involvement in administrative policy, but the skeptic could justify such intervention on the grounds that it compensates for under-enforced constitutional norms aimed limited federal power and delegation.

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

[43] Id. at 674–75.

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

[45] For an excellent overview of these objections, see Evan Bernick, Is Judicial Deference to Agency Fact-Finding Unlawful?, __ Geo. J. L. & Pub. Pol'y __ (forthcoming 2017).

[46] See Gary Lawson, Rise and Rise, at 1246–48 (suggesting blanket incompatibility); Hamburger, Unlawful, at 318–19.

[47] Bernick, SSRN Draft, at 2. Bernick's set of "core private rights" appears to be broader than the set of "private rights" the *Northern Pipeline* plurality directly addressed in its discussion of what must be adjudicated in an Article III court. Cf. id. at 37 ("Following *Atlas Roofing*, such deprivations [as fines for safety violations] are treated as public-rights cases and do not trigger independent review.").

C. Administrative Accommodation

A third position neither chastises the administrative state nor submits governance to its mercy. Rather, it seeks to accommodate the reality of administrative power, expertise, and political authority with broader constitutional and rule of law values. The primary means for doing so is Legal Process-style development of administrative common law doctrine that implements or supplements positive law like the APA or the Constitution. This is the largest and, relatedly, least precise category of approaches to administrative law I will be describing here. Adherents to this approach vary among themselves with respect to particular questions, but a family resemblance emerges once we group these doctrines together. In fact, one could do reasonably well on an administrative law exam by using the accommodationist doctrines 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 interpretation passes certain legal tests. This can come in the form of a contextual, multi-factor approach to *Mead* like that applied Justice Breyer,[48] a more rule-like interpretation of *Mead*,[49] or through the invocation of certain exceptions, such as withholding deference on major questions or scope of jurisdiction.[50] Like the administrative supremacist, the accommodationists recognize that there are some underdetermined legal questions over which agencies should have ultimate legal authority either because of technical competence, political accountability, or both. Implicit in this judgment is that on unclear questions, there is no preexisting law to declare, but rather a policy choice to make among the plausible options.[51]

Like supremacists, accommodationists usually justify deference as an implied congressional delegation of lawmaking authority, though this is also usually[52] understood as a fiction that is useful for the sound allocation of decisionmaking power. Accommodationists, however, are far more willing than supremacists to tailor the reach of that implied delegation so that it does not extend to situations in which the underlying justification for deference is unlikely to apply. In other words, for the accommodationists, the moderate legal realism about law's determinacy that justifies deference on ordinary questions of law does not extend to the meta-law of deference, where it is assumed courts can adequately and usefully calibrate the amount of respect they afford agency legal interpretations.

A similar story follows with respect to agencies' interpretations of their own regulations. Rather than heeding Justice Thomas's call to abandon *Auer* deference, accommodationists seek to domesticate the doctrine to avoid abuse and promote the purposes it serves. Hence, the emerging

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[48] See Barnhart (applying a standard-like approach to *Mead*).

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

[50] See King v. Burwell (major questions); City of Arlington (rejecting jurisdictional exception).

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

[52] But see Merrill and Tongue-Watts (grounding deference test in actual legislative drafting conventions).

exceptions for interpretations of regulations that parrot statutes[53] or interpretations that are inconsistent or spring unfair surprises on the regulated community.[54] With tongue in cheek, 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*.[55] As with *Chevron*, the accommodationist gives *Auer* a Step Zero, not complete abolition or unfailing application.[56] With only Justice Alito and Justice Thomas expressing direct skepticism about the doctrine in *Perez*[57] we can assume the Footnote 4 approach will persist at the Supreme Court, even if Justice Gorsuch joins the chorus.

Here, 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 it is an agency delegating interpretive authority to itself.[58] 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 precisely when it will make those policy choices. But such an argument is inconsistent with *Mead*'s restrictions on the exercise of delegated authority and will unlikely appeal to most accommodationists. Furthermore, this explanation would add yet another epicycle to a theory of delegation that appears increasingly verbal. Rather, any modulation of *Auer* doctrine will primarily turn on comparative assessments of agency competence and accountability, as well as ensuring the smooth running 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, an accommodationist could argue that institutional competence, political accountability, and the tradeoffs inherent allocating resources between procedure and substance point toward deference along these lines. This explains the dominance of the D.C. Circuit's deferential approach to agency decisions on whether its organic statute prescribes formal or informal adjudication, as well as the lack of scholarly uproar along those lines. Similarly, while *Florida East Coast Railway* made a hash of the administrative law that framed the backdrop of formal rulemaking, mainstream administrative law has little problem with leaving that choice to agencies, which is to say interring it. Furthermore, theorists we can classify as accommodations held no brief for the now-defunct *Paralyzed Veterans* doctrine, which sought to burden, and therefore limit, agencies' choice to modify interpretive rules.[59]

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[53] Gonzalez v. Oregon, 546 U.S. 243 (2006).
[54] Christopher v. SmithKlineBeecham, 132 S. Ct. 2156 (2012).
[55] 135 S. Ct. 1208 n.4 (2015).
[56] For an example of such an inquiry, see Matthew C. Stephenson and Miri Pogoriler, *Seminole Rock*'s Domain, 79 Geo. Wash. L. Rev. 1449 (2011).
[57] See their concurrences in *Perez*.
[58] Cf. Manning, Constitutional Structure, at __ (distinguishing the different delegations in *Chevron* and *Auer*).
[59] See, e.g., Amicus Brief of Administrative Law Scholars in Support of the Petitioners, *Perez v. Mortgage Bankers Ass'n* (2014); Richard J. Pierce, Jr., Distinguishing Legislative Rules from Interpretive Rules, 52 Admin. L. Rev. 547, 561–66 (2005) (criticizing *Paralyzed Veterans*).

On the other hand, accommodationists should not be confused with supremacists along these lines. The accommodationists' delegation theory of *Chevron* provides little support to 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, accomodationist approach that finds it unreasonable to infer that Congress delegated authority to administer a procedural provision of the statute with force of law.[60] [NB: I need to research law and commentary on Q of *Auer* deference re: agencies' own procedural regulations.]

Notwithstanding *Vermont Yankee*, accommodationist 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 (see below), there is a connection with positive law: the APA requires judicial review, and judicial review is not meaningful without some kind of reasoned explanation that includes, among other things, responses to important objections, connections between the record facts and the chosen policy, some indication of deliberation about policy alternatives, etc.[61] 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 agency formed its tentative policy judgments. As with the delicate balance in substantive review between enforcing legal values respecting administrative expertise, accommodationist courts seek to optimize the mix of procedural protections and agency flexibility.[62] here courts modulate this supervision through supple doctrines like the logical outgrowth test and harmless error,[63] or by adopting rough stopping rules born of practical necessity.[64]

Finally, notwithstanding their rejection of *Paralyzed Veterans*, accommodationist scholars embrace complicated tests to distinguish procedurally valid interpretative rules and policy statements from invalidly promulgated legislative rules.[65] A simpler—and discretion-enhancing—approach would have courts deprive policy statements and interpretative rules of force-of-law benefits,[66] but pragmatic concerns about agencies using nonlegislative rules for prelitigation coercion lead accommodationist courts and scholars to supervise administrative procedure more closely. Again, we see a judicially

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

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

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

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

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

[65] See, e.g., American Mining Congress v. Mine Safety & Health Administration, 995 F.2d 1106 (D.C. Cir. 1993); Pierce, Distinguishing, at 548 (praising *American Mining Congress*).

[66] For a critique of such tests, see John Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893 (2004).

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 accommodationist again balances legal values with the agencies' expertise and accountability. Resisting Judge Leventhal's call to have courts flyspeck the administrative record, but unsatisfied with Judge Bazelon's purely procedural approach, the accommodationist settles on the "hard look" review that demands a reasoned explanation for agency action that connects the chosen policy with the administrative record.[67] As demonstrated by the majority opinion in *State Farm*, this review can at times be exacting.[68] *State Farm*'s rhetoric, however, leaves a reviewing court flexibility to approach a case with a light touch or heavier thumb, depending on the atmospherics and the general sense of whether the agency is seeking to implement its mandate in good faith.[69] As with review of legal questions, these tests have the flavor of common law inspired, but not directly derived from, positive law. There is little direct interest in what, in fact, the framers of the APA meant or were understood to mean when they codified arbitrary and capricious review.

4. Review of Factfinding

The accommodationist neither questions the constitutionality of agency fact finding nor advocates for a supine posture across the board. Rather, *Universal Camera*'s whole record rule, applied with a mood somewhat less forgiving than the jury standard suffices for review of agency facts. *Universal Camera* is rooted in the Court's understanding of what the APA's original meaning, and in this respect it has less of a common law feel than, say, accommodationist deference doctrines on legal questions.

That said, informal patterns or practices may arise, such as a likelihood of heightened scrutiny when an agency head overrides the factual finding of administrative law judge.[70] Furthermore, the *Universal Camera* test is generally applied across policymaking formats, not just for formal adjudication,[71] even though there are reasonable arguments that the APA prescribes a more nuanced

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

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

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

[70] See, e.g., Kimm v. Department of the Treasury, 61 F.3d 888 (Fed. Cir. 1995); Lawson, Administrative Law 481–82 (noting this phenomenon).

[71] See, e.g., ADAPSO v. Bd. of Governors of the Federal Reserve Sys., 745 F.2d 677 (D.C. Cir. 1984) (Scalia, J.) (the arbitrary and capricious test for fact finding under informal rulemaking is identical to the substantial evidence test for fact finding under formal adjudication); but see

treatment.[72] Such niceties fall by wayside, especially in the face of the pragmatic concern that more careful delineation could, for example, result in less searching review under informal rulemaking proceedings, which affect far more people than formal adjudications. Ensuring a rough, sensible balance between administrative prerogative and legal values across the doctrinal system is more important than revisiting those legal weeds.

II. The Neoclassical Alternative

This section presents an alternative approach, which I call neoclassical administrative law. This approach is both more exacting and more forgiving than the accommodationist approach that marks much of the administrative law mainstream. In particular, it is less likely to defer on questions of law, but is inclined to approach review of policymaking with a lighter touch and may give agencies more flexibility in crafting administrative procedures. It would go too far to say that neoclassicism is a "movement" in contemporary administrative law. Rather, it more of an emerging tendency demonstrated by an array of jurists and scholars, some of whom would not consider themselves partners in a common project. The point of this paper is to pull these disparate strands together into a coherent approach, excavate its jurisprudential underpinnings, unpack its doctrinal implications, and make the case for why jurists and scholars should take neoclassical administrative law seriously.

To begin that work, this section proceeds in two parts. First, it offers a first cut at the jurisprudential commitments of neoclassical administrative law. This abstract explication will become more tractable in the second subpart, where I apply the framework to questions of deference to law and fact and judicial review of administrative procedure. This jurisprudential lens will help tie together otherwise disparate developments in administrative law and suggest new lines of inquiry.

A. The Neoclassicist's Commitments

Neoclassical administrative law rests on the three basic commitments: (i) belief in the autonomy and determinacy of the legal craft; (ii) the priority of original, positive law over judicial doctrine; (iii) hesitance to engage in judicial deconstruction of the administrative state through constitutional law.

1. Autonomy of Law and Legal Reasoning

The neoclassical alternative resists mainstream administrative law's working assumption that the resolution of challenging legal questions is inextricably intertwined with policymaking judgment. Its faith in the autonomy and determinacy of law is far closer to the interpretive formalist perspective of classical common lawyers, whose approach administrative skeptic Philip Hamburger outlined in *Law and Judicial Duty*. 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 reasonable answer, but the neoclassicist would maintain that choosing which one is stronger is more a question of lawyerly judgment than policymaking will. The corollary of this belief in the autonomy of legal reasoning is the conclusion

[72] Browning-Ferris Industries of South Jersey, Inc. v. Muszynski, 899 F.2d 151, 164 (2d Cir. 1990) (arguing that the tests are distinct and should not be "conflated").

that it is generally inappropriate, or at least beyond the central case of judicial duty,[73] for courts to engage in complicated policymaking in the way that legislators or administrators do.[74]

These presuppositions about the autonomy of legal reasoning have implications for which kinds of interpretive tools the neoclassicists are likely to favor. The neoclassicist is far more likely to see text, structure, linguistic canons, and perhaps[75] historical intent and context as the appropriate tools for interpretation, as opposed to normative canons or legislative purpose at a high level of generality.[76] They are also likely to disfavor interpretive tools that require predictions about consequences or direct assessment of contemporary norms. The more consequences, purpose (especially at a high level of generality), and contemporary values enter the interpretive picture, the less tenable the distinction between law and policymaking.

The neoclassicist's legal formalism stands in contrast with the stark legal realism of administrative supremacists like Adrian Vermeule and the accommodationist's more moderate realism. It would mark a return to classical, pre-legal realist thought that, while aware of the blurriness in the lines between making, executing, and interpreting law, nevertheless insisted that the division of these activities was coherent in theory and a salutary goal in practice.[77] The tenability of such a classical approach to the legal craft in a post-Realist world is one of the most important challenges neoclassical administrative law must address.[78]

2. The Priority of Original, Positive Law

A second feature is the neoclassicist's prioritization of original, positive law over judge-made doctrines. The neoclassicist takes the APA and other 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 what we can call "APA originalism."[79] The neoclassicist will look to the original understanding of the APA and treats it as entrenched, enduring

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

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

[75] There are those who think legislative intent is not a myth *and* that it can at times provide rules of decision that can dictate results in a formalist fashion. See, e.g., Larry Alexander.

[76] Strongly purposive interpretation is tricky to the extent that deciding how to give effect to the purpose of the statute requires a prediction about the likely consequences of such an interpretation. See, e.g., Radin, at __.

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

[78] See Part III.A., infra.

[79] For a thorough and thoughtful defense of this position, see Evan D. Bernick, Administrative Procedure Act Originalism: Promise and Prospects (unpublished working draft on file with author). See also Aditya Bamzai, The 'Administrative Process' in the 1940's Court, *3 (coining phrase "APA originalism.")(available at https://www.hoover.org/sites/default/files/pages/docs/bamzai__admin_in_the_1940s_court_.pdf).

law, not as a springboard or inspiration for administrative common law that goes against that entrenched understanding.[80]

This is not to say that neoclassical administrative law views all administrative common law as inherently suspect. Positive law has priority, not exclusivity. General administrative common law might exist as a freestanding rule of decision in the absence of legislation on point[81] and it can work as a backdrop that informs the contours of codified administrative law.[82] In fact, the neoclassicist understanding of what the APA requires for judicial review of legal questions is informed by the background administrative common law of review that Congress incorporated in the statute upon enactment.[83] In this respect, the neoclassicist approach to the APA resembles "original methods" or "original law" approaches to constitutional originalism.[84]

This recognition of the hierarchy of statutory law over judicial doctrine, not skepticism about legal craft, presses them toward closer attention to the original APA. In fact, it is the neoclassicists' faith in interpretation that gives them confidence that an (often open-ended) statute can give useful guidance on the judicial tasks in administrative law. Their unfashionably firm belief in law's determinacy makes adherence to the APA's original positive law a conceivable enterprise in the first place. 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 rejects judicial doctrine that contravenes the original law laid down in the APA or other governing organic statutes.

The justifications for originalism about the APA will track arguments in defenses of originalism in other constitutional and statutory contexts more generally, but there is reason to believe that those arguments will be particularly strong here. As Cass Sunstein and Adrian Vermeule have recently argued, much contemporary administrative law doctrine is best understood as judicial attempts to instantiate the principles inherent in Lon Fuller's internal morality of law.[85] As they recognize, however, there is a kind of "Step Zero"-type question about the domain in which those rule-of-law principles should supervene upon ordinary administrative law. Along with that comes questions of institutional competence to determine the scope of morality of administrative law's domain. These questions are particularly challenging because, as Fuller acknowledges, the internal morality of law is scalar and can never be perfectly realized along its dimensions. Rather, the goal is to ensure that a system of law's inevitably imperfect attempts to achieve those aspirations fail completely.

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

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

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

[83] Bamzai at __ (review of statutory interpretation); Pojanowski at __ (review of regulatory interpretation).

[84] Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J. L. & Pub. Pol'y 817 (2015); John O. McGinnis and Michael B. Rappaport, 103 Nw. L. Rev. 751 (2009).

[85] Sunstein and Vermeule, The Morality of Administrative Law (forthcoming Harvard Law Review).

The systemic complexity of implementing the internal morality of law recalls another Fullerian trope, namely polycentric problems and the limits of adjudicative forms of ordering in resolving those challenges. 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 ordering. Against the administrative supremacist, who would likely argue that managerial direction would be the best form to operationalizing the internal morality of law, the neoclassical administrative lawyer would contend that systemic, durable, legislated norms are more promising than adjudication and more legitimate than managerial direction by the administrative entity whose operations we seek to harmonize with the rule of law. The Administrative Procedure Act, 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 it is good enough, the moral benefits of fixed, enduring positive law recommend adhering to the original law struck by the statute's framers.[86]

Thus, the neoclassicist's commitment to original, positive law is sympathetic to the accommodationists' and the skeptics' desire to bring administrative governance into harmony with the internal morality of law. It simply differs with them as to means. 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 that proffered solution to the polycentric problem.

3. Constitutional Modesty

An originalist approach to our original constitution may well in fact condemn most of the contemporary administrative state, APA and all, to the dustbin of 18th Century history. Hence, the administrative skeptics, who share many of the neoclassicists' interpretive commitments, call for the revival of the non-delegation doctrine, invalidation of contemporary administrative adjudication, abolition of independent agencies and insulated administrative law judges, and launch constitutional arguments against *Chevron* and *Auer* deference.

The neoclassical approach I will be describing and advancing, 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. This tendency to avoid large scale constitutional critiques of 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 also serious challenge for the neoclassicist.[87] [Need to build out.]

B. Neoclassical Administrative Legal Doctrine

This subpart will deploy the premises sketched out in II.A. to the array of administrative law doctrines I discussed above. Explicating neoclassical administrative law does not require one to work

[86] See Pojanowski and Walsh, Enduring Originalism, supra, at __.
[87] See Part III.B, infra.

entirely from scratch. While it would be too much to say neoclassicism is a full-fledged *movement* in administrative law, there is a group of scholars and jurists whose work demonstrates at least a tendency to embrace the commitments interpretive formalism, positive law, and constitutional modesty. I will be drawing on their work but also, when necessary, fill in gaps by appealing to the guiding principles I have identified above. These are tentative, of course, and to the extent they turn on excavating the original law created by the APA and subsequent legislation, revisable in light of those arguments and discoveries.

1. Review of Legal Interpretations – Substance.

The neoclassical administrative lawyer, like the skeptic, rejects deference to agency interpretations of law of substantive law. The neoclassicist would replace *Chevron* deference with either de novo review or something like *Skidmore* deference.[88] Like the skeptic, the neoclassicist may draw on constitutional arguments about the judicial power or due process, or may reason more generally from conceptions about the judicial duty.[89] What distinguishes neoclassicists from the skeptic along this line is the additional sources of arguments they are likely to bring to justify rejecting *Chevron*.

A neoclassicist is far more likely to invoke the original understanding of 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 John Duffy's critique of *Chevron* as a product of administrative common law that contradicts positive law on judicial review entrenched in the APA.[90] Similarly, Aditya Bamzai's recent historical spadework challenges *Chevron*'s claim that the decision (and, implicitly, the APA) was adopting earlier judicial practice on judicial review. He argues that deferential language in pre-APA decisions was a product of the mandamus posture in which many administrative challenges arose. In proceedings that, as a matter of *general* procedure did not call for heightened deference, pre-APA courts conducted a more searching review of administrative legal conclusions.[91] A neoclassicist need not chastise all administrative common law, but when there is statutory law on the matter, the courts should do their best to discern and follow it.

For this reason, the neoclassicist will not be persuaded by the ingenuous argument that deference comports with the judicial duty to say what the law is due to the fact that the law tells them to defer.[92] It is possible that some form of this argument could be persuasive. A neoclassicist sympathetic to

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

[89] See Jeffrey A. Pojanowski, A Socratic Dialogue Inspired by "Marbury and the Administrative State," Yale J. on Reg.: Notice & Comment (May 26, 2016), http://yalejreg.com/nc/a-socratic-dialogue-inspired-by-marbury-and-the-administrative-state-by/.

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

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

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

Duffy's and Bamzai's arguments will also take seriously Professors Merrill and Watts' claim about original legislative drafting conventions indicating when Congress wants courts to defer to agency interpretations of law.[93] Probing that convention and reconciling it with a non-deferential APA are interesting, important projects for the neoclassicist galists to pursue, as is further work on the original understanding of the APA. Both might offer reasons for deference and thus require the neoclassicist to confront the larger constitutional questions about deference more squarely. Nevertheless, the neoclassicist will not accept the more generalized presumption of implicit congressional delegation of interpretive authority that many *Chevron* advocates deploy. Rather, they are likely to see this as a legal fiction delicately cloaking 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 is dereliction of judicial duty. But another line of attack may also appeal to the neoclassicist interested in descending from the heights of constitutional theory. There is compelling evidence that *Seminole Rock*, which gave rise to *Auer* deference today, was not understood as conferring general *Chevron*-like power to agencies.[94] In fact, it is plausible to read the case as an unremarkable application of *Skidmore*-type deference: when, as in *Seminole Rock*, an agency offers a virtually contemporaneous interpretation of a regulation it just authored, that interpretation will have power to persuade, especially when courts are more inclined toward intentionalism than they are today.[95] Tracking Duffy's and Bamzai's argument about *Chevron* deference, the neoclassicist can contend that it is plausible to read the APA as incorporating this approach (*Seminole Rock* was handed down just before the APA's enactment), which would cast *Auer*'s expansion of the doctrine as a counter-statutory exercise of administrative common law.

Implicit in this argument is the rejection of the functionalist justification of *Chevron*. This is grounded not only in conclusions about the APA, but a greater faith in the determinacy of legal materials in hard cases. For the neoclassicists, moreover, the legitimate tools of legal interpretation (as opposed to policymaking) will be formal: text, context, structure,[96] and canons, rather than high purposivism, policy balancing, or dynamic updating.[97] Were the latter set of tools on equal footing, *Chevron* deference would be more acceptable, if not inevitable, since there are plausible arguments that agencies would be better suited to "making" this law in the gaps rather than "finding" the better of the competing arguments. This is not to say that every statutory provision will be tractable to

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[93] Merrill and Tongue-Watts, *supra*.

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

[95] See Jeffrey A. Pojanowski, Revisiting *Seminole Rock*, __ Geo. J. L. & Pub. Pol'y (forthcoming 2018).

[96] Though a formalist intentionalist might also look to legislative intent at a low level of generality. See, e.g., Richard Ekins, The Nature of Legislative Intent.

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

standard lawyers' arguments. Congress passes statutes that insist agencies be "reasonable" or maintain an "adequate margin of safety." Unless phrases of those sort encapsulate 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 had. Rather, they would file this question as one delegated to the agencies subject to arbitrary-and-capricious review.

As a practical matter, judicial review of agency interpretations of law would look very much like Justice Scalia's application of *Chevron*.[98] It would involve a very strong Step One in which the judicial interpreter does not cede matters to agencies when the formal legal materials point one way—even if the interpreter appreciates that there are plausible, if less strong, arguments pointing the other way. This Step One would be paired with a dissolution of Step Two into arbitrary and capricious review on matters that are simply not tractable to formalist craft. In other words, it simply takes "Step Two" outside the realm of "legal interpretation."[99] This reformulation of judicial review without *Chevron*, which I have explained in greater length elsewhere,[100] would also seem to address the concerns of more recent judicial *Chevron* skeptics, such as Justice Gorsuch and Judge Kavanaugh, both of whom bristle at deferring on lawyers' questions without insisting that judicial review doctrine should plunge courts into the weeds of regulatory policymaking.

In short, the neoclassical approach to judicial review of legal questions divvies up what conventional administrative law deems "Step Two" into domains of (1) de novo or *Skidmore* review and (2) deferential review of policymaking. The neoclassicist extends the domain of "Step One" to absorb legal questions upon which reasonable parties could disagree in terms of interpretive formalism, while evacuating to the domain of arbitrary-and-capricious review questions unamenable to formal legal craft. As noted, an approach like this resonates with latter day critics of *Chevron*, but is hardly something new under the sun. As John Dickinson noted nearly a century ago, this more searching review echoes Lord Coke's bid to place the Crown under the supremacy of law.[101] Somewhat less archaically, the neoclassicist approach recalls Justice Hughes' position in *Crowell v. Benson* on review of legal questions,[102] and likely is closer than contemporary practice to the original understanding of the Administrative Procedure Act.[103]

2. Review of Legal Interpretations – Procedure.

As with judicial review of questions of substantive law, a neoclassical approach to agencies' conclusions about their procedural obligations would not be deferential and would focus with more resolution on the original law laid down by the APA and other organic statutes. In a number of

[98] Antonin Scalia, Judicial Deference to Agency Interpretations of Law, 1989 Duke LJ 511.
[99] See Kozel and Pojanowski, Administrative Change, 59 UCLA L. Rev. 112 (2011) (drawing this distinction between "expository" (truly interpretive) and "prescriptive" (policy-based) reasoning, which recognizing its tension with received *Chevron* theory).
[100] See Jeffrey A. Pojanowski, Without Deference, 81 Mo. L. Rev. 1075 (2017).
[101] See John Dickinson, Administrative Justice and the Supremacy of Law in the United States, 75, 76–104 (1927) (tracing the English historical roots of "the demand that the determination of rights should in the last analysis be a matter for the courts").
[102] Crowell at __.
[103] Bamzai at __.

circumstances this will affirm current doctrine or even suggest agencies have discretion that current law affords them. In other circumstances, an accurate understanding procedural law may point to less freedom than the courts have otherwise given to agencies.

On the side of upholding existing doctrine, the neoclassicist's commitments to APA originalism will likely uphold the Court's rulings in *Vermont Yankee* and *Perez v. Mortgage Bankers*. The standard textualist arguments about legislation striking a compromise and encouraging interpreters to respect the means the legislature chose to advance its ends[104] can readily apply to the intricate procedural scheme Congress chose when crafted the APA.[105] Indeed, *Vermont Yankee* emphasizes this point precisely when explaining that the procedural choices Congress selected are, for the courts at least, a ceiling and not a floor upon which the courts should layer additional stories.

Although courts have largely been willing to confine *Vermont Yankee*'s principle in rulemaking to comment procedures, this line of argument can also lead to expansion to other domains. Here, we see an overlapping consensus between neoclassicists and supremacists like Adrian Vermeule. For example, Justices Thomas and Scalia, who offered the harshest criticism of *Auer* deference in *Perez v. Mortgage Bankers Association*, had no problem rejecting the D.C. Circuit's *Paralyzed Veterans* rule on *Vermont Yankee* grounds.[106] In fact, Justice Scalia's sole misgiving about this conclusion was that *Auer* allowed agencies to game the system by sequential issuing of interpretive rules. Nevertheless, he thought that was a problem with *Auer*, not a reason to pile procedural common law atop the APA.[107] For Justice Scalia, a return to the APA on both fronts—rejecting *Auer* deference and *Paralyzed Veterans*—would set things aright.[108]

Similarly, on the D.C. Circuit, Judge Brett Kavanaugh has objected to his court's insistence on bulking up rulemaking procedures in the teeth of *Vermont Yankee*.[109] He has contended that these judicially imposed requirements for notices of proposed rulemakings and statements of basis and purpose are unmoored from the APA's text and flout *Vermont Yankee*'s teaching against administrative common law upsetting the procedural balance Congress struck in that statute.[110] But do not confuse Kavanaugh with an administrative supremacist. His recent judicial and scholarly writings have *also* raised questions about *Chevron*. Like Justice Scalia in *Perez*, Judge Kavanaugh

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[104] Easterbrook, Statutes Domains; Manning, Second-Generation Textualism.

[105] Cf. United State v. Fausto, 484 U.S. 439 (1988).

[106] 135 S.Ct. at 1211 (Scalia, J) ("I agree with the Court's decision, and all of its reasoning demonstrating the incompatibility of the D.C. Circuit's *Paralyzed Veterans* holding with the Administrative Procedure Act."); *id.* at 1213 (Thomas, J.) ("I concur in the Court's holding that the doctrine first announced in [*Paralyzed Veterans*] is inconsistent with the [APA] and must be rejected.").

[107] 135 S. Ct. at 1211–12.

[108] Ibid.

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

[110] See American Radio Relay League, 524 F.3d at 246 (D.C. Cir. 2008).

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*.[111]

But the neoclassical approach to procedure does portend pure sweetness and light for agencies. It casts doubt on the majority position in the courts of appeals that agencies merit *Chevron* deference[112] on whether they must provide formal or informal adjudication. There is also a strong argument that *Florida East Coast Railway* seriously bungled its interpretation of the APA regarding when agencies must engage in formal, trial-type rulemaking, as opposed to notice-and-comment rulemaking.[113] Upsetting that ruling would certainly bring a shock to the administrative system—one that the meta-law of stare decisis would have to take that serious disruption into account when considering its revisitation—but taking the original APA and its background law seriously could remove that argument from "off the wall" status.[114] Along the same lines, agencies would not receive *Auer* deference on the interpretations of their own procedural regulations.

[Not sure what, if anything, to say about *Chenery II* or nonlegislative rules here.]

3. Review of Agency Policymaking

Neoclassical administrative law is more forgiving than the administrative skeptic or even the administrative accommodationist on review of agency policymaking. At risk of intertemporal anachronism, we could identify Justice Thomas as an avatar of this approach. In his later writings, he is deeply skeptical of judicial deference on findings of law. On the D.C. Circuit, however, he penned an opinion (joined by then-Judge Ginsburg) giving agencies wide latitude to engage in policy experimentation under uncertainty.[115] Similarly, Judge Kavanaugh has raised warned against growing "*State Farm*'s 'narrow' § 706 arbitrary-and-capricious review into a far more demanding test."[116] Under a neoclassical approach, arbitrary and capricious review would be closer to the rational basis test than the more vigorous applications of hard look review. And, notwithstanding Judge Kavanaugh's concerns, this more deferential posture may be closer to actual judicial practice in review of agency policy decisions, even though agency reversals in cases like *State Farm* are more salient in casebooks and doctrinal rhetoric more generally.[117]

While this simultaneous rejection of *Chevron/Auer* and embrace of deference on policymaking may seem incongruous, the neoclassicist can square the circle. Deference on policy questions are

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

[112] Chemical Waste Mgmt, supra.

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

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

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

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

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

the flip side of non-deference of legal questions. As explained above, rejecting *Chevron* deference disaggregates the inquiry formerly known as "Step Two" into (a) questions on which so-called lawyers arguments cut both ways such that it was hard to say the matter was clear, even if a reviewing judge thought one interpretation was better on balance than its reasonable rival[118] and (b) cases in which there is no terrain upon which traditional lawyers' tools can have purchase, such as commands that the agency be "reasonable" or act "in the public interest" when those phrases are not terms of art. Abandoning *Chevron* would eliminate Step Two reasonableness inquiry for questions falling under category (a), while taking a more deferential stance to agencies under category (b), which are in fact arbitrary and capricious questions mislabeled as unclear questions of statutory interpretation.[119]

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

A further argument returns to the Administrative Procedure Act. There is good reason to believe, though more work is needed, that arbitrary and capricious review under the APA was originally closer to rational basis review under constitutional law than contemporary hard look review. The standard "restated the scope of judicial function in reviewing final agency action,"[120] which it appears to have been more lenient than hard look.[121] In line with this understanding, early arbitrary and capricious cases applied standards very similar to rational basis review.[122] Rational basis-type language continued into the 1960s,[123] though it declined with the rise of hard look review in the D.C. Circuit.[124] As with judicial review of legal conclusions, the neoclassicist can rely on original, positive law to set the standard of review in addition to more general ideas about the judicial role. Such an approach, of course, rejects the accommodationists' post-APA administrative common law *and* the skeptics' stance that such open-ended grants of administrative authority violate the non-delegation doctrine.

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[118] Justice Thomas's majority opinion in *Brand X* has this feel.

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

[120] Attorney General's Manual 108 (citing Sen. Rep. p. 44 (Sen. Doc. p. 230); Senate Hearings (1941) pp. 1150, 1351, 1400, 1437).

[121] See Raoul Berger, Administrative Arbitrariness and Judicial Review, 65 Colum. L. Rev. 55, 82 (1965) (arguing that under the original understanding "arbitrariness consists of action that is unreasonable under all circumstances"). [Working on more research and cites here. I may be wrong.]

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

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

[124] The strength of the rational basis test is up for debate. For an argument that APA era rational basis review was stricter than *Williams v. Lee Optical* and thus roughly within the range of standard hard look review, see Bernick, APA Originalism, at __. *But see State Farm* at __ (distinguishing between hard look review and rational basis).

4. Review of Agency Factfinding

Discussion of a neoclassical approach to judicial review of fact finding will be more speculative, in part because there has not been much development along this front besides criticism of deference by avowed administrative skeptic like Philip Hamburger and the more moderate critique by Evan Bernick.[125] Nevertheless, based on the neoclassicist's jurisprudential assumptions, we can sketch what its approach might look like.

Whether its level of scrutiny looks like *Universal Camera* will depend on whether Justice Frankfurter was correct to hold that the APA's substantial evidence test calls for a mood more searching than the jury standard. (There seems to be little doubt that he was right about its requirement that the reviewing court evaluate factual findings in light of the whole record.) Some critics have contended that the "weight of authority in 1946 (or 1947) would have clearly supported the view that a 'substantial evidence' standard is the equivalent of the jury standards."[126] Along these lines, Justice Scalia's majority in *Allentown Mack* linked the substantial evidence test with the jury standard,[127] but it does not appear that this verbal reformulation reduced the level of scrutiny even in that case.[128]

A neoclassical approach might also consider a more nuanced approach to the standard of review depending on the form of agency policymaking. While many courts, following *ADAPSO*, hold that the arbitrary and capricious standard for factfinding in informal proceedings has the equivalent intensity of the substantial evidence standard in formal proceedings, a court that takes the original APA seriously might revisit that conclusion. As Professor Davis noted, it appears that the difference between the arbitrary-and-capricious and substantial evidence standards mattered "from 1946 until sometime during the 1970s,"[129] a fact that would give the APA originalist pause. Collapsing the two standards may have mattered less for then-Judge Scalia in *ADAPSO*. As in *Allentown Mack*, he equated substantial evidence with the jury standard, which was similarly forgiving as the original understanding of arbitrary and capricious review. Perhaps the difference in standards of review that Professor Davis flagged between the APA and the 1970s was a product of *Universal Camera*'s contested heightening of scrutiny for formal proceedings. If one were to conclude that substantial evidence is in fact closer to the jury standard, it would make more sense to the collapse the two standards of review as *ADAPSO* did. If, however, Justice Frankfurter was right in *Universal Camera* about formal proceedings, and if courts were in fact supposed to approach informal proceedings

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[125] Hamburger, Is Administrative Law Unlawful at __; Bernick, Factfinding, supra note __. Bernick's unpublished working paper "Administrative Procedure Act: Promise and Prospects" is an excellent example of an emerging neoclassical approach. Interestingly, however, that originalism paper does not address review of findings of fact, whereas his critique of administrative factfinding primarily views the problem through lens of constitutional law, rather than the original law of the APA. It is possible that an originalist understanding of the APA's standard of review for factfinding comports with Bernick's constitutional critique of contemporary doctrine, but that requires further exploration.

[126] Gary Lawson, Administrative Law at 474.

[127] Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359 (1998).

[128] See Lawson at 474 ("*Allentown Mack* scrutinized the agency's findings with a rigor it would have never applied to a jury verdict.").

[129] 1 Kenneth Culp Davis, Administrative Law Treatise § 613 at 512 (2d ed. 1978) (quoted in *ADAPSO*).

with a less searching mood, the neoclassical critic might call for a new, "more technical" approach that Scalia rejected in *ADAPSO*.[130]

Nor would the neoclassicist be necessarily unhappy to discover APA originalism leading to a more deferential approach to fact finding. Appellate review in the common law system traditionally rejects close judicial scrutiny of factfinding on the grounds that the initial decisionmaker is in a far better position to weigh evidence and make judgments about credibility. As a matter of institutional competence and judicial role, it does not appear that an appellate tribunal would be in any better position reviewing agency findings than it would findings flowing from a jury or bench trial. On the other hand, a jury of one's peers or a dispassionate trial judge stand in a different position than a factfinder who is institutionally aligned with the agency pressing the case. Even bracketing for now the constitutional propriety of deference on agency factfinding (a question I will address in Part III), the question of how to modulate the standard of review is a challenging one. The neoclassicist, however, might argue that this could be one of the benefits of APA originalism: identifying authoritative congressional guidance on the problem could eliminate the difficulty of making administrative common law from whole cloth.

One last note on fact finding. The neoclassicist might also be more open to returning to *Crowell v. Benson*'s rule that courts should engage in more searching review of jurisdictional facts. Such a position defies the legal realist's claim that it is impossible to distinguish between jurisdictional facts and ordinary facts,[131] a rejection which is sympathetic with the neoclassicist's less skeptical orientation. More importantly, such an inquiry would turn on the extent to which the *Crowell* doctrine was part of the legal backdrop that informed the APA's review provisions.

III. Challenges and Prospects

I have sketched out the jurisprudential presuppositions of neoclassical administrative law and suggested how such an approach to judicial review would play out on the ground. I have done so in an effort to capture a "mood," if not a movement, emerging in contemporary administrative law, and bring it forward for more systematic consideration. One could undertake such an exercise with the purpose of condemning such a nascent approach before it takes hold, but that is not my intention. Rather, the neoclassical approach is normatively appealing, worth exploring, and merits a place as a serious contender in administrative law and theory. No theory of any interest lacks vulnerabilities, however, and this part will begin to address a number of challenges and open questions facing neoclassical administrative law. The agenda setting paper will not exhaustively articulate theory, nor does it purport to defeat all comers. Rather, my aim is to show that this emerging approach is plausible and worth pursuing as a means for understanding contemporary administrative law and reforming it in the future.

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[130] See, e.g., Browning-Ferris Industries v. Muszynski, 899 F.2d 151, 164 (2d Cir. 1990) (criticizing *ADAPSO*'s conflation of substantial evidence and arbitrary-and-capricious review).

[131] See Vermeule, Law's Abnegation at __; cf. Scalia in *City of Arlington* re: legal interpretation of jurisdictional grants.

A. The Archaism Objection

The first challenge, one leveled in varying degrees by supremacists and accommodationists, is that the neoclassical faith in the autonomy of law is deluded, naïve, or at least excessive. Any interesting question of legal interpretation gives rise to linguistic ambiguity; canons of interpretation are indeterminate; appeals to purpose require a value-laden choice regarding the level of generality; and choosing an interpretation based on whatever purpose you select requires expertise judges lack.[132] If this is so, *Chevron* and *Auer* suit judicial review to a tee: Step One gives courts the power to resolve the (few) litigated cases which are quite clear,[133] while allowing politically accountable agencies to make the value choices associated with sorting out dueling canons and competing level of generalities *and* make the consequentialist predictions necessary for implementing the chosen statutory policy. If this is so, more stringent review of legal questions are a misguided power grab by unaccountable, unskilled judges. Relatedly, the neoclassicist's rejection of administrative common law in favor of deriving rules of decision from the APA is far less plausible 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. The extent to which one thinks that appeal to craft determinacy is plausible or recoverable will go a long way toward deciding whether neoclassicism is promising or misguided. Adjudicating that question is a matter of a separate paper—or, indeed, research agenda—and given an intellectual climate in which we are all legal realists to some degree, the burden of persuasion is more likely to rest on the neoclassicist.

With that said, it is not clear that the neoclassicists' problems in this respect are theirs alone. Consider the assumptions about legal craft behind much mainstream accommodationist administrative law doctrine. Ordinary doctrinal science finds it coherent to ask whether an agency pronouncement is a valid interpretive rule or illegitimate legislative rule in the guise of interpreting a regulation. Doing so requires a court to distinguish (i) mere interpretation of a norm from (ii) policymaking in the norm's linguistic gaps. Notwithstanding academic encouragement to abandon the hunt for that jurisprudential snipe,[134] the courts press on, albeit with some *Chevron*-induced embarrassment.[135]

The structure of *Chevron* itself also presupposes some of the pre-Legal Realist assumptions that accommodationists and perhaps even supremacists reject. To stipulate that a question can be clear or not presupposes some sort of metric or stable baseline against which to judge lack of clarity. If that baseline is entirely or primarily policy-laden, it's not clear what Step One is for. If, however, that baseline is not policy determined, it is also not obvious that the choice between two plausible readings along that metric necessarily itself devolves to pure policy choice, as opposed to craft judgment. This is not a new argument,[136] but it suggests that the structure of *Chevron* presupposes more determinacy than its practitioners admit. At most, deference on legal questions should be a "doctrine of

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[132] See generally, Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863 (1930).
[133] Radin at __ (noting that while words are not always clear, they are not "portmanteaus").
[134] Manning, Nonlegislative Rules; Pierce's criticism of *Hoctor* in his admin law treatise.
[135] American Mining Congress; Syncor; etc.
[136] Stephen Breyer, Admin. L. Rev. ???

desperation"[137] when interpretive arguments are nearly in equipoise or simply do not have enough material to work with, such as when statutes command agencies to operate "in the public interest." In the former context, informal consideration of the agency's view as an epistemic authority may be warranted,[138] whereas the latter is truly an arbitrary and capriciousness question mischaracterized as a legal one.

The accommodationists' more general embrace of administrative common law may also indicate that they have a stronger belief in law's autonomy and determinacy than their *Chevron* skepticism indicates. Consider the stance of classical common lawyers. Sensitive to the current texture of the law, they would extend, develop, and even modify its principles to accommodate developments in society and its norms. They would do so through a traditionalist method of "artificial reason" that would maintain coherence in legal doctrine and ensure doctrine was roughly congruent with the society's shared sense of reasonableness.[139] It's questionable whether judges are as suited to this role in regulated industries as they are in contracts, so it is telling that much of the "common law" of administrative law today pertains to procedure and allocation of decisionmaking authority, matters which are quintessential lawyers' questions. Hence we argue about *Chevron*'s domain, what is required for a reasoned agency explanation, and when agencies must engage in rulemaking. And, like common lawyers, we do so with little attention to the text of the Administrative Procedure Act itself.

The accommodationist echoes the classical common lawyer's faith in the artificial reason of the law—a reason whose method gives its practitioners tools to develop law with only indirect engagement in intractable moral disputes. Yet it remains a tall task. The administrative common lawyer must strike the right balance between procedural rigor and policy flexibility while translating constitutional values into the administrative setting. In comparison to the neoclassicist, who simply insists that courts can identify the most plausible interpretation of a statute or regulation, the accommodationist might be taking a path that implies a more demanding faith in law.[140] If they lacked it, the more responsible course would be to development administrative common law in the direction of Vermeuele's administrative supremacy, where, for good lawyerly reasons, law largely departs the field out of a recognition of its own limits.

From this perspective, it might be possible to see neoclassicism as a reformed or refined version of administrative accommodationism. Both the neoclassicist and the accommodationist believe there are statutory questions upon which the law runs out, hence the neoclassicist's distinction between legal questions (no or little deference) and arbitrary-and-capricious questions (rationality review). Compared to the accommodationist, however, the neoclassicist believes that interpretive tools can stretch much further before reaching the domain of policy: adjudicating disagreements over "lawyer's questions" (text, structure, canons, etc.) is not policy-laden in the way deciding whether a regulation is "in the public interest." On the other hand, the accommodationist has greater faith in the courts' capacity to develop administrative common law, while neoclassicists are more inclined to rely on the

[137] Cf. Scalia in Cardozo-Fonseca.
[138] Cf. Skidmore.
[139] E.g., Gerald Postema, Classical Common Law Jurisprudence, I & II, Oxford Commonwealth LJ.
[140] See Pojanowski, Neoclassical Administrative Law, New Rambler (2016).

APA and other review statutes, which they (unsurprisingly) believe are more determinate than the accommodationist does. Either way, the lawyer's faith endures, even amid the bewildering complexities of regulatory state.

B. The Faint-Heartedness Objection

Although accommodationists and supremacists may charge that neoclassicism is radical and old-timey, the administrative skeptic may charge that it is milquetoast and too new-fangled. It is all well and good to believe that courts can identify the best meaning of statutes and to have them be originalists about the APA, the skeptic argues, but how about applying that legal craft to the original Constitution, which tells us that deference on factfinding is illegitimate, that rational basis review of policymaking enables unconstitutional delegations, and that judicial duty requires revival of the nondelegation doctrine?

The neoclassicist has a few replies, though, for reasons that should be obvious from this discussion so far, foreswearing formalist/originalist methods of constitutional interpretation in general cannot be one of them.[141] A first response would be to offer an argument for why the original constitution is perfectly compatible with the administrative state we have. Certainly, one could do so through Balkin's framework originalism. Alternatively, the neoclassicist might invoke the interpretation/construction distinction and argue that today's administrative state arises within the "construction zone."

These are valid moves, but I have to admit some skepticism toward both tacks. Whether or not Balkin "counts" as an originalist is not a game I am interested in playing, but it is not the kind of originalism I am inclined toward, and I imagine similarly formalist neoclassicists would agree. As for the construction zone argument, a valid construction cannot violate original public meaning, intent, expected application (depending on your originalist metric). I am not a constitutional historian, but based on the evidence it seems hard to resolve the entirety of the current administrative dispensation with the original constitution. It is possible that *some* items on the administrative skeptics' bill of particulars are consistent with originalism, but it would be a stunner if the original law of our constitution dismissed every item of importance.

Nor is neoclassicism a straightforward exercise in constitutional damage control or a "second best" alternative to unwinding the administrative state. Peter McCutcheon, for example, has argued that originalists resigned to the administrative state should cope by erecting compensating doctrines to mitigate its excesses.[142] Neoclassicism limits the power of agencies on questions of law, but may increase administrative power to find facts and make policy and procedure, which arguably exacerbates the constitutional problems at play.

The neoclassicist might instead look toward original methods originalism. It is possible that the interpretive tools that make up the originalist law of constitutional interpretation include norms of stare decisis. If so, dismantling the administrative state on constitutional grounds today is a

[141] One perhaps might argue that originalism is more appropriate for statutory interpretation than constitutional interpretation. See Kevin Stack, The Divergence of Constitutional and Statutory Interpretation, 75 U. Colo. L. Rev. 1 (2004).

[142] McCutcheon, supra note __, at __.

jurisprudentially fraught enterprise.[143] To be sure, even if we set aside debate about the compatibility of originalism and stare decisis, the neoclassicist would in the odd position of invoking stare decisis as a shield against administrative skeptics while willing to jettison stare decisis in ordinary administrative law doctrine regarding *Chevron*, *State Farm*, *Portland Cement*, and the like. Which is not to say that position is untenable. Even if stare decisis is understood to be more flexible in constitutional adjudication than in the statutory context,[144] it is far more modest to chip away at the doctrinal layers stacked atop a purportedly unconstitutional edifice than to kick away the foundation that makes all those doctrines relevant in the first place.

Is neoclassicism incoherent on the originalist premises that inform its approach to legal interpretation? I am not so sure it is, even if one concedes the incompatibility of the administrative state with the original constitutional regime. The neoclassicist's hesitance—or call it faint-heartedness—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.[145] The judiciary lacks the institutional capital and perhaps even the capacity to turn the aircraft carrier around on a dime. This 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 at this point in time.

Nor is it obvious that the neoclassicism is an unprincipled cop out. As defenders and critics of the administrative state will agree, the development and supremacy of the Fourth Branch was a three-branch enterprise. The solution will have to be a three-branch solution, and one that depends on a change in the political culture. One way for the judiciary to play its role in that cultural change—and to do so without shocking the legal system or provoking an overwhelming backlash—is to both insist on its supremacy on questions of law while recognizing the limits of its capacity to resolve questions of policy. With the constitutional nettle too sharp to grasp today, the courts can nevertheless demonstrate their proper, limited role in a system of separated powers on questions of statutory interpretation and regulatory policy.

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

In this respect, we can view neoclassicism as a variety of administrative skepticism. Its commitments to formalist approaches to legal interpretation lead it to be skeptical of deference on legal questions and to be sympathetic to arguments that much of the administrative state is

[143] See McGinnis & Rappaport on Original Methods; cf. Baude and Sachs on Law of Interpretation.
[144] See, e.g., Payne v. Tennessee. To the extent *Chevron*, *State Farm*, and the like turn on "interpretation" of the APA, the neoclassicist also has to confront objections about super-strong statutory stare decisis.
[145] Frohnen and Carey. Cf. also McConnell, *Glucksberg and the Jurisprudence of Tradition*.

questionable from the perspective of the original constitution. It departs from the skeptics on matters of tactics and seeks to preserve and purify the judicial role on defensible territory. From this angle, neoclassicial is administrative skepticism and judicial formalism in a vale of functionalist tears.

[Further objections to address here or elsewhere in the paper

(a) the original APA intended/was understood to either give us the administrative common law we have today or authorize judicial development of doctrine even in the teeth of the original law. I need to read more before addressing this.

(b) Transition costs/shocks of taking the original law of the APA seriously. This is a problem for any originalist theory and prudence, incrementalism, the usual work of stare decisis will come into play. The problem is mitigated here to the extent that (i) deference doctrine is such a mess to begin with and (ii) arbitrary and capricious review on the ground tends to be pretty forgiving, notwithstanding salient cases like *State Farm*.

The biggest shock will be with respect to rulemaking. The APA did not envision anything like the explosion of informal rulemaking we have today (though this is in part a product of the Court's drive-by dispatching of formal rulemaking). Stripped-down notices and peremptory statements of basis and purposes for such monumental acts of regulatory legislation might gall us and wonder how we are to hold such powerful agencies accountable. (A&C review will require some kind of explanation, cf. *PBGC v. LTV*, but it will not likely be as fulsome as *Portland Cement*-style review.) I'm inclined to let Congress and the people appreciate what they have wrought and pose legislative solutions to accommodate a new era of rulemaking rather than have adjudicative reform. Cf. my point on Fuller, the internal morality of law, and polycentricity.]

CONCLUSION

Will go here. Thank you for reading this far.