Constitutional Self-Interpretation

JASON MARISAM*

What are the constitutional norms for self-interpretation—that is, the constitutional rules governing whether and when a government body has the power to issue controlling interpretations of legal texts that it drafted? The answer to this question could determine the fate of Seminole Rock *deference, the nearly seventy-year-old doctrine enabling agencies to issue controlling interpretations of their own regulations. Jurists and scholars have argued that the doctrine runs afoul of a constitutional norm against self-interpretation, and last term Chief Justice Roberts asked future litigants to brief whether the court should overturn the doctrine on this basis. This Article is the first to comprehensively examine constitutional self-interpretation norms by looking at the conditions under which the heads of the three branches of government exercise self-interpretation powers. It shows that self-interpretation is pervasive and that the Supreme Court would be wrong to overturn* Seminole Rock *on self-interpretation grounds. Moreover, by examining self-interpretation practices, this Article brings new insight to the many areas of law that involve self-interpretation, including presidential oversight of agencies and judicial stare decisis.*

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* Assistant Professor, Hamline University School of Law. I would like to thank Professor Andy Grewal for inviting me to workshop this article at the University of Iowa College of Law. For helpful comments and feedback, I would like to thank Andy Grewal, Aaron Nielson, Kristin Gutting, Andrew Schwartz, and Elizabeth Chorvat.

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I. INTRODUCTION

What are the constitutional norms for self-interpretation—that is, the constitutional rules governing whether and when a government body has the power to issue controlling interpretations of legal texts that it drafted? The answer to this question, which is the focus of this Article, has high stakes. It could determine the fate of one of the most-cited administrative law doctrines, *Seminole Rock* deference.[1]

[1] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

In 1945, the Supreme Court held in *Bowles v. Seminole Rock & Sand Co.*[2] that courts must treat agency interpretations of their own regulations as controlling unless they are "plainly erroneous or inconsistent with the regulation."[3] In effect, this landmark case allows agencies to self-interpret regulations. The doctrine went largely undisturbed until 1996, when Professor John Manning published an influential article arguing that our constitutional structure abhors self-interpretation, seeing as how it separates law-making and law-interpreting functions into different branches of government.[4] Because *Seminole Rock* deference violates this apparent norm against self-interpretation, Manning recommended that the Court invalidate the doctrine.[5] Manning's argument eventually influenced Justice Scalia, who in 2011 flipped from being for *Seminole Rock* to being against it in large part because of this anti-self-interpretation norm.[6] Justice Scalia, in turn, has influenced Chief Justice Roberts and Justice Alito, who recently signaled their desire for future parties to brief whether the Court should overturn *Seminole Rock*. In the 2013 case *Decker v. Northwest Environmental Defense Center*,[7] Scalia voted to overturn the doctrine because it "violate[s] a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands."[8] Because none of the parties had briefed the issue, Roberts was not prepared to vote against the doctrine, but Roberts, joined by Alito, wrote separately to note: "Questions of *Seminole Rock* . . . deference arise as a matter of course on a regular basis. The bar is now aware that there is some

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[2] *Id.*

[3] *Id.* at 414.

[4] John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654 (1996). Other important academic treatments of the doctrine include: Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 112 (2000) (defending *Seminole Rock* deference as necessary to make *Chevron* deference meaningful); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1307–09 (2007) (discussing when *Seminole Rock* applies); Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 516 (2011) (finding that, when the Supreme Court applies *Seminole Rock*, the agency wins 91% of the time); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 412 (2012) (arguing that courts should apply *Seminole Rock* deference when the agency's interpretation is consistent with the regulation's purpose); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1466 (2011) (developing a taxonomy of considerations that courts can use to assess when to apply *Seminole Rock* deference).

[5] Manning, *supra* note 4, at 617.

[6] Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring) (citing Manning's article and noting that, "while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity").

[7] 133 S. Ct. 1326 (2013).

[8] *Id.* at 1341 (Scalia, J., dissenting).

interest in reconsidering those cases, and has available to it a concise statement of the arguments on one side of the issue."[9]

Because of Roberts's plea, it is likely that briefs will soon be filed in federal court arguing that *Seminole Rock* deference should be overturned because it violates a constitutional norm against self-interpretation.[10] Eventually, it is likely that the Supreme Court will reconsider its correct assumptions about what our constitutional structure has to say about the conditions under which self-interpretation is and is not permissible. No one has yet taken an exhaustive look at this issue. Manning's article focused only on the general rule against self-interpretation by Congress. He did not address exceptions to this rule and did not focus on self-interpretation by the other branches of government.[11]

This Article examines the conditions under which the heads of the three branches of government have self-interpretation powers. I show that, far from being abhorrent to our constitutional system, self-interpretation is a pervasive feature of it. The commingling of law-making and law-interpreting power in a single body has its risks, most commonly that the body will draft unduly vague laws that provide little notice and then fill in gaps later with interpretations as it sees fit. However, under many conditions, these risks are outweighed by other institutional values. Moreover, these risks are often mitigated by procedural and structural mechanisms that help check the potential abuse of a self-interpretation power.[12]

The Article's concrete normative payoff is to show that the Supreme Court would be wrong to overturn *Seminole Rock*. There is no robust anti-self-interpretation norm that favors the result, and the opponents of *Seminole Rock* simply have not shown that the doctrine's institutional justifications are outweighed by the costs from allowing agency self-interpretation.[13]

By examining self-interpretation practices, this Article also brings new insights to the many areas of public law that involve self-interpretation, including presidential oversight of agency decision-making and judicial stare decisis, among others. On agency oversight, this Article shows that, after Presidents issue directives to agencies, they often have the power to self-interpret these orders to ensure agency compliance.[14] This power of self-interpretation gives Presidents an advantage over Congress, which can issue statutory orders to agencies but cannot self-interpret those orders. This finding adds to the literature showing that the office of the presidency comes with an

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[9] *Id.* at 1339 (Roberts, C.J., concurring).

[10] *See* Vanessa Baird & Tonja Jacobi, *Judicial Agenda Setting Through Signaling and Strategic Litigant Responses*, 29 WASH. U. J.L. & POL'Y 215, 217 (2009) (showing that "Supreme Court Justices shape the Court's agenda by providing signals to litigants about the sort of cases they would like to see, and litigants consider those signals when deciding whether or not to pursue a given case").

[11] *See* Manning, *supra* note 4.

[12] *See infra* Part III.

[13] *See infra* Part IV.

[14] *See infra* Part III.B.

array of tools for overseeing agencies that Congress lacks.[15] This Article also adds to the literature on how stare decisis affects judicial behavior by explaining how the self-interpretation feature of stare decisis can encourage the Supreme Court to craft vague rules that the Court will self-interpret later.[16]

This Article proceeds as follows. Part II provides the necessary factual background for the debate over *Seminole Rock* by discussing its justifications and critiques, highlighting Manning and Scalia's anti-self-interpretation critique. Part III comprehensively describes the many conditions under which the heads of the three branches of government exercise self-interpretation powers and the justifications for such institutional designs. Throughout this Part, implications for several other areas of law are discussed as well. Part IV applies the findings in Part III to the normative debate over *Seminole Rock* and concludes that the Court should not dismantle the nearly seventy-year-old doctrine because of concerns about self-interpretation. Part V concludes.

II. *SEMINOLE ROCK* DEFERENCE: ITS JUSTIFICATIONS AND CRITIQUES

This Part explains how *Seminole Rock* establishes agencies as the primary interpreters of their own regulations and examines the justifications and critiques for the doctrine. Section A describes the scope and content of *Seminole Rock* deference. Section B discusses the rationales for *Seminole Rock* deference. Sections C and D discuss potential problems with *Seminole Rock* deference. Section C discusses past concerns that *Seminole Rock* deference enables agencies to issue controlling regulatory interpretations without fair notice and how a 2012 Supreme Court case largely blunted these concerns. Section D is the heart of this Part. It explains the essential details and assumptions of the most important attack against *Seminole Rock* deference, which I will refer to as the anti-self-interpretation critique.

A. Seminole Rock*'s Holding and Scope*

This Section briefly discusses the major cases on *Seminole Rock* deference, which establish that courts must accept agency interpretations of their own regulations unless: the interpretation is plainly erroneous or inconsistent with the regulation; the regulation merely paraphrases or parrots the underlying statute; or the interpretation was announced without fair notice to the regulated entities.

The case of *Bowles v. Seminole Rock & Sand Co.* involved a dispute over a Depression-era regulation by the Office of Price Administration (OPA), which had implemented a general price freeze by providing that sellers of goods could not charge more for an item than the highest price the seller had charged for that

[15] *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[16] *See infra* Part III.C.

class of item in March 1942.[17] The Seminole Rock and Sand Company had delivered crushed rock for 60 cents per ton in March 1942, but at the time it also had a contract to deliver crushed rock for $1.50 per ton at a future date.[18] The legal issue was whether the 60 cents or $1.50 per ton was the highest amount the company could charge under the regulation.[19] The OPA interpreted its own regulation to mean that sellers were bound by the highest price based on actual deliveries in March 1942 and not based on future contractual obligations, thus Seminole Rock could only sell its rock for 60 cents.[20] The district court, in denying the agency's request for an injunction, appeared to give little or no weight to the agency's interpretation.[21] However, the Supreme Court sided with the agency and established that an agency's interpretation of its own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[22] This holding established agencies as the primary interpreters of their own regulations because, when a range of reasonable interpretations exist, the agencies and not the courts choose which one governs.

Cases involving agency interpretations of their own regulations routinely land on the Court's docket, and the Court has repeatedly reaffirmed *Seminole Rock* deference in the nearly seventy years since it was established, most famously in the 1997 case *Auer v. Robbins*.[23] Although *Auer* did not tread new ground, it has gained significant attention among courts as the modern reaffirmation of *Seminole Rock* deference, and commentators now alternate between referring to *Seminole Rock* deference and *Auer* deference as the doctrine that establishes strong judicial deference to agency interpretations of their own regulations.[24]

Despite the repeated reaffirmation of *Seminole Rock*, two recent cases have narrowed the doctrine's domain. In the 2006 case *Gonzalez v. Oregon*,[25] the Supreme Court established the anti-parroting principle, which holds that *Seminole Rock* deference does not apply to agency regulatory interpretations when the underlying regulation parrots or paraphrases the enabling statute.[26] To receive deference, the agency's regulation must significantly clarify or narrow the scope of the statute. As the Court explained: "An agency does not acquire special authority to interpret its own words when, instead of using its expertise

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[17] 325 U.S. 410, 413 (1945).

[18] *Id.* at 412.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 412–13.

[22] *Id.* at 414.

[23] 519 U.S. 452, 461 (1997).

[24] *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring) (referring to the doctrine as both *Seminole Rock* deference and *Auer* deference).

[25] 546 U.S. 243 (2006).

[26] *Id.* at 257; *see also* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584–85 (D.C. Cir. 1997) (stating that agencies are not free "to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations,'" but concluding that the principle did not apply to the particular case).

and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."[27]

The Supreme Court narrowed the doctrine's domain further in the 2012 case *Christopher v. SmithKline Beecham Corp.*,[28] which established that *Seminole Rock* deference does not apply when the agency's regulatory interpretation creates an "unfair surprise" for the regulated industry.[29] The question in *Christopher* was whether pharmaceutical representatives are "outside salesmen," a category of employee that is not entitled to overtime pay under the Fair Labor Standards Act.[30] For decades, pharmaceutical companies had interpreted the relevant Department of Labor regulations as treating their pharmaceutical representatives as exempt outside salesmen. During that time, the department never initiated an enforcement action or otherwise suggested that it took a contrary position.[31] Nevertheless, when the issue of whether pharmaceutical representatives are outside salesmen eventually arose in litigation between employers and employees, the agency submitted amicus briefs that interpreted its regulation to mean that pharmaceutical representatives would not qualify as exempt outside salesmen.[32] If the Supreme Court had accepted this interpretation, the companies could have been on the hook for large sums in overtime and back pay.[33] However, the Supreme Court did not defer to the department's interpretation because doing so would create an "unfair surprise" and "seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[34] The *Christopher* Court did not undermine the basic thrust of *Seminole Rock*, but it established that deference is not appropriate when the agency's interpretation lacks fair notice.

B. *The Rationales for* Seminole Rock

Many of the modern justifications for and critiques of *Seminole Rock* deference are derived from comparisons to its far more famous relative, *Chevron* deference.[35] This Section briefly discusses the *Chevron* doctrine and shows how its key rationales of expertise and accountability also support *Seminole Rock*. It then discusses the distinct rationale that *Seminole Rock* deference improves interpretive outcomes because it affords interpretive primacy to the actors with the most insight into the regulation's original intent.

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[27] *Gonzalez*, 546 U.S. at 257.

[28] 132 S. Ct. 2156 (2012).

[29] *Id.* at 2167.

[30] *Id.* at 2161.

[31] *Id.* at 2168.

[32] *Id.* at 2169.

[33] *Id.* at 2164.

[34] *Christopher*, 132 S. Ct. at 2167 (alteration in original) (quoting Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986)).

[35] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

Under *Chevron* deference, agencies' reasonable interpretations of their enabling statutes are controlling if those statutes are ambiguous.[36] This deference establishes agencies as the primary interpreters of their own statutes because, when there are a range of reasonable interpretations, the agencies and not the courts choose which of these interpretations govern.[37] Some jurists and theorists ground *Chevron* deference in a presumption that, when Congress delegates ambiguous authority to agencies, Congress prefers that the agencies and not the courts resolve the ambiguity.[38] This presumption of congressional intent is based on agencies' superior expertise and accountability.[39] As the Supreme Court said when it established *Chevron* deference: "Judges are not experts in the [agency's] field, and are not part of either political branch of the Government."[40]

Courts have used similar language to support *Seminole Rock* deference. For example, the Second Circuit has explained: "Like the deference owed under [*Chevron*] to an agency's reasonable construction of a statute it administers, *Seminole Rock* deference is justified both by the agency's special expertise in the subject matter . . . and by its relative political accountability."[41]

Aside from expertise and accountability, *Seminole Rock* deference may produce interpretive outcomes that are more in line with the regulation's original intent. Discovering the original intent of legal text has long been the cornerstone of legal interpretation, especially statutory interpretation. The Supreme Court has said that discovering the original intent of the legislator is the "sole task" before the Court in a statutory interpretation case.[42] The leading modern schools of statutory interpretation also emphasize the search for original intent.[43] Extending this original intent approach to regulatory interpretation

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[36] *Id.* at 843–44.

[37] *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 969–70 (1992) ("[R]ead for all it is worth, [*Chevron*] would make administrative actors the primary interpreters of federal statutes and relegate courts to the largely inert role of enforcing unambiguous statutory terms."); *see also* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 127 (1994).

[38] *See* United States v. Mead Corp., 533 U.S. 218, 230 n.11 (2001); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 872 (2001).

[39] *See* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 689 (2007) (noting that the presumption of congressional intent is a fiction based on institutional advantages of agency decision-making).

[40] *Chevron*, 467 U.S. at 865.

[41] Bruh v. Bessemer Venture Partners, 464 F.3d 202, 207 (2d Cir. 2006). Because of the similarities between *Chevron* deference and *Seminole Rock* deference, commentators often consider the two doctrines to apply the same deferential level of review to agency actions. *See, e.g.*, David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 144 n.25 (2010).

[42] Comm'r v. Engle, 464 U.S. 206, 214 (1984).

[43] *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13–14 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990).

supports *Seminole Rock* deference.[44] The drafting agency is in the best position to have insight into the original intent of a regulation because it wrote the regulation. *Seminole Rock* deference recognizes this fact by treating agencies and not courts as the primary interpreters of agency regulations.

The Supreme Court has endorsed this originalist rationale for *Seminole Rock*, explaining that *Seminole Rock* deference is based in part on the agency's superior ability to "reconstruct the purpose of the regulations" it drafted.[45] The Court has similarly noted that *Seminole Rock* deference "is strongly supported by the fact that [the agency] wrote the regulation."[46]

One potential weakness of the originalist rationale for *Seminole Rock* is that it may not justify judicial deference when agencies interpret regulations that were enacted years in the past because an agency will have less insight into the original intent of an old regulation.[47] However, the mere passage of time does not defeat the originalist rationale, which is based on comparative institutional competencies that remain relatively constant over time. Even when years have passed since the drafting of the relevant regulation, agency officials will have a greater link to the original drafting of the regulation than courts will. If we reasonably assume that some amount of institutional knowledge is passed down from one generation of agency officials to the next, then agencies have a greater claim to understanding the original intent of a regulation than courts do.[48]

C. Seminole Rock *Deference's Fair Notice Problem*

Although *Chevron* and *Seminole Rock* share some rationales, there is an important procedural difference between the two. Agencies generally receive *Chevron* deference only when their interpretations are made through formal procedures like notice-and-comment rulemaking, in which agencies publish proposals of their rules and solicit and respond to public comments before

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[44] *See* Stephenson & Pogoriler, *supra* note 4, at 1454.

[45] Martin v. Occupational & Safety Health Review Comm'n, 499 U.S. 144, 152 (1991).

[46] Mullins Coal Co. v. Dir., Office of Workers' Comp. Programs, 484 U.S. 135, 159 (1987).

[47] *See* Pierce & Weiss, *supra* note 4, at 516 ("In many cases, the interpretation at issue was announced so long after the rule was issued that it is unlikely that the agency decisionmakers who issued the interpretation played any role in the decisionmaking process that led to the issuance of the rule."); Stephenson & Pogoriler, *supra* note 4, at 1455–56; *see also* Caruso v. Blockbuster-Sony Music Entm't Ctr. at the Waterfront, 193 F.3d 730, 733, 737 (3d Cir. 1999).

[48] A separate question is whether the agency officials are motivated to uncover the original intent or instead want to advance their own policy goals, in which case they are unlikely to honor the original intent. This question of motive is a basic problem in any principal–agent relationship and exists when courts review agency statutory interpretations too. In that context, the agency may not be motivated to interpret its enabling statute consistent with Congress's intended meaning because the agency may be run by officials who have different preferences than Congress.

finalizing their rules.[49] However, agencies receive *Seminole Rock* deference regardless of procedural formality.[50] Agency regulatory interpretations issued through informal adjudication, post hoc litigation briefs, and interpretive rules and informal guidance documents have all received *Seminole Rock* deference, even though these procedures provide less notice than that obtained through notice-and-comment procedures.[51] This procedural difference has led some to criticize *Seminole Rock* deference. The basic concern is that the lack of procedure enables agencies to issue binding interpretations that have retroactive effect without affording regulated entities either the opportunity to comment on the new binding norm or to alter their conduct to avoid punishment under the new norm.[52] In other words, the first time a regulated entity hears about a binding regulatory interpretation may be when the agency is sanctioning the entity for not complying with that interpretation. This Section shows how doctrinal developments, in particular the holding in *Christopher*, have largely mitigated this fair notice problem for *Seminole Rock*, leaving the anti-self-interpretation critique discussed in the next section as the primary challenge to the doctrine.

For decades, courts have sought to shield regulated entities from the harsh effects of binding regulatory interpretations issued without fair notice. For example, in a 1987 D.C. Circuit case, a company had applied for a license from the Federal Communications Commission (FCC).[53] While reviewing the application, the FCC interpreted an ambiguity in its regulation to render the company's application untimely.[54] Although the agency's interpretation was reasonable and ordinarily worthy of *Seminole Rock* deference, the D.C. Circuit rejected the agency's retroactive application of the interpretation, explaining:

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[49] United States v. Mead Corp., 533 U.S. 218, 230 (2001) (referring to notice-and-comment rulemaking and formal adjudication as the paradigmatic procedures to which *Chevron* deference applies); *see also* Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2043–45 (2011) (justifying the link between *Chevron* and procedural formality). *But see* Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 771–73 (2002); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 469 (2002).

[50] *See* Hickman & Krueger, *supra* note 4, at 1308.

[51] For example, the Fourth Circuit deferred under *Seminole Rock* to the Army Corps of Engineers' interpretation of its own regulation when the interpretation was made as part of an informal process in which the Corps issued permits to mining companies discharging materials from mining activities into mountain valleys. Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 430, 447 (4th Cir. 2003).

[52] *See* Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1720 (2007); Stephenson & Pogoriler, *supra* note 4, at 1479–81. The retroactive application of regulatory interpretations has been a subject of much discussion by tax scholars in particular. *See, e.g.*, Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 269–71; *see also* United States v. Home Concrete & Supply, L.L.C., 132 S. Ct. 1836, 1842–44 (2012).

[53] Satellite Broad. Co. v. FCC, 824 F.2d 1, 1–2 (D.C. Cir. 1987).

[54] *Id.* at 2–3.

"The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation."[55] Presumably, if the agency had announced the interpretation before the company filed its application, the court would have accepted the agency's interpretation because the company would have had fair notice about the proper timing requirement.

The Supreme Court made fair notice in regulatory interpretation cases the law of the land in *Christopher*, which, as discussed earlier, held that *Seminole Rock* deference does not apply if the agency's interpretation would come as an "unfair surprise" to regulated entities.[56] By carving out this exception to *Seminole Rock*, the Court quelled concerns that the lack of procedural formality in *Seminole Rock* cases deprives regulated entities of adequate notice. One commentator has cautiously lauded *Christopher* for potentially "address[ing] the most substantial problems with [*Seminole Rock*] deference,"[57] while others have noted that *Christopher* "remove[s] any doubt that where a defendant . . . faces punishment, the standards of conduct giving rise to such punishment must be reasonably discernible *before* the punishment is imposed."[58]

Some could argue that, even after *Christopher*, *Seminole Rock* deference is problematic because *Christopher* only requires that regulated entities receive "fair notice"—an unclear standard that likely will not produce notice equivalent to that obtained through notice-and-comment procedures used in *Chevron* cases. However, this concern overlooks the fact that *Seminole Rock* cases typically involve narrower agency actions than *Chevron* cases do and thus should not be subject to the same procedural rigor. Recall that the Supreme Court has established an anti-parroting principle under which agencies only receive *Seminole Rock* deference if the regulations significantly narrow the scope or clarify the enabling statute.[59] This principle ensures that regulations are typically narrower than enabling statutes, and as a result agency regulatory interpretations at issue in *Seminole Rock* cases are on the whole narrower in scope than agency statutory interpretations at issue in *Chevron* cases.[60] From a public welfare perspective, it makes sense that the broader agency actions in *Chevron* cases are subject to more procedure. Procedures can generate benefits

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[55] *Id.* at 4.

[56] Christopher v. Smithkline Beecham Corp., 132 S. Ct. 2156 (2012).

[57] *The Supreme Court, 2011 Term-Leading Cases*, 126 HARV. L. REV. 357, 364 (2012); *see also* Stack, *supra* note 4, at 411 & n.279 (noting how *Christopher* allays some fair notice concerns).

[58] Theodore J. Boutrous, Jr. & Blaine H. Evanson, *The Enduring and Universal Principle of "Fair Notice,"* 86 S. CAL. L. REV. 193, 194 (2013).

[59] Gonzales v. Oregon, 546 U.S. 243, 257 (2006).

[60] *See* Aneil Kovvali, Seminole Rock *and the Separation of Powers*, 36 HARV. J.L. & PUB. POL'Y 849, 863–64 (2013).

like fair notice, but they also consume resources and cause delay.[61] We ought to balance these procedural costs and benefits by applying the costliest procedures to the government actions that are broadest in scope and thus can do the greatest harm if not taken properly.[62] By requiring less procedure in comparatively narrow *Seminole Rock* cases, administrative law is consistent with this principle of tailoring procedure to the scope of government action.

Overall, *Christopher* ensures that regulated entities have some notice before courts afford agencies *Seminole Rock* deference. The *Christopher* holding has blunted the most serious fair notice concerns about *Seminole Rock* deference, leaving the anti-self-interpretation critique as the most problematic for the doctrine.

D. *The Anti-self-interpretation Critique of* Seminole Rock *Deference*

The anti-self-interpretation critique suggests that the Supreme Court should overturn *Seminole Rock* because the doctrine violates a constitutional structural norm against self-interpretation.[63] Below, I flesh out the rationales and assumptions underlying this critique.

1. *The Existence of the Anti-self-interpretation Norm*

The critique's most central assumption is that a widespread anti-self-interpretation norm exists. Manning sought to prove its existence by making one general observation about the nature of the constitutional separation of powers and two specific observations about what our Constitution leaves out.

The general observation is simply that our constitutional system places the primary law-making function in Congress and then enables the executive and the judiciary, but not Congress, to issue controlling interpretations of legislative acts.[64] Indeed, the Constitution does not just avoid congressional self-interpretation, it also makes it difficult for Congress to control the interpretive efforts of the President and the judiciary by insulating presidential and judicial decisions from Congress. For example, the Constitution provides that electors and not Congress select the President and that federal judges have life tenure.[65]

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[61] *See* Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 211–12 (2013) (discussing the opportunity costs of delayed action).

[62] *See* Arthur Earl Bonfield, *Administrative Procedure Acts in an Age of Comparative Scarcity*, 75 IOWA L. REV. 845, 847 (1990); *cf.* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 241 (1997) ("At some point, participation begins to interfere with—and subverts—deliberative values."). Professor Adam Samaha goes one step further, noting not only the costs of too much procedure for government decision-making, but arguing that the constitutional structure provides a global norm against excessive process. *See* Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 603 (2006).

[63] *See* Manning, *supra* note 4, at 617.

[64] *Id.* at 641–43.

[65] U.S. CONST. art. II, § 1, cls. 2–3; art. III, § 1.

The Framers' concerns about self-interpretation are also evident by their rejection of two specific proposals. First, the Framers considered whether judges should counsel Presidents on whether to veto legislation.[66] The proposal would have enabled self-interpretation because judges could help make law by having a hand in the approval of legislation and then later have to interpret that law through normal judicial review procedures. The Framers rejected the idea because of concerns about self-interpretation. As one Framer argued: "Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation."[67] The Framers also rejected the British practice of having one house of Parliament serve as a court of last resort.[68] For much of British history, the House of Lords heard appeals from the British judiciary in some matters.[69] Because the House of Lords had participated in the drafting of the laws, by acting as a high court, the House was engaging in self-interpretation. Again, the Framers rejected the proposal because of concerns that the power of self-interpretation could produce biased and self-interested decision-making. As Alexander Hamilton explained, using one house as a court of last resort could lead to bad interpretations because, "[f]rom a body which had had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application."[70]

Taken together, these observations about our constitutional structure show the existence of a norm against self-interpretation, Manning suggests.[71]

2. *The Relevance of the Norm to Agency Self-Interpretation*

Even if an anti-self-interpretation norm existed at the founding, it may not be relevant to the issue of agency self-interpretation today. There must be some problem that adherence to the norm would solve if applied to agencies. The problem, Manning points out, is that the agency self-interpretation enabled by *Seminole Rock* deference encourages self-interested agencies to craft unduly vague rules.[72] As Manning explains, "when a lawmaker controls the interpretation of its own laws, an important incentive for adopting transparent and self-limiting rules is lost because any discretion created by an imprecise, vague, or ambiguous law inures to the very entity that created it."[73]

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[66] Manning, *supra* note 4, at 643–44.

[67] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 98 (Max Farrand ed., 1911).

[68] Manning, *supra* note 4, at 644.

[69] *See* R.B. Stevens, *The Role of a Final Appeal Court in a Democracy: The House of Lords Today*, 28 MOD. L. REV. 509, 511 (1965).

[70] THE FEDERALIST NO. 81 (Alexander Hamilton).

[71] Manning, *supra* note 4, at 644.

[72] *Id.* at 647–48.

[73] *Id.*; *see also* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013) (Scalia, J., dissenting).

To illustrate more precisely how *Seminole Rock* has this effect, imagine an agency that is in the midst of drafting a proposed notice-and-comment rulemaking on a complex matter. The agency has incomplete information about the matter and will likely need to update the rule when more is known in a few years. If the agency drafts a very specific and clear rule now, it will most likely need to update the rule through amendments that require notice-and-comment procedures. If the agency drafts a vague rule, it can update the rule through regulatory interpretations that do not require these procedures. All else being equal, a rational and self-interested agency is likely to choose the vague rule because the agency can update its policies without expending the resources needed to go through notice-and-comment procedures. However, if *Seminole Rock* were overturned and replaced with a less deferential standard of review for agency regulatory interpretations, agencies would be deterred from taking this vague rule approach because their interpretations of the vague rule would be less likely to survive judicial review.

This critique does not assume that vague regulations updated by regulatory interpretations are inherently bad, though. If agencies oversee a fast-moving field in which regulatory conditions rapidly change or regulated entities' behaviors are significantly diverse, it may be optimal from a public welfare perspective for agencies to maintain their flexibility with vague rules.[74] The critique simply says that *Seminole Rock* deference provides an incentive for agencies to write rules that are vaguer than optimal in order to maximize the number of decisions that they can make through regulatory interpretations that are not subject to rigorous procedural checks or stringent judicial review.

3. *The Anti-self-interpretation Norm as a Canon of Construction*

Assuming the existence of the anti-self-interpretation norm and its relevance to agencies, the last step in the anti-self-interpretation critique is to apply the norm as a canon of construction to determine the proper level of deference for agency regulatory interpretations. This question is a matter of statutory interpretation.[75] The Administrative Procedure Act (APA), which establishes judicial review of agency actions, is silent on the matter of how much weight courts should afford to agency regulatory interpretations.[76] If a

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[74] *Cf.* Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 192–93 (2011) (discussing how ambiguous statutory provisions provide agencies needed flexibility to adapt to regulatory changes). The advantages of vague rulemaking track arguments about the benefits of standards in the legal literature on rules and standards. *See generally* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

[75] Manning, *supra* note 4, at 635–37. *But see* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295–97 (2012) (arguing that, when statutes are silent, it is best to consider the judicial role as one not just of statutory interpretation but also of administrative common law).

[76] 5 U.S.C. § 706 (2012).

strong anti-self-interpretation norm exists, it can operate as a presumption against treating agency regulatory interpretations as controlling.[77] Applying this presumption suggests that the Supreme Court should abandon *Seminole Rock* and establish courts as the primary interpreters of agency regulations instead of agencies.[78] Manning argues in particular for *Skidmore* deference under which agency regulatory interpretations would receive weight only based on their "power to persuade" courts that their interpretations are correct.[79]

In sum, the anti-self-interpretation critique rests on several key assumptions: there is a strong norm against self-interpretation; the norm is relevant to the issue of agency self-interpretation; and the Court should employ the norm as a canon of construction. If these assumptions are accepted, it follows that the Court should overturn *Seminole Rock*. For the purposes of this Article, I will largely accept the second and third assumptions.[80] However, the next Part of this Article aims to dismantle the first and most central assumption about the existence of a strong anti-self-interpretation norm.

III. SELF-INTERPRETATION PRACTICES BY CONGRESS, THE PRESIDENT, AND THE SUPREME COURT

To justify a court decision to overturn *Seminole Rock*, the anti-self-interpretation norm must be robust enough to act as a presumption that informs judicial creation of administrative law doctrine. Yet, no one to my knowledge has systemically examined the extent and strength of the anti-self-interpretation norm. Manning's treatment does not address instances of congressional self-interpretation contemplated by the Constitution or self-interpretation by the other branches of government more generally.[81] This Part more fully examines self-interpretation by the heads of all three branches of government.

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[77] Manning, *supra* note 4, at 638–54.

[78] *Id.* at 681.

[79] *Id.* at 687; *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[80] There is a long debate about whether courts should use canons of construction. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 67 (1994); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 656–67 (1992); Stephen F. Ross, *Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 562–66 (1992); Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579, 583–87 (1992); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 941–47 (1992). The use of constitutional structure as canons of construction may be particularly problematic because it applies structural norms created at the founding to modern branches of government whose internal structure has evolved significantly since then. *See* Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 904–29 (2012).

[81] Manning does not discuss presidential self-interpretation, and the discussion of judicial self-interpretation is contained to one footnote. Manning, *supra* note 4, at 648 n.175.

My general claim in this Part is that the anti-self-interpretation norm is not an inviolable mainstay of our constitutional system and should not be understood as a presumption that grounds constitutional and administrative law inquiries. At most, anti-self-interpretation is a norm that is followed sometimes but not others. More precisely, I claim that the anti-self-interpretation norm trades off against competing institutional values, and self-interpretation often exists when these competing considerations plausibly outweigh the risks from self-interpretation.[82] Constitutional designers have also allowed self-interpretation when there are mechanisms that sufficiently protect against the abuse of self-interpretation powers.[83]

I advance these claims in three sections that explore the use of self-interpretation by the heads of each branch of government. My methodology in these sections is not to reveal the original intent of the founders but rather to unpack the actual, persistent structural features of our constitutional system as they relate to self-interpretation by these actors. Throughout the discussion in these sections, my institutional analysis also adds insight into the self-interpretation aspects of other areas of law.

Before going further, a couple of clarifying points are needed. First, we need a working definition of law-making and law-interpreting. Law-making is the act of establishing authoritative legal texts. Law-interpreting is the cognitive act of understanding or explicating a legal text's meaning.[84] The line between law-making and law-interpreting is not always clear because one can draft new legal text in order to explicate the meaning of older legal text, seemingly making and interpreting law at the same time. For example, when Congress amends a statute to clarify terms in the old statutory language, it plausibly can be said to be making law by writing new statutory text and interpreting law by clarifying existing statutory text. This Article follows Manning by assuming that interpretation does not include the act of altering the language in the authoritative text that is being interpreted, and thus congressional amendments are acts of law-making and not law-interpreting.[85] Other definitional assumptions will be discussed as they arise.

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[82] *Cf.* Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 389 (2012) (arguing that the principle that no man should be a judge in his own case "constantly trades off against and competes with other values" and is not "a mainstay of our system of government").

[83] *Cf.* Douglas S. Massey et al., *Of Myths and Markets*, 606 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 28 (2006) ("A variety of 'second-order' institutional mechanisms are capable of satisfying the first-order requirements for sustained economic growth.").

[84] *See* David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135, 137 (1985).

[85] Manning, *supra* note 4, at 645–48. An even more difficult example to classify is the Dictionary Act, ch. 71, § 2, 16 Stat. 431 (1871), which in one statutory section provides definitions that clarify the meaning of words used throughout the U.S. Code. When Congress adds definitions to this section, it could be seen as an act of interpretation. However, to maintain a useful distinction between law-making and law-interpreting, it is perhaps best to view the Dictionary Act as an act of law-making that provides interpretive rules that tell

Second, the analysis in this Part will include instances of partial self-interpretation in which the primary law-interpreter did not draft the relevant legal text alone but was one of multiple law-makers. For example, partial self-interpretation exists when the Senate has the power to interpret statutes that it drafted along with the House.[86] Manning, citing Alexander Hamilton, considered partial self-interpretation by one house of Congress in his analysis.[87] I will follow Manning, following Hamilton, and examine institutions that allow partial self-interpretation as well.

A. *Congressional Self-Interpretation*

The Constitution can be read as establishing a default rule that Congress does not have the power of self-interpretation except when specific provisions give Congress that power. Generally, Congress lacks the power of self-interpretation because, after Congress enacts a statute, neither the whole body nor any individual house has the power to offer controlling interpretations of that statute. Congress can draft amendments or new legislation, but it cannot authoritatively expound on the meaning of a text without altering the terms of the statutory text. However, express constitutional provisions contemplate that Congress or one house of Congress will have binding self-interpretation powers in at least a couple of instances: when impeaching government officers and voting to confirm presidential appointees.[88] Aside from these exceptions, Congress retains some interpretive power through legislative history, which courts look to for guidance out of respect for the views of the more representative legislators.[89] The use of legislative history by courts suggests that the anti-self-interpretation norm for Congress is at least weakened when there are competing values at play.

This Section proceeds by first discussing congressional self-interpretation through impeachment trials and confirmation hearings. It then discusses congressional interpretive influence through legislative history. It concludes by discussing the importance and limits of these findings for the question of whether a robust, universal anti-self-interpretation norm exists.

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courts how to interpret statutes. *See* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1697 (2002) (referring to the Dictionary Act as a repository of "interpretive rules").

[86] *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1755 (2002) (noting how Congress itself recognizes a distinction between each individual house of Congress and the collective entity of Congress).

[87] Manning, *supra* note 4, at 644.

[88] U.S. CONST. art. I, § 2, cl. 5; art. II, § 2, cls. 2, 6.

[89] *See infra* Part III.A.3.

1. *Congressional Self-interpretation Through Impeachment Hearings*

The Constitution provides that the House impeaches and the Senate tries public officials for "treason, bribery, or other high crimes and misdemeanors."[90] These impeachment processes can involve self-interpretation because Congress drafts statutes that define treason, bribery, and other high crimes, and then each house of Congress must interpret these statutes to perform their impeachment functions in individual cases. For example, legislators had to interpret federal statutes defining perjury and obstruction of justice to determine whether President Clinton should be removed from office because he committed these crimes.[91] Similarly, legislators had to interpret the Tenure of Office Act[92] to determine whether President Johnson committed a high crime by violating that Act and should be removed from office.[93]

The benefit of placing impeachment functions with legislators is that it allows popular representatives to make what is essentially a political decision about whether a President or other official is fit to remain in office.[94] The risk, though, is that legislators can take advantage of vague definitions of treason and other high crimes that they enacted by interpreting these definitions in individual impeachment cases to fit their partisan needs.[95] The Framers understood that the houses' impeachment powers entailed an interpretive function, but they nevertheless countenanced these instances of self-interpretation because they believed that alternative arrangements involved worse tradeoffs.[96] They debated whether the Supreme Court should try impeached officials but rejected the idea because some of the sitting Justices would likely have been appointed by the impeached President, and thus they may be biased in his favor.[97] Moreover, the Justices may later have to rule on criminal or civil charges against the impeached official and would have biased

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[90] U.S. CONST. art. I, § 2, cl. 5; § 3, cl. 6; art. II, § 4.

[91] *See* 144 CONG. REC. H11, 967–68 (daily ed. Dec. 19, 1998).

[92] Tenure of Office Act, ch. 154, 14 Stat. 430 (1867) (repealed 1887).

[93] *See* Marjorie Cohn, *Open-and-Shut: Senate Impeachment Deliberations Must Be Public*, 51 HASTINGS L.J. 365, 383 (2000).

[94] As Alexander Hamilton explained in Federalist No. 65, impeachment is a "NATIONAL INQUEST into the conduct of public men . . . [and] who can so properly be the inquisitors for the nation as the [elected] representatives of the nation themselves?" THE FEDERALIST NO. 65, at 376 (Alexander Hamilton) (Am. Bar Ass'n 2009) (emphasis omitted).

[95] *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 953 (2005) (describing how party affiliation drove the impeachment votes in President Clinton's case).

[96] *See* THE FEDERALIST NO. 65, at 375 (Alexander Hamilton) (Am. Bar Ass'n 2009) (discussing impeachment as "the judicial character of the Senate"); *see also* Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 307 (1999).

[97] Michael F. Williams, *Rehnquist's Renunciation? The Chief Justice's Constitutional Duty To "Preside" over Impeachment Trials*, 104 W. VA. L. REV. 457, 467 (2002).

themselves if they had already ruled on the impeachment of the official.[98] These concerns could have been ameliorated with the creation of a special court of impeachments that only performed impeachment functions. However, a proposal for such a body was rejected in part because it "would either be attended with heavy expense, or might in practice be subject to a variety of casualties and inconveniencies."[99]

Ultimately, the Framers opted for an impeachment scheme with legislative self-interpretation because alternative arrangements came with high costs and worse tradeoffs.

2. *Congressional Self-interpretation Through Senate Confirmation*

The Constitution also enables Senate self-interpretation through the Senate's confirmation function.[100] The Constitution provides that the Senate must confirm presidential nominees for "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[101] Congress has enacted statutes that provide minimum qualifications for nominees to some of these seats.[102] These qualifications include restrictions on demographic characteristics, political party affiliations, expertise, experience and conflicts of interest.[103] When the Senate reviews these nominations they must determine whether those nominees meet the congressionally set qualifications—that is, the Senate must interpret statutory qualifications that it had a hand in writing. Even when no express qualifications are required for an office, legislators have written statutory duties for that office and Senators must interpret those duties to determine whether a nominee has the skills for the job as statutorily described.

The risk of allowing partial self-interpretation in appointments hearings is that Senators will make partisan determinations of whether a nominee's skills match statutory requirements. Republican Senators could conclude that Republican nominees met the qualifications but Democratic nominees did not, and vice versa for Democratic Senators. For example, Republican Senators blocked President Obama's nominee to the Federal Reserve Board, economist Peter Diamond, purportedly because they narrowly interpreted the Board's statutory purview to require the skills of macroeconomists and monetary

[98] THE FEDERALIST NO. 65, at 377 (Alexander Hamilton) (Am. Bar Ass'n 2009).

[99] *Id.* at 378.

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

[101] *Id.*

[102] More than forty percent of agencies created by legislation between 1946 and 1995 (seventy-four agencies) have restrictions placed on the qualifications of agency officials. *See* William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POLITICS 1095, 1098–99 & tbl. 1 (2002).

[103] *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 929 (2009).

specialists but not labor economists like Diamond, although many believed the real reason was partisan opposition to Diamond.[104]

The Framers could have avoided this problem of self-interpretation by removing the requirement of Senate confirmation for presidential appointees. However, the Framers were concerned that the absence of the Senate's check on nominees would enable Presidents to abuse their power and make self-interested appointments.[105] In other words, to counteract presidential self-interest, the Framers created an institution that entails Senate self-interpretation because the benefits of checking the President here plausibly outweighed the costs from self-interpretation.

Also, although not mentioned in the Framers' debates, the presidential veto power may act as a particularly effective procedural check on the Senate's self-interpretation power because legislation on appointee qualifications directly constrains the President, who thus has an especially strong incentive to police legislation and veto unacceptable terms. Indeed, the White House often chastises Congress for proposing statutory qualifications for executive offices filled by presidential appointment.[106]

3. *Congressional Interpretive Influence Through Legislative History*

A world with the strongest possible anti-self-interpretation norm would be one in which the interpretive views of the law-making body would be accorded no weight at all. This is not the world we live in. For more than a century, the Supreme Court and lower courts have afforded some interpretive influence to legislative history out of respect for the views of the more representative law-makers.[107] This judicial use of legislative history does not lead to pure self-interpretation as I have defined the term because, even when courts give legislative history some interpretive weight, the courts remain the primary

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[104] Binyamin Appelbaum, *Frustration Grows as Nominee for the Fed Withdraws*, N.Y. TIMES, June 7, 2011, at B1.

[105] As Alexander Hamilton wrote in Federalist 76:

> [Senate confirmation] would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.

THE FEDERALIST NO. 76, at 439 (Alexander Hamilton) (Am. Bar Ass'n 2009).

[106] In fact, the White House often criticizes Congress's practice of establishing minimum qualifications for agency position. O'Connell, *supra* note 103, at 929.

[107] *See* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 97–102 (1998); *see also* Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 548 (1997) (arguing that the judicial use of legislative history is legitimate "in light of our longstanding traditions").

interpreters of the statutes.[108] Nevertheless, judicial resort to legislative history is evidence of the notion that adherence to an absolute anti-self-interpretation norm is relaxed when confronted with countervailing values.

To illustrate the aspects of self-interpretation involved in the judicial use of legislative history, consider the case of *Steadman v. SEC*,[109] in which the Supreme Court had to interpret the APA to determine the standard for imposing administrative sanctions. Because the statutory language was vague,[110] the Court looked to and adopted the interpretive view contained in the House committee report, which expressly adopted a preponderance-of-the-evidence standard.[111] By giving weight to the committee's view, the Court afforded the legislators on the committee interpretive influence over statutory language they drafted.

Some have attacked the judicial use of legislative history by arguing that legislative history may not provide reliable indicators of legislative intent because it represents the interpretive statements of only a few legislators whose views may not have been enacted if stated expressly in the statute.[112] In particular, one risk is that legislators will draft vague statutory language that on its face does not alienate too many other legislators, only to fill in the specifics with statements in legislative history that courts will examine for guidance.[113]

Despite this risk, courts have long looked to legislative history as a way to discern legislative intent.[114] Some forms of legislative history are more reliable indicators of legislative intent than others, and Supreme Court doctrine has established a hierarchy of legislative history that affords weight based on how closely the legislative source reflects the intent of the enacting Congress.[115] Under this hierarchy, committee reports from the committee that drafted and reviewed the legislation rank at the top along with statements from the statutes' sponsors.[116] Committee reports are considered the best evidence of agreement between both houses because the reports from each house are often identical or else the reports explain how the two houses decided to resolve differences in bills that passed each chamber.[117] Floor debates and hearing testimony are afforded weight too but are less authoritative because they are more likely to

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[108] Another difference is that legislative history is usually made before a statute is enacted, while interpretation (and self-interpretation) in the usual sense of the word occurs after a law has been made. *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1460 (2000).

[109] 450 U.S. 91, 97 (1981).

[110] The Court called it "opaque." *Id.* at 100.

[111] *Id.* at 101.

[112] *See* Conroy v. Aniskoff, 507 U.S. 511, 518–28 (1993) (Scalia, J., concurring in the judgment).

[113] *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 423 (1988).

[114] Eskridge & Frickey, *supra* note 43, at 356–58.

[115] William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 636 (1990).

[116] *Id.* at 637.

[117] *Id.*

reflect the views of individual legislators instead of the majority of both houses.[118] Similarly, courts afford more weight to congressional sources of legislative history than to presidential sources, such as signing statements that interpret statutory phrases, because the congressional sources are more likely to accurately reveal the drafters' preferences.[119] In short, the more reliably a source of legislative history reflects legislative intent, the more weight courts are likely to afford it, up to but not beyond the point at which the court could be said to cede primary interpretive authority to the legislators.

Overall, for many decades, a majority of sitting Supreme Court Justices have viewed legislative history as a legitimate guide for judges in statutory interpretation cases. This practice implies that, at least for these Justices, the robustness of the anti-self-interpretation norm for Congress wanes in the face of competing values, such as the value of democratic representativeness that is arguably advanced when courts look to the views of the elected representatives who enacted the laws.

4. *The Limits of Congressional Self-Interpretation*

This Section has discussed two discrete exceptions to the norm against congressional self-interpretation and shown how the strength of the norm is relaxed in the context of judicial use of legislative history. These findings by themselves are not enough to disprove the existence of a robust anti-self-interpretation norm for a couple of reasons. First, the discrete examples of congressional self-interpretation are based on express constitutional provisions and can be read as providing constitutionally sanctioned exceptions to a general anti-self-interpretation norm. Second, many scholars and jurists, including Manning and Scalia, view judicial use of legislative history as a constitutionally shaky practice that is just as vulnerable to attack as *Seminole Rock* deference.[120] For them, citing the judicial use of legislative history as indirect support for *Seminole Rock* deference is simply citing one bad doctrine as support for another.

Nevertheless, the instances of legislative self-interpretation discussed here substantially weaken the claim that a robust anti-self-interpretation norm exists by showing that, even for our constitutional system's primary law-makers in Congress, constitutional designers have permitted self-interpretation when competing norms and values outweigh the costs of self-interpretation. The next two sections build on this insight by showing how the pervasiveness of

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[118] *Id.* at 639.

[119] *Id.* at 636–37. For an argument that presidential signing statements should, under some conditions, receive as much weight as ordinary legislative history, see Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 352–56 (2006).

[120] *See* Eskridge, *supra* note 115, at 652–64; *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 719 (1997).

presidential and judicial self-interpretation undermine the notion of a universal constitutional norm against self-interpretation.

B. *Presidential Self-Interpretation*

Presidential self-interpretation is a widespread and persistent part of our constitutional system. This Section illustrates how Presidents exercise self-interpretation in three contexts: judicial deference to presidential law-making; the President's power to oversee agency actions; and the President's power to recommend legislation. In each of these contexts, self-interpretation has its costs, but they are plausibly outweighed by competing institutional values associated with presidential decision-making.

1. *Presidential Self-interpretation Through Judicial Deference to Executive Law-Making*

Presidents often make law.[121] For example, Presidents make law when they enter into agreements with other nations under their Article II foreign affairs powers,[122] or when they issue regulations under authority delegated to them by Congress. When Presidents make law, they must interpret the underlying constitutional or statutory provisions that authorize their actions. Sometimes courts defer to these presidential interpretations by invoking the political question doctrine, which holds that the political branches should receive absolute deference on questions for which courts cannot craft judicially manageable standards.[123] Other times, courts accept the President's interpretation after affording the President highly deferential review because of the President's national accountability, expertise, and ability as chief executive to maintain uniformity and act with dispatch. Presidents are most likely to receive absolute or strong judicial deference in foreign affairs and national security cases because the President's institutional advantages over Congress and courts are greatest here.[124] These basic propositions of judicial deference to

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[121] *See, e.g.*, Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 148–67 (2009) (discussing the President's constitutional and statutory authority to make international law).

[122] *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 661 (2000).

[123] Baker v. Carr, 369 U.S. 186, 217 (1962).

[124] *See, e.g.*, Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 329–30 (2002). Indeed, the Supreme Court has noted that it has a "customary policy of deference to the President in matters of foreign affairs." Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348 (2005). When there is a crisis that involves foreign affairs and national security, judicial deference is at its peak. *See* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1034 (2003).

Presidents have been much discussed in the legal literature.[125] What has been overlooked, though, is that courts also afford absolute or strong judicial deference to presidential self-interpretations.

The President's ability to self-interpret has never been seriously questioned, so long as the matter is one in which courts would ordinarily defer to the President's interpretation of the underlying statutory or constitutional authority. Consider the President's constitutional authority to "receive Ambassadors and other public Ministers."[126] Courts have long accepted as controlling presidential decisions that interpret and implement this provision.[127] They have also accepted as controlling the President's interpretations of presidentially made law derived from this provision. For example, in the 1890 Supreme Court case *In re Baiz*,[128] a U.S. citizen, Jacob Baiz, sought recognition as foreign minister representing Honduras. The State Department, acting for the President, explained that there was a policy "to decline to recognize American citizens as the accredited diplomatic representatives of foreign powers."[129] While there were rare exceptions, Baiz did not meet these exceptions, the State Department explained.[130] The Court accepted the President's view as controlling because "we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister."[131]

The *Baiz* case involved self-interpretation because Presidents had established a general rule against recognizing American citizens as foreign representatives, and a President was now authoritatively interpreting that rule to determine that Baiz did not fall into one of the rule's exceptions. A Court committed to avoiding self-interpretation by Presidents would have insisted that it and not the President determine whether Baiz qualified for an exception. This anti-self-interpretation approach would have minimized the risk that Presidents could abuse their self-interpretation power by granting exemptions to friends and political supporters but not others. Despite this risk, the Court was inclined

[125] *See, e.g.*, Barkow, *supra* note 124, at 329–30; William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1163–66 (2008); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 20–24 (2013) (summarizing the doctrinal triggers for the political question doctrine); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 748–57 (2007).

[126] U.S. CONST. art. II, § 3.

[127] *See, e.g.*, United States v. Ortega, 27 F. Cas. 359, 361 (C.C.E.D. Pa. 1825) (No. 15,971) ("The constitution of the United States having vested in the president the power to receive ambassadors and other public ministers, has necessarily bestowed upon that branch of the government, not only the right, but the exclusive right, to judge of the credentials of the ministers so received . . . .").

[128] 135 U.S. 403, 422 (1890).

[129] *Id.* at 411.

[130] *Id.*

[131] *Id.* at 432.

to accept the President's self-interpretation as controlling because of his institutional advantages handling foreign affairs. The benefits of presidential decision-making here trumped the costs from self-interpretation.

A more recent example of presidential self-interpretation and its risks concerns the issuance of what are called "presidential permits." For decades, Presidents have used their constitutional foreign affairs powers to administer regulatory schemes in which private companies must apply for and receive permits issued by the President before they transport energy across international boundaries.[132] Presidents have published regulatory standards for when permits should be issued and then interpreted those standards in individual cases when companies apply for permits.[133] No presidential permit case has reached the Supreme Court, but lower courts have accepted the practice as constitutional and the President's self-interpretations as controlling.[134] Again, under this power of self-interpretation, Presidents can craft unduly vague standards that provide less than optimal notice to companies ex ante and then fill in the details later with interpretations. For example, the President is currently using his self-interpretation power to assess the permit application for the controversial Keystone XL Pipeline System, a pipeline that would transport oil sands from Canada to the United States.[135] The President has established that pipelines like Keystone XL should receive permits if the projects "serve the national interest."[136] The President must now self-interpret this vague standard to determine whether the Keystone XL project qualifies.

Courts also accept presidential interpretations when the President was not the sole drafter of the law, as in cases interpreting treaties and executive agreements that were drafted with other signatory nations. While there is some debate about the level of deference courts give to presidential treaty interpretations,[137] the most persuasive scholarship has shown that judicial deference in treaty cases is a function of the foreign affairs implications in the case. When the issue is one that has a significant impact on American relations with foreign countries, courts are more likely to accept the President's interpretation because these are cases in which the President's comparative

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[132] Exec. Order No. 13,337, 3 C.F.R. 165 (2004); Exec. Order No. 10,485, 3 C.F.R. 970 (1953); Exec. Order No. 8202, 3 C.F.R. 560 (1939). For a discussion of how Presidents have used these schemes to gain power over Congress, see Jason Marisam, *The President's Agency Selection Powers*, 65 ADMIN. L. REV. 821 (2013).

[133] Exec. Order No. 13,337, 3 C.F.R. 166 (2004).

[134] *See* Natural Res. Def. Council, Inc. v. U.S. Dep't of State, 658 F. Supp. 2d 105, 111–13 (D.D.C. 2009).

[135] *See New Keystone XL Pipeline Application*, DEP'T STATE, http://www.keystonepipeline-xl.state.gov/ (last visited Jan. 12, 2014).

[136] Exec. Order No. 13,337, 3 C.F.R. 166 (2004).

[137] For example, compare Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1201–02 (2007), with Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1245–46 (2007).

advantages are greatest.[138] Because treaty cases often involve foreign affairs, courts often accept presidential treaty interpretations. The data suggests that the President's interpretative stance is "the single best predictor of interpretive outcomes in American treaty cases."[139] In other words, courts often let Presidents self-interpret treaties.

The presence of additional parties in the treaty-making process provides a constraint on the President that makes presidential self-interpretation of treaties less problematic than presidential self-interpretation in cases where the President was the sole drafter of the law. When the President is the sole drafter and primary interpreter of laws, he can abuse this power by crafting unduly vague laws that preserve his flexibility to interpret those laws later. This concern is of less magnitude in treaty cases because the treaty text must be acceptable to the other signing nations and the Senate, which must approve treaties by a two-thirds vote. These parties can reject treaties replete with textual language, vague or otherwise, that they dislike. As a result, the structure and procedure of treaty cases provide a check on the President's ability to abuse his self-interpretation power. This finding does not mean that deference to presidential treaty interpretations should be greater than deference to Presidents in cases where they are the sole law-maker. The proper level of weight given to presidential interpretations of treaties is a contested issue that involves many significant factors aside from the risk of abuse from self-interpretation.[140] My point is simply that, if we isolate risks derived from the President's self-interpretation power, these risks are possibly lower in treaty cases because it is more difficult for the President as law-maker to craft the legal text in order to preserve maximum flexibility for his interpretive options later.

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[138] *See, e.g.*, Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 791 (2008) ("When enough concerns arise about the potential foreign effects of an interpretive decision, [the court] defers."); Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 573 (2007) (claiming that judicial enforcement of treaties "turns mainly on who is accused of being the party in breach and the perceived competence of the judiciary to offer a remedy").

[139] David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1015 (1994). This deference did not exist at the nation's founding, though. *See* Sullivan, *supra* note 138, at 788 (discussing how, in nineteen cases dealing with treaty interpretation in the early 1800s, the Court agreed with the Executive's interpretation only three times).

[140] Indeed, some scholars have argued that presidential treaty interpretations should receive less weight than interpretations in cases where the President was the sole law-maker because treaty interpretations should not be governed by the President alone but by the shared expectations of the parties. *See* Evan Criddle, Comment, Chevron *Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1930 (2003). At least one commentator includes the Senate as a treaty-making partner whose views share equal weight with the executive. *See* David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1357 (1989). However, others argue that the Senate's power to veto treaties does not make it equal to the President in the treaty-making process. *See* Lawrence J. Block et al., *The Senate's Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U. PA. L. REV. 1481, 1482–83 (1989).

Overall, if the interpretive question implicates significant foreign relations concerns, courts tend to accept the President's self-interpretations as controlling because of the benefits of presidential decision-making.

2. *Self-interpretation Through the President's Agency Oversight Powers*

Presidents routinely issue executive orders or presidential memoranda that direct agencies to enact policies.[141] Presidents then interpret these orders to determine whether agencies have complied with them. We should not necessarily count these interpretations as self-interpretations, though. Self-interpretation, as I have defined the term, requires that the interpretations be legally controlling. There is a large debate about whether and when presidential oversight actions generally are legally binding on agencies, with the answer depending on one's theory of executive power and the conditions under which the action was taken. Thus, whether presidential interpretations of agency directives are binding self-interpretations depends on theory and context. This subsection describes the scope of the President's self-interpretation power under three leading and competing theories of presidential oversight powers.

Adherents of the unitary executive theory believe that presidential directives to all agencies are legally binding because the Constitution contains a "grant to the president of all of the executive power, which includes the power to remove and direct all lower-level executive officials" at his will.[142] If the President has plenary power to issue binding orders to agencies, by extension, he should have the power to issue binding interpretations of those orders. In other words, under the unitary executive theory, the President has plenary power to self-interpret his directives to agencies. To illustrate self-interpretation under this theory, consider the Obama Administration's efforts to combat climate change. In June, 2013, President Obama issued a memorandum directing the Environmental Protection Agency (EPA) to regulate climate change through "approaches that allow the use of market-based instruments, performance standards, and other regulatory flexibilities."[143] The agency is working on a proposed rule, which the White House will review. This review process will entail self-interpretation because the White House must interpret the President's memorandum to determine whether the EPA has fulfilled the President's objectives. If the White House concludes that the agency has not complied with the President's memorandum, the EPA is legally bound to accept the conclusion and rework its proposal accordingly, much the way an agency must respond to a court's interpretation that the agency has not complied with a statutory directive.

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[141] *See* Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 541 (2005).

[142] *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 3–4 (2008).

[143] Presidential Memorandum on Power Sector Carbon Pollution Standards, President Obama, to EPA (June 25, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards.

Some scholars and jurists, most notably Justice Elena Kagan, have advanced a somewhat less strong view of the President's oversight power that is rooted in statutory interpretation presumptions.[144] Kagan has argued that, when Congress delegates statutory authority to agencies, these delegations should be read as granting the President the power to direct the agencies' implementation of those statutes.[145] However, when Congress delegates authority to an independent agency, the statute should not be read as granting the President directive power because Congress's purpose in choosing the independent agency was to insulate decision-making from the President.[146] For our purposes, the President's lack of authority to control independent agencies means that he cannot issue binding interpretations of his directives to those agencies. Under this view, President Obama's directive to the EPA and self-interpretation of that directive are binding. But, if we swap an independent agency like the Securities Exchange Commission for the EPA, neither the President's directive nor his interpretation of that directive would be legally binding.

Another leading theory holds that Presidents lack the general constitutional or statutory power to direct agency actions taken pursuant to congressionally delegated authority.[147] A President only retains the power to direct agencies when he is acting pursuant to statutory authority that Congress delegated expressly to the President.[148] Under this theory, the President's interpretation of his directive to the EPA would not be a controlling self-interpretation. However, a President can self-interpret a directive that was based on his own statutory authority. For example, the President has express statutory authority to respond to oil spills.[149] Under this authority, the President has directed the Navy to develop a long-range plan to restore the Gulf of Mexico after the Deepwater Horizon spill in 2010.[150] The President can issue controlling self-interpretations of this directive that determine whether the Navy has complied with the initial order.

Ultimately, while the scope of the President's self-interpretation power through agency directives depends on one's theory of executive power generally, under any of three leading schools of thought, there is at least some domain of cases in which the President has the power to issue controlling self-interpretations of agency directives.

Whether the President's power of self-interpretation through agency directives is broad or narrow, the self-interpretation power gives Presidents an advantage over Congress. When Congress issues statutory commands to

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[144] Kagan, *supra* note 15, at 2327.

[145] *See id.* at 2369.

[146] *Id.* at 2327.

[147] Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263, 277 (2006); Strauss, *supra* note 125, at 704–05.

[148] Stack, *supra* note 147, at 269.

[149] 33 U.S.C. § 1321(d) (2012).

[150] Long-Term Gulf Coast Restoration Support Plan, 75 Fed. Reg. 38,913 (June 30, 2010).

agencies, it knows that the agencies and not Congress will act as primary interpreters of those commands under *Chevron* deference. Accordingly, Congress has an incentive to speak clearly because, otherwise, the agencies can interpret the vagueness as they see fit and not necessarily as Congress would prefer.[151] By contrast, when a President issues binding directives to agencies, he has the power to self-interpret those directives. Accordingly, a President lacks the same incentive to issue clear directives to agencies because, if the President's directives are vague, he retains the authority to interpret those directives and determine whether the agencies are implementing them as he would prefer. This distinction provides Presidents a key advantage over Congress because, when issuing legally binding directives to agencies, Presidents need not invest as many resources ex ante to ensure they provide clear direction to agencies.

3. *Presidential Self-interpretation Through Recommending Legislation*

A final form of presidential self-interpretation comes from the Constitution's mandate that the President recommend legislation for Congress to pass.[152] Under this authority, Presidents submit many bills for Congress to consider.[153] Some view the President's exercise of this power as legislative—that is, the President is behaving like a law-maker because he is designing legislation, which he may ultimately vote to approve by signing into law.[154] Under this view, if the President's recommended legislation includes authority that the President must implement, the President has the power of self-interpretation because he must interpret legislation that he wrote. For example, President Franklin Roosevelt used his recommendation power to push through New Deal-era legislation that he had crafted.[155] This legislation included provisions that the President himself would have to implement.[156] Thus, one could reasonably say that President Roosevelt self-interpreted legislation.

The primary risk of this presidential self-interpretation is that the President will recommend legislation that grants him broad powers. Indeed, many were concerned that President Roosevelt had secured too much power for himself

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[151] Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013) (Scalia, J., dissenting) (noting that, because "whatever [Congress] leaves vague in the statute will be worked out *by someone else* . . . Congress's incentive is to speak as clearly as possible on the matters it regards as important").

[152] U.S. CONST. art II, § 3. For one of the few academic discussions of the clause, see J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2079 (1989).

[153] *See* Cass R. Sunstein, *An Eighteenth Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 8 (1994).

[154] *See* Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 4–7 (2002).

[155] *Id.* at 52.

[156] *See, e.g.*, National Industrial Recovery Act, ch. 90, 48 Stat. 195, 196 (1933).

through legislation that he recommended.[157] However, this risk is balanced by the benefits of having a nationally elected chief executive, with expertise implementing statutes, recommend legislation to a Congress full of legislators who represent individual districts and have little if any experience implementing statutes. Moreover, there is an obvious procedural check on presidential self-dealing through legislative recommendations: any presidential recommendation must be approved by both houses of Congress. Thus, while the recommendation power can be said to commingle law-making and law-interpreting powers in the President, the benefits of the recommendation power and the procedural check on its use make it a worthwhile institution.

Overall, presidential self-interpretation exists as a function of judicial deference to presidential law-making, the President's agency-oversight powers, and the President's recommendation power. Presidential self-interpretation has persisted mostly because of the many institutional benefits associated with presidential decision-making.

C. *Judicial Self-Interpretation*

Like presidential self-interpretation, judicial self-interpretation is rampant in our constitutional system. This Section illustrates how courts, in particular the Supreme Court, have exercised self-interpretation in three contexts: adherence to stare decisis principles; the formation of judicial common law; and the creation of judicial rules of governance. In each of these contexts, self-interpretation has its costs but they are plausibly outweighed by competing institutional values. This Section discusses self-interpretation in each of these contexts and concludes by discussing procedural and structural constraints that mitigate the risk of judicial self-interpretation in general.

1. *Judicial Self-interpretation Through Stare Decisis*

The broadest and most important form of judicial self-interpretation results from adherence to stare decisis norms. Stare decisis has both a vertical and horizontal form,[158] and judicial self-interpretation exists under both. There are costs to judicial self-interpretation through vertical and horizontal stare decisis, but the structures persist because their rule-of-law benefits plausibly outweigh these costs.

Vertical stare decisis refers to the principle that decisions of a high court are binding on lower courts.[159] This form of stare decisis leads to self-interpretation

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[157] *See* Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1680–81 (2009).

[158] *See* Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460–63 (2010).

[159] State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (establishing that lower federal courts must follow Supreme Court precedent and cannot depart from that precedent by anticipating

because high courts reviewing the work of lower courts must interpret their earlier opinions to assess whether the lower courts are acting in line with those binding opinions. One potential cost of vertical stare decisis is that it can encourage appellate courts to craft overly broad rules.[160] Appeals courts review a fraction of lower court cases because appeals are not always filed or, if appellate jurisdiction is discretionary, the courts lack the resources to review too many cases.[161] As a result, appeals courts cannot constrain lower courts by frequently reviewing and reversing their work. Instead, if an appellate court wants to influence the lower courts in the largest number of cases feasible, the court must establish a broad rule "that limits the trial court judge's ability to choose a decision that is at odds with the appeals court's preferred decision."[162]

Broad judicial rules of the sort encouraged by vertical stare decisis have been criticized for their decision and error costs. Decision costs refer to the costs of drafting the decision, and these costs are higher with broad rules because the court must devote extra resources to develop a broad rule that covers many situations instead of a narrow one that hews to the facts before the court.[163] Error costs refer to the costs from an erroneous decision, and these costs too are higher with broad rules because any mistake applies to more cases than a mistaken narrow rule would.[164] There are of course costs to narrow judicial rules too,[165] but the point here is that vertical stare decisis can generate rules that are broader than optimal.

While self-interpretation through vertical stare decisis has its costs, the benefits of such a structure are easy to understand. Imagine if vertical stare decisis were replaced with a system in which appeals courts' rulings did not bind trial courts. This system would reduce self-interpretation because appeals courts would not interpret their own rulings to ensure that trial courts complied with them. This system would also remove the incentive for appeals courts to craft unduly broad rules because their rules, broad or narrow, would have no force over trial courts. But abandoning vertical stare decisis would be disastrous for judicial management and rule-of-law norms such as predictability. Potential litigants would not know which rules governed their behavior because each trial court, freed from having to follow opinions passed down from higher up the

how the Court will rule on the issue again in the future); *see also* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994).

[160] *See* Hugo M. Mialon, Paul H. Rubin & Joel L. Schrag, *Judicial Hierarchies and the Rule-Individual Tradeoff*, 15 SUP. CT. ECON. REV. 3, 4–5 (2007).

[161] *Id.*

[162] *Id.* at 5.

[163] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 47 (1999).

[164] *See id.* at 49.

[165] *See* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 4 (2009) (arguing that broad and clear rules from the Supreme Court are desirable because when the "Court instead issues a narrow, fact-bound (minimalist) decision, it leaves a great deal to be decided by the lower courts in future cases and thereby delegates its supreme law-declaration function to its judicial inferiors").

judicial chain of command, could fashion its own rules. The costs of such unpredictability justify maintaining a judicial hierarchy in which lower courts are bound by higher courts' rulings, even if the maintenance of this structure requires that we accept judicial self-interpretation through vertical stare decisis.

Judicial self-interpretation also exists through horizontal stare decisis, which refers to the principle that decisions of a court either bind or influence other courts that are at the same level in the judicial hierarchy and facing the same or similar issues.[166] For our purposes, the horizontal stare decisis analysis will be confined to how Supreme Court opinions set precedent that constrain later Supreme Court decisions. There is a large debate about how Supreme Court statutory and constitutional precedent ought to constrain the Supreme Court.[167] Some argue for absolute stare decisis under which the Court must always adhere to its precedent.[168] Others argue for abandoning stare decisis and entirely freeing the Court to decide cases without the constraint of precedent.[169] The current doctrine falls somewhere in the middle, with the Court affording precedent a presumption of correctness that can be rebutted.[170] Under this doctrine, the Court first assesses the strength of the arguments against the precedent. If those arguments do not meet the burden of rebutting the precedent's correctness, the Court must interpret its own precedent and apply it to the case at bar.

The self-interpretation that comes from horizontal stare decisis has its costs, namely that it encourages the Supreme Court to craft vague rules.[171] To

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[166] *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2024–25 (1997).

[167] *See, e.g.*, Brian Bix, *Michael Moore's Realist Approach to Law*, 140 U. PA. L. REV. 1293, 1319–21 (1992) (discussing a metaphysical approach that supports giving weight to precedent); William N. Eskridge, Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450, 2453 (1990) (arguing that absolute stare decisis "may exacerbate countermajoritarian features of our system"); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 23–24 (1994) (arguing that it is unconstitutional to follow precedent in some circumstances); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1548 (2000) (arguing that "stare decisis is a policy judgment, *not* a rule of law specified in the Constitution or clearly implicit in its provisions or overall structure").

[168] *See* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 183–84 (1989); Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 1, 12 n.45 (1988).

[169] *See* Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 298 (2005).

[170] *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362–63 (1988); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1–2 (2001).

[171] My finding that horizontal stare decisis encourages vague rules is not inconsistent with others finding that vertical stare decisis encourages broad rules. The two kinds of rules are likely to arise under different conditions. The broad rules are more likely for legal questions that frequently come up in lower courts and, for any given case dealing with the

illustrate, imagine the Court is preparing an opinion on a particular matter. The Court believes the rule it will announce in the case is the best one but it is not certain. In a world with no horizontal stare decisis, the Court could write a clear rule and know that, if it turns out to be wrong, it could easily overturn the rule the next time the issue comes before the Court. But with some form of horizontal stare decisis, the Court knows that any rule it writes will be harder to overturn because it will be presumptively correct.[172] If the Court gets the rule wrong, it might end up binding itself to a less than ideal rule in future cases.[173] However, if the Court writes a vague rule, the Court can more easily claim to follow the precedent, while interpreting the vagueness in such a way as to make the application of the rule less problematic. A vague rule makes it easier for the Court to confine the vague precedent to its facts and to update the rule to meet changing circumstances without expressly overruling the precedent.[174]

These vague rules come with costs, namely that they provide less than optimal notice about the content of the law for concerned parties. For example, consider the Supreme Court's jurisprudence on the scope of Congress's power under the Commerce Clause.[175] The Court has established that an act of Congress is constitutional under the Commerce Clause if it has a "substantial relation to interstate commerce."[176] The vagueness of the phrase "substantial relation" gives the Court leeway to find violations of the Clause or not under a variety of facts without having to overturn the doctrinal test. It also provides less than clear notice to Congress about when its legislation is in danger of crossing the line and becoming unconstitutional under the Commerce Clause.

Despite this cost, horizontal stare decisis persists in large part because many believe it advances other rule-of-law values. The Supreme Court often offers platitudes about how the "rule of law depends in large part on adherence to the doctrine of *stare decisis*,"[177] and legal scholars have backed up these statements

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question, there is a low probability of review. By contrast, high courts are more likely to produce vague rules for legal issues that arise less frequently and are more likely to be reviewed by the high court. Under these conditions, the high court does not need to worry about constraining the lower court ex ante with a broad rule. Instead, the court must worry more about constraining its own options by having to adhere to a clear, somewhat binding precedent.

[172] This point assumes that the Court is bound not just to its precedent on the issue at bar but also to the precedent establishing stare decisis as binding. For a brief discussion on the legal philosophy behind such judicial self-binding, see Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 189–90 (2006).

[173] *But see* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 143–44 (2000) (noting that a weakened stare decisis rule that allows judges to overrule results may produce worse outcomes becomes judges may not have the capacity to accurately determine when precedent is erroneous or obsolete).

[174] *See* Solum, *supra* note 172, at 191–92.

[175] U.S. CONST. art. I, § 8, cl. 3.

[176] United States v. Morrison, 529 U.S. 598, 609 (2000).

[177] Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 478–79 (1987).

with substantive defenses of stare decisis. For example, Professor Jeremy Waldron has recently shown that stare decisis is justified by specific rule-of-law norms, including: the principle of generality, which "requires all judges to base their decisions on general norms and not just leave them as freestanding particulars"; institutional responsibility, which requires judges to treat precedent "as a genuine legal norm to which the court that he belongs to has already committed itself"; and the principle of fidelity to law, which "requires the precedent judge to approach her decision as far as she can by trying to figure out the implicit bearing of such existing law as there is on the case in front of her."[178]

Ultimately, both vertical and horizontal forms of stare decisis are a mainstay of our constitutional system.[179] Because of the benefits of stare decisis, jurists over time have chosen adherence to stare decisis over adherence to an anti-self-interpretation norm.[180]

2. *Judicial Self-interpretation Through Federal Common Law*

Federal common law is another context in which the Supreme Court makes and self-interprets law. Scholars and jurists have labored to provide a precise definition of federal common law. For our purposes, it is enough to say that federal common law refers to judge-made rules that are not derived from statutory or express constitutional text and have the status of federal law.[181] For centuries, there has been a debate about the scope of federal courts' common law power, but the conventional view, and the one embraced by the Supreme Court, is that our constitutional structure left some category of legal questions

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[178] Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 23, 31 (2012).

[179] Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748 (1988) (stare decisis has become "part of our understanding of what law is").

[180] In a footnote, Manning dismisses judicial stare decisis as irrelevant to the question of agency self-interpretation because "any legal system that includes both an ultimate expositor of legal meaning and a doctrine of stare decisis will inevitably involve some self-interpretation; at some point, a final judicial authority will have to determine what its precedents mean." Manning, *supra* note 4, at 648 n.175. The problem with this argument is that stare decisis is not a necessary feature of a constitutional system. Constitutional designers could have created a system without stare decisis and thus minimized judicial self-interpretation. The fact that our system possesses a more robust version of stare decisis suggests that the abhorrence of self-interpretation is a comparatively weak constitutional value compared to the rule of law values that underlie stare decisis.

[181] *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 7 (1985). Some have suggested that the distinction between statutory interpretation and common law is one of degree but not kind. *See* Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980) ("The more definite and explicit the prevailing legislative policy, the more likely a court will describe its lawmaking as statutory interpretation; the less precise and less explicit the perceived legislative policy, the more likely a court will speak of common law.").

governed by federal common law.[182] Within this category of cases, judicial self-interpretation is inevitable because, after a court establishes new law through common law it must interpret that law in individual cases. For example, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*[183] involved a water dispute between two states. The Supreme Court declared that the interstate issue was not governed by either state's laws but by federal common law.[184] The Court then looked to its precedent to find the federal common law rule, which it determined was a rule of "equitable apportionment" between states.[185] It then interpreted that rule by applying it to the dispute at bar.[186]

The risk of such self-interpretation is that the Court, in order to retain flexibility, will craft vague common law that provides less than optimal notice. But federal common law has its benefits. The most commonly invoked rationale for federal common law is that there are often shortcomings or biases in states' law-making processes that create a need for federal law. The federal political branches have not always provided the needed federal law.[187] When there is a gap of this sort, federal courts must create federal law on their own. For example, in matters dealing with border disputes among states, individual states are likely to produce laws biased in their own favor, thus generating a need for federal law to provide a fairer rule. When Congress has not established a federal rule, the Supreme Court may have to develop the rule itself, as in the *Hinderlider* case noted above. A similar rationale has been invoked to justify the use of federal common law in foreign affairs.[188] The logic is that foreign affairs typically require a uniform approach that multiple states cannot provide. Sometimes the federal political branches will have failed to provide the necessary law, leaving the federal courts to develop the law on their own unless and until the political branches act.

While some have denied the legitimacy of federal common law entirely,[189] it has long remained a feature of our constitutional system. Despite involving self-interpretation, it persists because of its value in promoting federal uniformity.

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[182] *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 907–08 (1986); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1513–17 (1984); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1007 (1985).

[183] 304 U.S. 92, 95 (1938).

[184] *Id.* at 110.

[185] *Id.* at 109–10.

[186] *Id.*

[187] *See* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 588 (2006).

[188] *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1620–21 (1997) (describing and attacking this conventional view).

[189] *See, e.g.*, Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 766–67 (1989).

3. *Judicial Self-interpretation Through Rules of Governance*

The first session of Congress in 1789 produced a statute authorizing courts to "make and establish all necessary rules for the orderly conducting of business in the said courts."[190] Since that time, judicially crafted rules for court business have become a mainstay of our constitutional structure. Most prominently, the Rules Enabling Act authorizes the Supreme Court to promulgate rules for court business.[191] These statutes inevitably lead to judicial self-interpretation because the Supreme Court establishes rules of conduct and then later interprets those rules to ensure that court actors abide by them.

As with many instances of self-interpretation, the Supreme Court can use its self-interpretation power to enact vague rules that produce less than optimal notice to litigants, knowing that it can expound on these rules through later interpretations. Consider the standard for surviving a motion to dismiss. The Supreme Court promulgated a vague rule, Federal Rule of Civil Procedure 12(b)(6), which provides that complaints can be dismissed for "failure to state a claim upon which relief can be granted."[192] The rule, by itself, provides little guidance to litigants about how much work they need to put into their complaints in order to survive a motion to dismiss. Instead, guidance has come through Court interpretations of the rule, which can significantly alter litigants' expectations. In *Bell Atlantic Corp. v. Twombly*, the Court interpreted the rule to require pleading "enough facts to state a claim to relief that is plausible on its face."[193] This interpretation was widely seen as an attempt by the Court to make it harder for parties to survive a motion to dismiss in many cases.[194]

While judicial self-interpretation of court rules has its costs, there are a couple of reasons why the Supreme Court has the power to both write and interpret these rules. First, there are definite benefits to having judges, who are experts in the internal affairs of courts, establish rules for court business.[195] If legislators set these rules, there would be a greater risk of error due to a lack of specialized information. Second, judicial self-interpretation is necessary to preserve judicial autonomy. If legislators set the rules for how to behave in federal court, it could be seen as legislative interference with another branch's internal affairs. Taken together, these benefits plausibly outweigh the costs of judicial self-interpretation here, and once again self-interpretation persists in our constitutional system.[196]

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[190] Act of September 24, 1789, ch. 20, 1 Stat. 73, 83.

[191] 28 U.S.C. § 2072 (2012).

[192] FED. R. CIV. P. 12(b)(6).

[193] 550 U.S. 544, 570 (2007).

[194] *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 9–10 (2010).

[195] *See* Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1186–87 (1996).

[196] One could argue that governance rules produced by courts are of an entirely different ilk than legislative rules and legislative-like rules produced by agencies and should not be

4. *Procedural and Structural Checks on Judicial Self-Interpretation*

Along with the institutional advantages that support and maintain widespread judicial self-interpretation in different contexts, the practice of judicial self-interpretation also persists in part because its risks are minimized by several procedural and structural constraints that make judicial self-interpretation less worrisome than self-interpretation by the heads of the other branches of government.

First, Justices' ability to set their own agendas is significantly constrained. Congress can freely set its policy agenda, and Presidents too have substantial leeway to prioritize among a variety of issues. But Supreme Court Justices must wait for cases on the issues they want to address,[197] and the Court is often left out of some of the most pressing issues of the day.[198] As a result, power-maximizing judges can often do less harm than power-maximizing legislators or Presidents can. Thus, granting self-interpretation powers to judges is less problematic.

Second, Justices have a weak information-gathering capacity compared to Congress and the President. While Congress and the President can draw on reams of information prepared by experts largely of their choosing, courts must generally rely on information presented to them by the litigants at bar.[199] The courts have limited ability to supplement this information with their own information-gathering efforts. This constraint can deter judges from writing opinions that require additional information gathering of their own. As a result, courts are deterred from departing too much from the holdings and rulings suggested to them in briefs and other litigation materials. Courts' comparatively constrained information-gathering capacity thus reduces their ability to abuse self-interpretation powers by crafting rules and interpretations of rules as they see fit, if such rules and interpretations have not been briefed and supported by litigants.

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considered in this debate over agency self-interpretation. After all, these governance rules only apply to those appearing before or filing documents with the courts. However, it is difficult to distinguish judicial governance rules from agency rules in a meaningful way. Judicial rules for the governance of court proceedings are parallel to agency rules covering entities under the agency's jurisdiction because both rules "have the force of law on those subject to them and those administering them." Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 576 n.13 (1984). The Supreme Court can fine attorneys and hold court actors in contempt by interpreting its rules of procedure. Viewed this way, there is little distinction between judicial self-interpretation and agency self-interpretation because both the judges and agencies are interpreting rules that sanction behavior under their purview.

[197] *See* Baird & Jacobi, *supra* note 10, at 216.

[198] *See* Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4, 8–9 (2006).

[199] *See* Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 94 n.105 (1986).

Finally, the constitutional separation of powers provides an indirect check on judicial self-interpretation. Federalist No. 78 famously observed that the judicial branch was the weakest of the three branches.[200] It must rely on Congress for funding and most of its jurisdiction,[201] and it must depend on the executive to enforce its judgments.[202] This weakness can make judges reluctant to issue opinions that would provoke a backlash from the political branches of government.[203] The fear of political backlash can constrain the Court and its use of self-interpretation powers.[204] For example, because of potential backlash, the Supreme Court is unlikely to expand its federal common law power, and the self-interpretation power that goes along with it, into domains already regulated by Congress or the President.

Overall, the judicial structure is quite permissive when it comes to self-interpretation. Judicial self-interpretation is so widespread because of various institutional advantages and procedural and structural institutions that minimize the risks of giving judges this power.

IV. TRADEOFFS AND PROCEDURES THAT JUSTIFY AGENCY SELF-INTERPRETATION

This Article has shown that self-interpretation is common in our constitutional system. It exists when the institutional benefits from a structural scheme that includes self-interpretation plausibly outweigh the costs from self-interpretation. Sometimes, procedural and structural protections also mitigate the risks from self-interpretation and help justify the existence of this power. These findings suggest that there is no universal anti-self-interpretation norm that counsels in favor of overturning *Seminole Rock*. With no clear presumption against the doctrine, the question becomes whether *Seminole Rock* deference is vulnerable because its costs are high and its benefits too low. This Part makes two straightforward points that cut in favor of retaining *Seminole Rock*. First, challengers to the doctrine have not shown that the costs of agency self-interpretation justify departing from the decades-old status quo. Second, the risks of vague draftsmanship under the status quo are far less than assumed because agencies' ability to promulgate vague rules is already checked by procedures established by Congress and the President, namely notice-and-comment rulemaking and White House review of agency rules. These procedural mechanisms have been largely absent from the discussion on how *Seminole Rock* promotes vagueness. Yet, they provide strong support for

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[200] THE FEDERALIST NO. 78 (Alexander Hamilton).

[201] *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2164 (2004).

[202] THE FEDERALIST NO. 78 (Alexander Hamilton).

[203] *See* Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1341–43 (2006).

[204] *But see* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 42 (2005) ("There are political limits on what the Court can do, but they are capacious.").

leaving the doctrine in place because a judicial check on agency vagueness may be unnecessary given the effectiveness of these procedures.

A. *Institutional Tradeoffs and Agency Self-Interpretation*

Should agencies be allowed to issue controlling interpretations of their own regulations? Agency self-interpretation can lead agencies to draft regulations that are overly vague. On the other hand, the benefits of agency self-interpretation are that agencies instead of judges interpret regulations, which likely reduces errors because of judges' comparative lack of expertise, accountability, and familiarity with the original intent of the regulation, as discussed in Part II. These benefits plausibly outweigh the risks from agency self-interpretation and justify continued adherence to *Seminole Rock*.

Of course, it is impossible to say with any significant degree of certainty whether a highly deferential regime is more cost-effective than a regime in which agency regulatory interpretations would receive little or no deference. Knowing which regime is more cost-effective would require comparing public welfare outcomes under the two regimes. We do not have this data because *Seminole Rock* has been the law since 1945.[205] Moreover, even if both types of regimes existed (perhaps in different state governments), we would have no way of quantifying these costs because one cannot simply capture the value of accountability and expertise, and one cannot easily specify the optimal level of rule vagueness and then measure deviations from that goal.

Despite this uncertainty, for seventy years, the Supreme Court has acted as if the benefits from agency self-interpretation outweigh the costs. Assuming that the burden is on the challengers to this well-entrenched status quo,[206] they simply have not shown that the Supreme Court has been wrong all this time and should overturn *Seminole Rock* now.

Challengers to *Seminole Rock* deference could potentially show that agency self-interpretation is more problematic than presidential self-interpretation. Presidents, because of their stature as the nationally elected figures atop the executive hierarchy, have often been treated as different from agencies and more worthy of respect. For example, Presidents do not have to comply with the APA. The argument could be made that, because Presidents are special, the fact that they have self-interpretation powers does not mean that agencies should too. Similarly, it could be argued that, because the judiciary is weak compared to the political branches of government, judicial self-interpretation is less problematic than self-interpretation in those branches. Agencies, with their

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[205] *Cf.* Vermeule, *supra* note 173, at 116 ("There is some chance that switching to a presumption in favor of extraterritoriality will increase legislative drafting costs, but that probability cannot be quantified, because no series of similar trials exists from which to generate a frequency or a nonrandom subjective probability assignment.").

[206] When making decisions under this kind of uncertainty, it is common to place the burden on the challengers to the status quo. *See* Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698, 699 (1999).

legislative-like rulemaking powers and ability to execute vast statutory powers, are generally seen as belonging to the political branches. Thus, perhaps judicial self-interpretation is less problematic than agency self-interpretation, and the existence of the former should not justify the latter.

However, even if we accept the contestable assumptions that Presidents deserve more leeway under administrative law than agencies do and that judicial abuse of power is less of a concern than agency abuse of power, these assumptions do not show that agency self-interpretation should not exist. The basic point remains that the existence of self-interpretation depends on institutional tradeoffs. Presidential self-interpretation may be acceptable because Presidents have unique institutional advantages, but that simply proves the point that there is no absolute norm against self-interpretation and that self-interpretation is more likely to exist when the institutional advantages of such a structure are greatest. Likewise, judicial self-interpretation may be acceptable because courts are weak, but that just shows that self-interpretation is more likely to exist when the risks from the use of a self-interpretation power are lower.

The institutional benefits of agency self-interpretation may be less strong than those for presidential self-interpretation, and the institutional costs of agency self-interpretation may be greater than those for judicial self-interpretation. But opponents of *Seminole Rock* deference have not shown that agency self-interpretation is, on net, institutionally undesirable. The doctrine has existed in its basic form for nearly seventy years, and we should not depart from it now.

B. *Procedural Protections Against Vague Agency Rules*

Even if one is inclined to believe that vague rules of the sort encouraged by agency self-interpretation generate huge costs that ought to be minimized, the problem for challengers to *Seminole Rock* is that these costs are already addressed by notice-and-comment rulemaking and presidential review of agency rules. Empirically, there is no reason to believe that these more direct procedures are insufficient to check agency self-interpretation or that a judicial check would further improve outcomes. This Section first discusses how notice-and-comment rulemaking decreases the amount of vagueness in agency rules. It then discusses how presidential review also limits vague agency rules. It concludes that the marginal benefits of scrapping *Seminole Rock* in order to check agency vagueness may simply not be worth the costs, given the existing institutions that reduce agency vagueness.

1. *Notice-and-Comment Rulemaking as a Safeguard Against Vague Agency Rules*

Regulated entities have an enormous impact on agency decisions through notice-and-comment procedures, and they use this influence to reduce vagueness in proposed agency rules.

Recall that Congress, through the APA, requires that agencies publish proposed rulemakings, solicit public comments for their proposals, and consider these comments before promulgating a final rule.[207] These notice-and-comment procedures ensure that agencies' decisions are transparent and responsive to interested parties.[208] Regulated entities and their interest groups tend to make the most use of comment periods, submitting voluminous comments that often successfully lead agencies to alter proposals.[209] If agencies fail to respond to the comments, the groups can contact Congress and enlist legislators in their effort to craft proposed rules to their liking. As a result of their comments and lobbying, regulated entities have a significant and documented effect on agency outputs.[210]

Not only do they have strong influence over agencies, regulated entities have significant incentives to use their influence to minimize regulatory vagueness. The clearer a rule, the more advanced notice these entities have about what is expected of them and how they can comply. More importantly, when regulations are clear and not vague, agencies lose flexibility to update the rules through informal procedures. Instead, more updates must go through comparatively onerous notice-and-comment rulemaking procedures again—thus slowing and having a deregulatory effect on the regulatory process, which is advantageous to regulated entities that want to avoid being subject to new requirements.[211]

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[207] 5 U.S.C. § 553 (2012).

[208] *See* Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 934 (2012) (describing how notice-and-comment procedures can make opaque agency actions more transparent).

[209] One study looked at forty rules promulgated by four agencies from 1994 to 2001 and found that business interests filed fifty-seven percent of the comments. Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POLITICS 128, 133 (2006).

[210] *See id.* at 133–35; Matthew C. Stephenson & Howell E. Jackson, *Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System*, 47 HARV. J. ON LEGIS. 1, 11–12 (2010) (finding that single regulated entities are better able to employ and monitor lobbyists who influence agency decisions than are diffuse interest groups).

[211] A large body of literature has shown how notice-and-comment rulemaking delays regulatory action in part because agencies take a long time to "write the lengthy preambles and technical support documents and to address public comments on proposed rules." Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387 (1992); *see also* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 70 (2000). Of course, regulated entities

When regulated entities want to avoid vague rules, they often succeed in their efforts to convince agencies to clarify proposed rules. For example, the Department of Health and Human Services recently proposed a rule that would implement portions of the Affordable Care Act (Obamacare).[212] Commentators objected that the agency's definition of the term "medically frail" was too vague, and the agency responded by clarifying the definition.[213] Similarly, consider the Department of the Interior's recent proposed rule on hydraulic fracturing of oil and gas, also known as fracking.[214] The fracking industry complained that the agency's early proposals were too vague, and the agency "worked to ensure the revisions [to the rule] also increased clarity."[215]

Examples like these, in which commentators successfully push an agency to clarify a vague term, are commonplace. While it is impossible to know precisely how much vagueness is eradicated through the notice-and-comment process, it undoubtedly is significant.[216]

2. *White House Review Reduces Vagueness in Agency Rules*

White House review of agency proposals is another important check on vagueness in agency rules. The White House's Office of Information and Regulatory Affairs (OIRA) reviews the most economically and politically significant rules proposed by agencies to ensure that they are cost-effective and align with presidential priorities.[217] The White House has an incentive to use OIRA review to curb rules that are overly vague because such vagueness is unlikely to benefit the sitting President. If a President wants to advance and solidify his regulatory agenda, he will demand clear rules. Vagueness and ambiguity leave room for the agency to fill in the gaps later, at a time when the agency is likely run by officials appointed by a subsequent President who often will not share the earlier President's political affiliation and preferences. Unsurprisingly then, OIRA officials have in fact reported that a key function of

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may sometimes want vague rules because the vagueness can give them leeway compared to a clear rule that dictates precisely how they should behave.

[212] 78 Fed. Reg. 42,160 (July 15, 2013).

[213] *Id.* at 42,229.

[214] 78 Fed. Reg. 31,636 (May 24, 2013).

[215] *Id.* at 31,645.

[216] *See generally* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005) (reporting the results of an empirical study finding that "agencies react to the notice and comment process by making changes in their proposed rules").

[217] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011). Agencies must submit to OIRA all "significant" regulations, which include those that have an annual effect on the economy of over $100 million as well as those that "[r]aise novel legal or policy issues arising out of legal mandates [and] the President's priorities." Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434 (Jan. 25, 2007), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf.

OIRA review is to "negotiate issues and clarify terms" in agencies' proposals.[218]

Undoubtedly, OIRA review alone does not ensure that all agency regulations align with presidential preferences. OIRA does not review all rules, and it does not have the resources to ensure that each rule perfectly aligns with the President's preferences. Nevertheless, there is significant evidence that White House oversight in general and OIRA in particular have gone a long way to ensuring that agencies' regulatory decisions respond to presidential preferences.[219] For example, President George W. Bush's former OIRA administrator has explained how, under her watch, OIRA ensured that high-priority agency rulemakings were complete before the President left office.[220] Administrations try to finalize rules before exiting the White House because finalized rules become more entrenched and are far harder than proposed rules for later Presidents to undo.[221] This goal has led to the well-documented phenomenon of midnight regulations, in which agencies quickly finalize rules before a President's term expires and the new President and his agency heads take over.[222] In this midnight regulation process, the agency officials are doing the opposite of writing rules designed to maintain flexibility for the agency later. Instead, they are acting to limit the agency's flexibility by entrenching policies that are difficult for the agency to later reverse. They do so because, although this kind of behavior does not boost the power of their own agencies, it helps the sitting President.

If agencies are in fact responsive to the preferences of sitting Presidents, it is predictable that agencies will not draft especially vague rules at time 1 in order to maximize their interpretive flexibility at time 2. Instead, they will write rules that advance the President's agenda as clearly as possible now and leave

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[218] Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1278 (2006).

[219] *See* William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence over Rulemaking*, 54 ADMIN. L. REV. 611, 611–15 (2002) (discussing the influence the President exercises on administrative rulemaking through ex parte OIRA contacts with agencies).

[220] Susan E. Dudley, *Regulatory Activity in the Bush Administration at the Stroke of Midnight*, 10 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, July 2009, at 27, 27.

[221] *See* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 560–61 (2003). Aside from rushing to finalize rules, agencies can entrench rules by developing internal procedures that put in place procedural hurdles that make it harder for later agency officials to reverse existing rules. *See* Elizabeth Magill, *Agency Self-regulation*, 77 GEO. WASH. L. REV. 859, 888 (2009).

[222] *See* Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 983–84 (2003); Peter D. Holmes, *Paradise Postponed: Suspensions of Agency Rules*, 65 N.C. L. REV. 645, 646 (1987); Thomas O. McGarity, *Jogging in Place: The Bush Administration's Freshman Year Environmental Record*, 32 ENVTL. L. REP. 10,709, 10,715 (2002); Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 471–72, 473 n.8 (2011); Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J. 1883, 1884–85 (2012).

less room for later administrations to undo their work through later regulatory interpretations.

Ultimately, Congress and the White House have established institutions that provide a direct safeguard against vague agency rules. Overturning *Seminole Rock* deference would enable courts to also help reduce vague rulemakings. However, the marginal benefits of adding this extra check on agency vagueness may not be worth the costs of abandoning a doctrine that promotes expertise, accountability, and adherence to regulatory intent. If existing procedures are insufficient, the White House could fairly easily intensify its regulatory review process to screen out more instances of regulatory vagueness. The costs of doing so would likely be less than the costs of abandoning *Seminole Rock* deference. In short, withholding deference to agency regulatory interpretations is likely an unnecessary and inefficient way to reduce agency vagueness.

V. CONCLUSION

This Article has examined the constitutional norms governing whether and when a government body has the power to issue controlling interpretations of legal texts that it drafted. Contrary to one view, the Article has shown that there is no widespread norm against self-interpretation and thus there should be no presumption against self-interpretation in constitutional and administrative law inquiries. The immediate normative payoff of this finding is to show that the Supreme Court would be wrong to overturn *Seminole Rock* deference. Briefs will likely soon be filed urging the Court to overturn the doctrine on the grounds that it violates a norm against self-interpretation, and the Court should reject these arguments. Aside from firmly entering the debate over *Seminole Rock*, this Article also brings new insight into the many areas of public law where self-interpretation occurs, including presidential oversight of agencies and judicial stare decisis.