
COMMENT

TOWARD A CONSTITUTIONAL *CHEVRON*: LESSONS FROM *RAPANOS*

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INTRODUCTION

In 2006, the Supreme Court started a revolution in environmental law. In *Rapanos v. United States*,¹ while addressing jurisdiction over wetlands under the Clean Water Act, the Court purported to clarify an issue of statutory interpretation. In reality, the Court had reentered the fray in a four-way struggle for supremacy in constitutional meaning. This struggle involves all three branches of government and, to a large extent, the federal agencies that implement the Constitution as part of their everyday function: the U.S. Army Corps of Engineers (the Corps) and the U.S. Environmental Protection Agency (EPA).

The *Rapanos* decision was widely criticized when it was handed down,² but there has been no real empirical analysis of how the decision has affected the agencies' on-the-ground interpretations of their own jurisdiction. In this Comment, I examine the fallout from *Rapanos*—beginning with its impact on the judicial, legislative, and executive branches—and then focus on its impact on the Corps's process for determining its own jurisdiction. Procedurally, the main effect of the decision has been to add density to the Corps's already onerous permitting process.³ Substantively, the decision has forced the Corps to add an unnecessary judicial gloss to its scientific determinations, imposing court-like reasoning onto professional engineers.⁴ Perhaps worst of all, the increased enforcement costs of these changes have

¹ 547 U.S. 715 (2006).

² See, e.g., Mark Latham, *Rapanos v. United States: Significant Nexus or Significant Confusion? The Failure of the Supreme Court to Clearly Define the Scope of Federal Wetland Jurisdiction* (criticizing *Rapanos* as shifting the "jurisdictional question" from a state of "uncertainty to one of the absurd"), in *THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS* 5, 13-16 (L. Kinvin Wroth ed., 2007); Charles Duhigg & Janet Roberts, *Rulings Restrict Clean Water Act, Hampering E.P.A.*, N.Y. TIMES, Mar. 1, 2010, at A1 (reporting that *Rapanos* has created "widespread uncertainty" for federal and state regulators and has eroded federal ability to protect the environment); Brad Marten, *Post-Rapanos Rulings Continue to Bedevil Developers, Agencies, Courts and Congress*, MARTEN L. (Apr. 28, 2010), <http://www.martenlaw.com/newsletter/20100428-post-rapanos-rulings> (indicating that the ongoing post-*Rapanos* confusion will likely continue into the future).

³ See *infra* Section IV.B.

⁴ See *infra* Part V.

been shifted to the regulated community. All players in the game—developers seeking quick disposition of permitting requests, environmentalists pursuing wetlands protection, and agency personnel tasked with making jurisdictional determinations—have come out as losers after *Rapanos*.

Based on these findings, I propose a radical shift in judicial review of agency constitutionalism and argue that the Court should apply the *Chevron* doctrine⁵ to certain agency constitutional interpretations. In particular, where Congress has clearly delegated constitutional definition to an agency and such definition implicates agency expertise, courts should explicitly grant *Chevron* deference to the agency constitutional interpretation. This paradigm would allow Congress the broadest possible latitude in exercising its power and would restore the institutional benefits lost when courts impose judicial constraints on administrative agencies that operate differently from the courts by design. Thus, when Congress clearly delegates constitutional interpretation to agency expertise, the judiciary should defer to the agency's interpretations so long as they are reasonable.

Part I provides a brief overview of scholarship exploring the role that extrajudicial actors play in constitutional interpretation. Part II introduces wetlands, explains their importance, and discusses the Clean Water Act, the statute that underlies their regulation. Part III explores each branch's interpretation of the Clean Water Act under the Commerce Clause, addressing the Supreme Court's recent jurisprudence, including the *Rapanos* decision, as well as congressional and executive responses. Part IV turns to how the agencies have interpreted their collective jurisdiction under the Clean Water Act, discussing both general principles of agency statutory interpretation and the narrow issue of how the EPA and the Corps have responded to *Rapanos*. Part V provides a case study of agency constitutional interpretation, examining a series of jurisdictional determinations by the Corps to demonstrate that *Rapanos* has resulted in increased bureaucracy, undermined the agencies' flexibility, and forced courtlike procedures and reasoning onto an expert agency. Finally, Part VI uses these conclusions to argue that the

⁵ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) (holding that courts should defer to an agency's interpretation of ambiguous statutory language as long as it is "reasonable"). For further discussion on the scope of *Chevron*, in general and under my proposal, see *infra* Parts IV and VI.

Court should abandon its current treatment of agency constitutional interpretation and instead adopt *Chevron* deference where Congress has clearly delegated constitutional interpretation to agency expertise. While this would represent a radical shift in judicial oversight, I argue that this degree of deference is the only mechanism by which Congress and agencies can protect fundamental interests such as the environment; respond appropriately to advances in scientific knowledge; and enforce the underlying purpose of statutes without being tethered to a rigid, textual interpretation of constitutional mandates.

I. CONSTITUTIONAL INTERPRETATION OUTSIDE THE COURTS

In the conventional narrative of American law, the Supreme Court functions as the primary, if not exclusive, interpreter of the U.S. Constitution.⁶ Recently, however, scholars and citizens alike have begun exploring to what extent, under what authority, and through what normative lens nonjudicial actors interpret the Constitution.⁷ This inquiry has focused both on actors outside of government, such as social movements, and other governmental institutions, such as the executive and legislative branches.⁸ Theorists have primarily addressed three questions: First, to what extent, and with what analytical tools, are nonjudicial actors interpreting the constitution?⁹ Second, what effect

⁶ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

⁷ See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1379-80 (1997) (arguing that much constitutional interpretation occurs outside of the courts). An example of citizens’ exploration came in the 2010 midterm elections, which heralded the rise of the Tea Party, a conservative political group advocating a constitutional interpretation in direct conflict with both Supreme Court precedent and longstanding congressional practice. See Jeffrey Rosen, *Radical Constitutionalism*, N.Y. TIMES, Nov. 28, 2010, § 6 (Magazine), at 34 (discussing a “newly elected Tea Party senator[’s]” plan to eliminate the Departments of Education and Housing and Urban Development on “constitutional grounds”).

⁸ See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 247-48 (2004) (insisting that U.S. citizens return to a regime under which the Supreme Court is subordinate to popular will); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007) (proposing the adoption of “democratic constitutionalism,” an empirical model under which judicially created constitutional judgments acquire “democratic legitimacy” only if they are based in “popular values and ideas”).

⁹ See, e.g., STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 145 (2008) (examining the role of conservative

have nonjudicial interpretations had on judicial opinions interpreting the Constitution and on the evolution of constitutional scholarship and meaning in the United States?¹⁰ Third, as a normative matter, who should have ultimate interpretive authority: courts, another branch of government, the “people,” or some combination of all three?¹¹

The goal of this scholarship has been to question and expand upon the traditional judge-centric view of constitutional interpretation. Instead of a world in which the Supreme Court hands down constitutional rulings and functions as the ultimate arbiter of constitutional meaning, these scholars see much of the practical identification of constitutional parameters as being performed by extrajudicial actors; including administrative agencies;¹² the executive and legislative branches;¹³ and the American people themselves via social movements and other mechanisms.¹⁴

legal scholars in promoting “originalism” as a credible canon of constitutional interpretation); Post & Siegel, *supra* note 8, at 379 (discussing how our “representative government and mobilized citizens” enforce the Constitution).

¹⁰ See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 201-02, 226-36 (2008) (exploring how the “culture war” over gun rights that preceded the Supreme Court’s decision in *District of Columbia v. Heller* most likely influenced its constitutional analysis).

¹¹ See, e.g., Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 121-23 (2004) (arguing in favor of functional departmentalism, in which each branch has an “obligation to interpret the Constitution,” but must conform its interpretation to constitutional constraints); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 223-25, 321-22 (1994) (maintaining that the executive branch should exercise its powers as a coequal branch in constitutional interpretation and characterizing the current trend of executive deference to the Supreme Court’s constitutional interpretation as “too-feeble acquiescence”).

¹² See, e.g., Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 96-100 (2000) (chronicling the FCC’s role throughout the twentieth century in content-based speech regulation under the First Amendment).

¹³ See, e.g., Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199 (1994) (discussing the President’s authority to decline to enforce a statute when he believes it is unconstitutional and thinks it probable that the Supreme Court would agree); Paulsen, *supra* note 11, at 263-64 (discussing different methods of executive review, including pardons, vetoes, nonexecution, and nonacquiescence).

¹⁴ Cf. KRAMER, *supra* note 8, at 246-53 (advocating a return to constitutionalism driven by popular will).

The role of administrative agencies in performing constitutional interpretation has been relatively underexplored.¹⁵ Nominally functioning under statutory authority, agencies face opportunities for constitutional interpretation quite frequently in practice.¹⁶ For example, Professor Reuel Schiller traced the influence of the Federal Communications Commission (FCC) on modern First Amendment doctrine. His analysis showed that the FCC, in regulating broadcast speech, maintained the autonomy to resist restrictive applications of the First Amendment, and served as the primary constitutional decisionmaker for free speech rights.¹⁷ Similarly, Professor Sophia Lee's archival research into agency behavior during the 1960s revealed contrasting visions of discrimination policy under the Fourteenth Amendment between the FCC and the Federal Power Commission (FPC), uncovering a seminal, and previously unnoticed, instance of agency constitutionalism.¹⁸ Conventional wisdom holds the Constitution to be fixed in meaning, requiring the expert analysis of the judiciary, but in many contexts the Constitution's meaning is indeterminate, open to interpretation, and largely unaddressed by the courts.¹⁹ It is in this vast space of indeterminate constitutional meaning that agencies can, do, and should interpret the Constitution directly.

¹⁵ See, e.g., Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 809-10 (2010) ("[L]egal scholars . . . have not yet examined ordinary administrators as constitutional actors."). Scholars in the field have examined instead how agencies implement the Constitution in various contexts. See, e.g., *id.* at 810-21, 847-57 (chronicling divergent interpretations of equal protection by the FCC and the Federal Power Commission during the latter half of the twentieth century); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2014-20 (2003) (discussing Congress's own interpretation of equal protection and the Commerce Clause when crafting the FMLA).

¹⁶ See Lee, *supra* note 15, at 809 ("[A]dministrative law scholars . . . have recognized that administrators must interpret the Constitution in their day-to-day work."); see also Paulsen, *supra* note 11, at 223, 278-84 (acknowledging that the executive branch is often the first branch to apply the Constitution to novel legal issues).

¹⁷ See Schiller, *supra* note 12, at 96-100; see also *id.* at 101 ("The FCC, not the judiciary, acted as the constitutional decisionmaker.").

¹⁸ See Lee, *supra* note 15 at 880-82 (finding that, in the 1960s, the FCC enacted equal employment rules and creatively expanded state action, while the FPC rejected equal employment rules and creatively narrowed state action).

¹⁹ See Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 506 (2010) (describing the indeterminate nature of constitutional law and agencies' role in constitutional interpretation).

Since this practical reality of on-the-ground agency constitutional interpretation is at odds with the traditional judge-centric vision of constitutional definition, this type of constitutionalism has received little attention from scholars and even less respect from the courts.²⁰ Typically, a court reviewing an agency's interpretation of a statute will apply *Chevron* deference, a two-step inquiry that favors the agency's interpretation.²¹ First, if the statute at issue has a clear meaning, that meaning will prevail.²² If the statute's meaning is ambiguous, the court will proceed to the second step, in which it will defer to the agency's interpretation so long as it is "reasonable."²³ As Justice Stevens, writing for the Court in *Chevron*, explained, "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'"²⁴

In reviewing agency constitutional interpretations, however, courts do not apply *Chevron* deference. Instead, courts refuse to defer if the challenged action raises "serious" constitutional issues.²⁵ Given the wide range of circumstances in which agencies interpret the Constitution, this disparate treatment requires further examination. The remainder of this Comment conducts such an inquiry through the lens of agency jurisdiction under the Clean Water Act, examining interpre-

²⁰ See *id.* ("Why the Court is so reluctant to acknowledge the role played by constitutional concerns in the development of ordinary administrative law is somewhat of a puzzle.").

²¹ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

²² *Id.*

²³ *Id.* at 843-45. In practice, the Court's use of deference may not be this simple. After conducting an empirical study of the Supreme Court's statutory interpretation cases since *Chevron*, William Eskridge and Lauren Baer identified a "continuum" of deference, noting that the Court did not apply *Chevron* in many cases where the agency action appeared to merit deference. 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, 1098-136 (2008). For the purpose of my argument, I focus on a simpler conception of judicial deference.

²⁴ *Chevron*, 467 U.S. at 866 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)).

²⁵ See, e.g., *Williams v. Babbitt*, 115 F.3d 657, 661-63 (9th Cir. 1997); see also *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001) (refusing to grant deference to the Corps's "Migratory Bird Rule" because it raised "significant constitutional questions").

tations by the Supreme Court, Congress, the Executive, and, finally, the agencies themselves. My findings demonstrate that the Supreme Court should articulate a separate standard of review for agency constitutional interpretation: courts should grant deference where Congress has clearly delegated its enforcement to an agency's expertise.²⁶

II. WETLANDS: NAVIGATING TRICKY WATERS

Historically, wetlands were considered "worthless swamps" and nothing more than impediments to development.²⁷ In recent years, however, with the country facing wetlands loss in various ecosystems,²⁸ wetlands conservation has risen to prominence as scientists learn more about wetlands' benefits to human populations, including flood modulation, groundwater preservation, nutrient and sediment retention, and storm surge protection.²⁹ However, this mounting concern for wetlands has not rendered them less attractive to farmers and developers looking to expand. As the amount of available land has diminished because of suburban sprawl and population growth, wetlands are

²⁶ Other theorists have proposed different relationships between agency constitutional interpretation and the courts. See, e.g., Eskridge & Baer, *supra* note 23, at 1115-17 (proposing "anti-deference" when an agency interpretation raises serious constitutional problems); Metzger, *supra* note 19, at 534-36 (arguing for more transparency in agency constitutional interpretation). These arguments are addressed in more depth in Part VI.

²⁷ J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 80 (2010).

²⁸ See U.S. FISH & WILDLIFE SERV., STATUS AND TREND OF WETLANDS IN THE COTERMINOUS UNITED STATES 2004 TO 2009, at 40 (2011) (noting, from 2004 to 2009, an average annual loss of 13,800 acres of wetlands overall but more significant losses to "salt marsh" and "freshwater forested" wetlands); see also EPA, WETLANDS OVERVIEW 2 (2004), available at http://water.epa.gov/type/wetlands/outreach/upload/overview_pr.pdf.

²⁹ See Ruhl & Salzman, *supra* note 27, at 80-81; see also THEDA BRADDOCK WITH CONTRIBUTIONS FROM L. REED HOPPMAN, WETLANDS: AN INTRODUCTION TO ECOLOGY, THE LAW, AND PERMITTING 5 (1995) ("Changes in hydrology can alter wetlands to uplands and vice versa."). Hurricane Katrina was a striking example of how wetlands erosion can wreak havoc; some scientists argue that the damage was exacerbated by the levees' effect on surrounding wetlands. See, e.g., *Hurricane Risk for New Orleans*, AM. RADIOWORKS (Sept. 2002), <http://americanradioworks.publicradio.org/features/wetlands/hurricane1.html> (predicting, three years prior to Hurricane Katrina, disastrous effects if a hurricane were to hit New Orleans because the natural buffer provided by the wetlands that surround the city had been eroding). Wetlands also provide significant ecological benefits for a host of plant and animal species. See EPA, *supra* note 28, at 2 (describing the benefits wetlands provide to "thousands of species of aquatic and terrestrial plants and animals").

prime candidates for such expansion due to their ubiquity.³⁰ If the Corps asserts jurisdiction over a particular waterway, costs for private development skyrocket, since such a determination invokes a procedurally complex permitting process that must be completed prior to dredging or filling on a jurisdictional wetland.³¹ The tension between environmentalists intent on preserving wetlands and industry advocates eager to build on undeveloped land and expand agricultural potential has led to contentious fights over the Corps's high-stakes wetlands regulation.³²

The Clean Water Act (the CWA or the Act) is designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."³³ To accomplish this goal, the Act makes illegal the

³⁰ See U.S. FISH & WILDLIFE SERV., *supra* note 28, at 37-39, 42 fig.23 (noting the existence of more than 110 million acres of wetlands, found in every one of the lower forty-eight states, and the continued role that agricultural development plays in wetlands loss); LeRoy Hansen, *Wetland Status and Trends* (explaining that wetlands cover more than seven percent of the nonfederal lands in the contiguous forty-eight states, and showing that conversion to agricultural uses accounted for an average loss of 593,000 acres per year from 1954 to 1974), in U.S. DEP'T OF AGRIC., *AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS* 42, 42-44 (2006); see also Jos T.A. Verhoeven & Tim L. Setter, *Agricultural Use of Wetlands: Opportunities and Limitations*, 105 *ANNALS BOTANY* 155, 156-57, 161-62 (2010) (noting that increased demand for food worldwide will place more of a strain on wetlands through agricultural use).

³¹ See U.S. ARMY CORPS OF ENG'RS, *REGULATORY JURISDICTION OVERVIEW* 3-7, available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_juris_ov.pdf (outlining the Corps's jurisdiction and describing the numerous steps within a permitting decision). According to regulations promulgated pursuant to the CWA,

[t]he term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. § 328.3(b) (2011) (emphasis omitted).

³² See, e.g., David Slade, *Developer Seeks to Fill Wetlands*, POST & COURIER (July 12, 2010), <http://www.postandcourier.com/news/2010/jul/12/developer-seeks-to-fill-wetlands> (describing a "long-running fight" over a proposed commercial development on wetlands recently determined by the Corps to be jurisdictional and subject to federal permitting requirements); *Wetlands Permit Gums Up the Works*, WASH. EXAMINER, <http://washingtonexaminer.com/opinion/2008/12/wetlands-permit-gums-works/26400> (last visited Feb. 15, 2012) (chronicling a six-year permit battle between various state and federal regulators, residents, and local authorities over the dredging of two three-foot-deep channels for local boat access).

³³ 33 U.S.C. § 1251(a) (2006). The Act was originally called the Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948), but acquired the common

discharge of any pollutant into “navigable waters.”³⁴ The statute defines navigable waters as “waters of the United States, including the territorial seas,”³⁵ and delegates regulatory authority for the Act’s enforcement to both the EPA and the Corps.³⁶ For a short period of time following the enactment of the CWA, the Corps applied the traditional judicial definition of navigable waters to the statute, which referred to “interstate waters that are ‘navigable in fact’ or readily susceptible of being rendered so.”³⁷ But after a district court held these regulations to be too narrow,³⁸ the Corps drafted new regulations that explicitly stretched its jurisdiction to the “outer limits of Congress’s commerce power.”³⁹ Under current regulations, the Corps’s jurisdiction is very broad and has included wetlands since the late 1970s.⁴⁰ This provision has been interpreted as far as the Commerce Clause allows, in accord-

name “Clean Water Act” through amendments in 1977. Clean Water Act of 1977, Pub. L. No. 95-217, sec. 2, § 518, 91 Stat. 1566, 1566.

³⁴ See 33 U.S.C. § 1311(a) (making illegal the “discharge of any pollutant”); *id.* § 1362(12)(A) (defining such discharge as “any addition of any pollutant to navigable waters”).

³⁵ *Id.* § 1362(7).

³⁶ See *id.* §§ 1251(d), 1344(a), (d).

³⁷ *Rapanos v. United States*, 547 U.S. 715, 723-24 (2006) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)).

³⁸ See *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (holding that “navigable waters,” as used in the CWA, is “not limited to the traditional tests of navigability,” and requiring the Corps to expand its definition of “navigable waters” to “the maximum extent permissible under the Commerce Clause”).

³⁹ *Rapanos*, 547 U.S. at 724 (citing *Permits for Discharge of Dredged or Fill Material into Waters of the United States*, 42 Fed. Reg. 37,144, 37,144 n.2 (July 19, 1977)); see also Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ENVTL. L. REP. 11,042, 11,045 (2002) (describing congressional debates over the proper geographic scope of the Corps’s jurisdiction and the concerns of some members of Congress that “the Corps was not reaching as far as it could, or should”).

⁴⁰ See L. Kinvin Wroth, *Introduction to THE SUPREME COURT AND THE CLEAN WATER ACT*, *supra* note 2, at 1; see also Margaret “Peggy” Strand & Lowell M. Rothschild, *What Wetlands Are Regulated? Jurisdiction of the § 404 Program*, 40 ENVTL. L. REP. 10,372, 10,375 (2010) (“The current Corps regulations continue to reflect the results of the 1975 . . . *Callaway* decision and provide that the CWA applies to very broad categories of waters.” (footnote omitted)). For the Corps’s current definition of “waters of the United States,” see 33 C.F.R. § 328.3 (2011) (emphasis omitted).

ance with the legislative history indicating Congress's intention for the Act to apply as broadly as constitutionally permissible.⁴¹

Various governmental actors have used this broad, open-ended mandate as an invitation to extend jurisdiction over wetlands as far as possible, while other actors have pushed back against this sweeping interpretation. Part III explores this interplay and discusses how each branch—judicial, legislative, and executive—has handled wetlands jurisdiction during the last decade by focusing on the Supreme Court's landmark decision in *Rapanos v. United States*.⁴² Part IV then turns to the agencies' reactions and examines how the Corps has redefined its own jurisdiction in response to changed mandates from the Supreme Court.

III. THREE COMPETING STRANDS OF COMMERCE CLAUSE INTERPRETATION

This Part briefly addresses how the three branches of government have interpreted jurisdiction under the CWA in order to show the constraints imposed and the authority conferred by each branch on the agencies' power to define the outer limits of Commerce Clause jurisdiction.

A. *Judicial Interpretations of "Waters of the United States"*

During the last ten years, the Supreme Court has become more involved in defining the jurisdictional boundaries of the Clean Water Act and has thereby profoundly shifted how the agencies handle their own jurisdiction. In its 2001 decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*, the Court struck down the Corps's "Migratory Bird Rule," which had extended the Act's jurisdiction to isolated ponds visited by migratory birds.⁴³ The Court determined that this rule stretched the Corps's powers under the Commerce

⁴¹ See 42 Fed. Reg. 37,122, 37,127 (July 19, 1977) ("The legislative history of the term 'navigable waters' specified that it 'be given the broadest constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.'" (quoting H.R. REP. NO. 92-1465, at 144 (1972) (Conf. Rep.))). For a more detailed discussion of the legislative history of the Act, see *infra* Section III.B.

⁴² 547 U.S. 715.

⁴³ 531 U.S. 159, 171-74 (2001).

Clause too far, rendering some jurisdictional determinations made pursuant to the rule outside the ambit of the Act's authority.⁴⁴ In the wake of this holding, a series of lower court decisions reflected a protracted, contentious, and confusing struggle over how to apply SWANCC to new sets of facts, typically involving complicated hydrogeologic determinations.⁴⁵ One environmental scholar considered SWANCC to be "the most devastating judicial opinion affecting the environment ever."⁴⁶

In 2006, the Court again took up the issue in two consolidated cases, *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*, where it addressed the question of what level of connection is required between wetlands and navigable waters to justify jurisdiction under the CWA and, implicitly, the Commerce Clause.⁴⁷ The Court did not issue a majority opinion. Instead, it articulated two tests with which the agencies have grappled in the ensuing five years: the plurality's test, as formulated by Justice Scalia, and Justice Kennedy's "significant nexus" test.

Justice Scalia, writing for a plurality of four, determined that "the waters of the United States" include "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"⁴⁸ Under this test, only wetlands with a "continuous surface connection" to such waters may be regulated by

⁴⁴ *Id.* at 173-74.

⁴⁵ For example, the Court of Federal Claims declined to apply SWANCC at all when deciding a wetlands case just ten months later. *See Laguna Gatuna v. United States*, 50 Fed. Cl. 336, 338, 343 (2001) (holding that a playa lake "not hydrologically connected to any other water source" was within the EPA's jurisdiction); *see also* *United States v. Newdunn Assocs.*, 195 F. Supp. 2d 751, 765 (E.D. Va. 2002) (denying jurisdiction over wetlands where the water's passage through miles of nonnavigable ditches and culverts "before finding navigable waters" complicated the determination), *rev'd sub nom.* *Treacy v. Newdunn Assocs.*, 344 F.3d 407 (4th Cir. 2003).

⁴⁶ William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 ENVTL. L. REP. 10,741, 10,741 (2001); *see also* Matthew A. MacDonald, Comment, *Rapanos v. United States and Carabell v. United States Army Corps of Engineers*, 31 HARV. ENVTL. L. REV. 321, 322-23 & n.21 (2007) (noting that, after SWANCC, the status of non-navigable tributaries and adjacent wetlands "remained in doubt," and discussing three different lower court tests for such waters).

⁴⁷ *See* 547 U.S. at 729-30 (plurality opinion).

⁴⁸ *Id.* at 739 (alteration in original) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2282 (2d ed. 1954)).

the Corps.⁴⁹ Scalia set forth a two-step analysis: first, the Corps must determine that there is a traditional “wate[r] of the United States,” which he defines as “a relatively permanent body of water connected to traditional interstate navigable waters,” and, second, it must find a continuous surface connection between that waterway and the wetlands at issue.⁵⁰ Only after satisfying both criteria may the Corps properly assert jurisdiction.

Justice Kennedy, writing the controlling concurring opinion, developed what has been dubbed the “significant nexus” test,⁵¹ finding that

wetlands possess the requisite nexus . . . if [they], either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters.”⁵²

Justice Kennedy determined, with little analysis, that his interpretation did not raise Commerce Clause concerns,⁵³ and Justice Scalia noted that the Corps’s interpretation of its authority “deliberately sought to extend the definition of ‘the waters of the United States’ to the outer limits of Congress’s commerce power” without further exploring Commerce Clause issues implicated by his test.⁵⁴

The case immediately sparked controversy, with critics highlighting both the bitter partisan divisions among the Justices and the Court’s failure to announce one coherent standard.⁵⁵ Critics objected that the ruling “inject[ed] . . . further confusion” into the area of wetlands protection, imposing higher burdens for both the Corps and property

⁴⁹ *Id.* at 742.

⁵⁰ *Id.* (alteration in original).

⁵¹ See *id.* at 787 (Kennedy, J., concurring in the judgment) (recommending “remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters”).

⁵² *Id.* at 780.

⁵³ See *id.* at 782.

⁵⁴ *Id.* at 724 (plurality opinion) (citing Permits for Discharge of Dredged or Fill Material into Waters of the United States, 42 Fed. Reg. 37,144, 37,144 n.2 (July 19, 1977)).

⁵⁵ See Linda Greenhouse, *Justices Divided on Protections over Wetlands*, N.Y. TIMES, June 20, 2006, at A1 (describing the case as a “major internal battle that undercut any image of good fellowship and unanimity on the Roberts court”).

owners in determining *ex ante* whether they must comply with the Corps's bureaucratic permitting requirements.⁵⁶ As discussed in Part IV, these limits on the Corps's jurisdiction are judicially derived, judicially reasoned, and judicially imposed. In struggling to apply these limits, the Corps has been forced to move further away from scientific determinations and focus instead on a legalistic definition of wetlands. The full extent of the fallout from *Rapanos* remains to be seen, but it has fundamentally redefined the scope of and basis for wetlands protection nationwide.

B. *Legislative Pushback: Congress and "Waters of the United States"*

When Congress enacted the CWA in 1972, it included the language "waters of the United States."⁵⁷ However, congressional expectations about the precise meaning of this language were "vague."⁵⁸ This broad language and the legislative history evince Congress's deeper purpose to protect the "chemical, physical, and biological integrity of the nation's water."⁵⁹ In 1977, Congress further amended the CWA to reflect the growing commitment to a broad definition of jurisdictional waters.⁶⁰ While the specific breadth of the Corps's ultimate interpretation of its own jurisdiction in *Rapanos* was probably not contemplated by the drafters of the Act in 1972, Professors Eskridge and Ferejohn

⁵⁶ See Latham, *supra* note 2, at 6. Other commentators supported the ruling as imposing meaningful limits on regulatory action. See, e.g., Jonathan H. Adler, *Once More, With Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction* ("To recognize and enforce limits on federal regulatory power is not to deny the importance of environmental conservation or the interconnected nature of ecological concerns."), in *THE SUPREME COURT AND THE CLEAN WATER ACT*, *supra* note 2, at 81, 81-82.

⁵⁷ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

⁵⁸ WILLIAM N. ESKRIDGE JR. & JOHN FEREOHNS, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 267 (2010).

⁵⁹ H.R. REP. NO. 92-911, at 71 (1972); see also *id.* at 131 ("The Committee fully intends that the term 'navigable waters' be given the broadest possible constitutional interpretation."); S. REP. NO. 92-414, at 77 (1971) (criticizing the 1965 version of the Act as being "severely limited" by its "narrow interpretation of the definition of interstate waters").

⁶⁰ Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566; see also ESKRIDGE & FEREOHNS, *supra* note 58, at 273-74 (discussing the various political developments that led to the passage of the 1977 amendments).

point out that a confluence of factors in the intervening years would justify such an interpretation:

If you combine Congress's broad statutory language ("waters of the United States") plus the congressional purpose of preventing and reversing the degradation of the nation's aquatic ecosystem plus this scientific understanding of the critical role played by even "isolated" wetlands in that ecosystem, then the Rapanos property begins to sound like something that should be regulated under the act. Congress did not say in 1972 that it wanted to slow down the transformation of wetlands to make way for shopping centers. What legislator would stand up to shopping center development? But the logic of the statute, when understood from a science perspective, suggests precisely that.⁶¹

Examining the behavior of the courts, Congress, and the agencies together, Eskridge and Ferejohn conclude that "the only predictable result is dynamic interpretation" and "that this dynamic, purposive, institutionally interactive process is typical for any statute that has an important effect in our society."⁶² Under this analysis, the agencies' decision to stretch their authority to the outer bounds of the Commerce Clause is in accord with the broader underlying purpose of the implementing statute—to enforce the "crazy quilt"⁶³ of wetlands law to the best of their ability in order to accommodate the actual congressional purpose in enacting the CWA. This view of the legislative history justifies the Corps's broad interpretation of their own jurisdiction: holistically evaluating all the information available to the Corps, this reading comports best with the purpose of the CWA as a whole.

In response to the *Rapanos* decision, Congress introduced the Clean Water Restoration Act (CWRA), designed, in part, "to provide protection to the waters of the United States to the maximum extent of the legislative authority of Congress under the Constitution."⁶⁴ The bill specifically redefined "waters of the United States" to reach a broader set of waters, including traditionally navigable waters as well as "all . . . mudflats, sandflats, wetlands, sloughs, prairie potholes, [and] wet meadows" regardless of their relationship to or effect on traditional navigable waters.⁶⁵ The CWRA also clarified that this definition applied

⁶¹ ESKRIDGE & FEREJOHN, *supra* note 58, at 272.

⁶² *Id.* at 276.

⁶³ *Id.*

⁶⁴ S. 787, 111th Cong. § 2(3) (2009).

⁶⁵ *Id.* § 4(3).

“to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”⁶⁶ Faced with the Court’s retrenchment on the scope of the Corps’s jurisdiction, Congress responded with a proposal that would have further expanded the Corps’s authority under the Commerce Clause, making clear their commitment to asserting jurisdiction over the widest range of wetlands constitutionally permissible.

The bill failed to make it out of the Senate, but Congress’s response is notable both for its timing and for its defeat.⁶⁷ First, the bill arose immediately after a controversial Supreme Court decision; Congress did not feel compelled to act until the judiciary stepped in and attempted to retract agency authority, indicating at least tacit acceptance of the Corps’s prior, expansive view of its jurisdiction under the CWA.⁶⁸ Second, the bill never made it out of committee in the Senate, so it was not possible to assemble enough political support to send a clear message to the Court and the agencies that the Corps should maximize its authority. Applying Eskridge and Ferejohn’s conception, however, reframes this legislative response to *Rapanos* as Congress’s attempt to reinforce continued support for a definition of “waters of the United States” that is broad enough to reach the outer bounds of the Constitution. The congressional debate over the proposed CWRA, Congress’s prior articulated purpose of protecting the waters of the United States, and the dynamic definition of wetlands indicate a legislative intent to implement the CWA as expansively as

⁶⁶ *Id.*

⁶⁷ See Press Release, U.S. Senate Comm. on Env’t & Pub. Works, Despite Changes, Water Bill Faces Certain Demise in the Senate (June 18, 2009), available at http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=f46bd9b7-802a-23ad-4183-baae0d6d5fad&Region_id=&Issue_id (reporting that the bill was stalled indefinitely due to opposition from some senators over what they perceived to be “regulatory overreach”).

⁶⁸ The legislature’s failure to act in the years prior to the *Rapanos* decision also compels this conclusion, although the Court has been unwilling to accept failure to act as evidence of congressional acceptance of a particular policy. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (“It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court’s statutory interpretation.” (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989))).

possible.⁶⁹ The CWRA, in spite of its failure, is merely another factor that should lead the Corps to implement its CWA mandate broadly.

These hurdles illuminate the problems with relying on Congress to push back against judicial redefinition of legislative intent. Whose interpretation of the outer limits of the Commerce Clause—the Supreme Court’s, Congress’s, or the Executive’s—should be given primacy?⁷⁰

C. Executive Interpretation

The SWANCC and *Rapanos* era of wetlands jurisdiction has coincided with the presidencies of George W. Bush and Barack Obama. In a 2004 Earth Day speech, President Bush discussed wetlands protection and committed his administration to go beyond a policy of no net loss to a policy of “an overall increase of Americans’ wetlands over the next 5 years.”⁷¹ The Bush Administration continued this initiative throughout both terms, setting annual goals for wetlands restoration and creating programs to achieve protection in specific high-risk areas such as the Everglades.⁷²

Despite President Bush’s 2004 proclamation that wetlands are “vital to the health of our environment,”⁷³ the Bush Administration’s guidelines issued in response to *Rapanos* were widely criticized by environmental groups.⁷⁴ A draft of the guidelines had been completed in September 2006 and a leaked copy of the draft version appeared to give

⁶⁹ See ESKRIDGE & FERREJOHN, *supra* note 58, at 272; see also *infra* Section IV.A.

⁷⁰ For an explanation of how the current paradigm, which relies on the Supreme Court’s definition as paramount, undermines agency implementation of congressional will and infringes on Congress’s power to delegate constitutional interpretation to agencies, see *infra* Part VI.

⁷¹ Remarks on Earth Day in Wells, Maine, 1 PUB. PAPERS 649, 651 (Apr. 22, 2004). Bush was referring to the “no net loss” policy the Corps implemented in 1989, which required “compensatory mitigation” at a ratio greater than 2:1 to offset any wetlands loss caused by permitted action. U.S. ARMY CORPS OF ENG’RS, QUESTIONS AND ANSWERS FOR *RAPANOS* AND *CARABELL* DECISION 5 (June 5, 2007), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_qa_06-05-07.pdf.

⁷² See U.S. ARMY CORPS OF ENG’RS, *supra* note 71, at 5-6.

⁷³ Remarks on Earth Day in Wells, Maine, *supra* note 71, at 651.

⁷⁴ See, e.g., John M. Broder, *After Concerted Lobbying, Rules Governing Wetlands Are Narrowed*, N.Y. TIMES, July 6, 2007, at A13 (reporting hostile reactions to the 2007 draft guidance from environmental groups such as the Sierra Club, based partly on perceived lobbyist influence).

officials broad power to assert jurisdiction, placing millions of acres off limits to industry.⁷⁵ However, the final guidelines, released in June 2007,⁷⁶ interpreted the *Rapanos* tests far more narrowly.⁷⁷ Environmental groups used the Freedom of Information Act to obtain communications between the White House Council on Environmental Quality and industry insiders, and claimed that the changes between the draft and final versions of the guidelines were the result of lobbyist influence.⁷⁸ The White House denied that lobbyists exerted improper pressure, instead arguing that Justice Kennedy's open-ended language, coupled with bureaucratic drafting requirements, had rendered the process frustratingly slow.⁷⁹

In his presidential campaign materials, then-Senator Barack Obama committed to preserving wetlands through existing federal legislation, new programs developed with local government officials, and cooperation with private landowners.⁸⁰ These materials do not set forth any specific goals for wetlands preservation, and so far the Obama Administration has not significantly altered the Bush Administration guidelines or wetlands policy. It has, however, committed to wetlands restoration as part of cleanup efforts after the BP Deepwater Horizon oil spill in the Gulf Coast.⁸¹ In 2009, the Obama Administration sent a letter to House and Senate leaders outlining broad principles for legislation clarifying the scope of the Act, including consistency, predictability, and waterway protection.⁸² As discussed above, however, the

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *infra* Section IV.B.

⁷⁸ Broder, *supra* note 74.

⁷⁹ See *id.* For a more detailed discussion of the Guidance, see *infra* Section IV.B.

⁸⁰ See OBAMA BIDEN, BARACK OBAMA AND JOE BIDEN: PROMOTING A HEALTHY ENVIRONMENT, available at <http://web.archive.org/web/20110203041207/http://www.barackobama.com/pdf/issues/EnvironmentFactSheet.pdf> (accessed via the Internet Archive).

⁸¹ See Exec. Order No. 13,554, 75 Fed. Reg. 62,313 (Oct. 8, 2010) (establishing the "Gulf Coast Ecosystem Restoration Task Force").

⁸² See CLAUDIA COPELAND, CONG. RESEARCH SERV., RL33483, WETLANDS: AN OVERVIEW OF ISSUES 12 (2012) (discussing the letter and the principles it outlined); Press Release, U.S. Senate Comm. on Env't & Pub. Works, Boxer Welcomes Obama Administration Letter on Need for Clean Water Act Legislation (May 21, 2009), available at http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=64739ae3-802a-23ad-4c30-36fc58cc1014&Region_id=&Issue_id=

legislation resulting from this recommendation—the Clean Water Restoration Act—never made it out of the Senate.⁸³

Thus, the agencies are seemingly faced with a congressional mandate to exert their jurisdiction as broadly as possible, two conflicting legal doctrines that purport to explain just how broad that jurisdiction really is, and executive oversight that seems to have shifted from a narrow interpretation to a broader one, while failing to provide any significant guidance. The next Part addresses how the agencies have responded generally to these conflicting authorities and then examines their reactions more narrowly through the lens of the Corps's determination of its own jurisdiction.

IV. AGENCY INTERPRETATION OF "WATERS OF THE UNITED STATES"

This Part analyzes the agencies' response to the *Rapanos* decision in detail by focusing on the publication of a Guidance document in 2007 and its subsequent modifications. First, I set out a brief overview of the sources of agency statutory interpretation, relying on the work of Professor Jerry Mashaw to reveal what sources agencies do, and should, rely upon in performing their interpretative function. I then contrast these sources and procedures with those used by courts.

Second, I summarize the agencies' response to the *Rapanos* decision, chronicling their release and subsequent modifications of a nonbinding Guidance document. As this brief overview will show, the result has been to add a considerable amount of complexity to the already cumbersome process through which the agencies assert their jurisdiction. Part V explores this backdrop of procedural complexity further and uses individual jurisdictional determinations to examine the agencies' on-the-ground implementation of the procedures set forth in the Guidance documents.

A. *Canons of Agency Interpretation*

Agencies and courts are designed to accomplish different ends, to use different procedures in making decisions, and to capitalize on their relative strengths to best fulfill their purposes. Jerry Mashaw's work on agency statutory interpretation is a useful framework for con-

⁸³ See *supra* notes 64-67 and accompanying text.

sidering these issues. He has argued that agencies do, and should, follow techniques of statutory interpretation that are different from those that judges employ.⁸⁴ More specifically, Mashaw argues that agencies should be instrumental rather than hidebound; they should use statutes to accomplish a particular purpose rather than feel they are tied directly to the statutory text.⁸⁵ He also recommends that agencies look to various legislative materials—beyond original legislative history—while judges should be more wary of these sources.⁸⁶ Agencies should be encouraged to adapt and modify their interpretations of statutes to reflect changing societal attitudes, political or presidential will, or recent scientific developments in a way that courts are not.⁸⁷ The *Chevron* Court itself acknowledged this freedom from *stare decisis* when it recognized that agencies act—and should act—differently from judges when engaging in statutory interpretation.⁸⁸ Justice Stevens, writing for the Court in *Chevron*, explicitly recognized that this difference is necessary to reflect different institutional competencies, since judges are ill-equipped to make the types of policy judgments agencies routinely perform.⁸⁹

These principles of agency statutory interpretation reflect fundamental differences in the respective constitutional positions and institutional competencies of agencies and courts. Eskridge and Ferejohn take this concept one step further, arguing that when agency personnel must interpret “superstatutes”—or cross-cutting statutes like the CWA—they often behave like judges interpreting the Constitution, by extrapolating a broader purpose from the statute based on a variety of

⁸⁴ See Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 524-36 (2005).

⁸⁵ See *id.* at 516-21 (emphasizing that agencies, like courts, should take into account “prudential considerations”).

⁸⁶ See *id.* at 511-13 (arguing that for agencies, unlike courts, it is “precisely their job as agents of past congresses and sitting politicians to synthesize the past with the present”).

⁸⁷ See *id.* at 513 (arguing that agencies should use “an interpretive approach that engages in a wider ranging set of policy considerations and a more straightforward attention to political context than would be constitutionally appropriate for judges”).

⁸⁸ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984) (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”).

⁸⁹ *Id.* at 865-66.

sources, and then acting based on that broader purpose.⁹⁰ They contend that this deviation is permissible, and even preferable, as it is “easier for the governmental process to override the agency” than it is to override the courts because all three branches retain some oversight powers over agency action.⁹¹ Unlike the judiciary, agencies are accountable to all three branches of government, as well as to the broader constituency of the American people.⁹²

Thus, agencies and courts approach interpretation—both statutory and constitutional—in fundamentally different ways. Judges are concerned with a narrow set of facts, or with an issue framed by adversarial parties, and they seek a remedy to resolve a particular case or controversy. Agencies, by contrast, implement statutes in accord with a broad underlying purpose, coordinate their responses dynamically and flexibly, and act as stewards of legislative intent in the face of shifting presidential will and dynamic science. There is a place for both methodologies in our constitutional structure, and both provide mechanisms for creating and interpreting constitutional norms.⁹³ The differences between them are necessary to accommodate different institutional competencies and to ensure that agencies possess the flexibility to freely implement their underlying statutes and respond to scientific developments.

To illustrate these principles in practice, the following discussion examines how the EPA and the Corps responded to the Court’s confusing holding in *Rapanos*.

⁹⁰ ESKRIDGE & FEREJOHN, *supra* note 58, at 292-93. While Professor Eskridge and I draw different conclusions on judicial deference based on this information, I agree with his larger points relating to institutional competence and the active role of agencies in defining and policing the outer bounds of the Constitution. Compare Eskridge & Baer, *supra* note 23, at 1171-75 (discussing the relative institutional competence of judges and agencies), with *infra* Part VI (discussing my own theory regarding agency expertise and constitutional interpretation).

⁹¹ ESKRIDGE & FEREJOHN, *supra* note 58, at 293.

⁹² See *Chevron*, 467 U.S. at 866 (noting that federal judges, unlike agencies and Congress, have no constituency); *id.* at 865 (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .”).

⁹³ See ESKRIDGE & FEREJOHN, *supra* note 58, at 6-9 (describing the process of forming constitutional norms through administrative and legislative deliberation).

B. *The Guidance: Procedural and Substantive*

In August 2006, the Chief of the Corps's Environmental Advisory Board, Kenneth Babcock, sent a letter to the Corps's Chief Engineer expressing concern that the *Rapanos* decision might be construed "as a call to remove protection from the extensive wetlands of the US without a permanent surface water connection to navigable streams."⁹⁴ Babcock urged the Corps to proceed through interpretive guidance, rather than rulemaking, in order to minimize inconsistency and avoid uncertainty while retaining flexibility and freedom to experiment with new solutions.⁹⁵ In June 2007, the EPA and the Corps heeded his call and issued a reaction to *Rapanos* through interpretive guidance (the Guidance) instead of notice-and-comment rulemaking.⁹⁶ This decision

⁹⁴ Letter from Kenneth M. Babcock, Chairman, Env'tl. Advisory Bd., to Lt. Gen. Carl A. Strock, Chief of Eng'rs, U.S. Army Corps of Eng'rs 1 (Aug. 11, 2006), available at http://www.usace.army.mil/Portals/2/docs/Environmental/rapanos-carabell_8-11-06ltr.pdf.

⁹⁵ *Id.* at 2. Proceeding through informal mechanisms, such as this interpretive guidance, has become the norm for administrative agencies as notice-and-comment rulemaking has become more costly. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1390-92 (1992) (describing agency incentives to let existing rules "ossify" instead of modifying them given the high resource costs required to alter the status quo); see also STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 730-37 (5th ed. 2002) (discussing the ossification thesis and external influences, including judicial review and oversight, as chilling agencies' ability to regulate). Professor McGarity suggests that all three branches should "back off" from agencies, allowing the regulatory state to "function with greater freedom and flexibility." McGarity, *supra*, at 1462. Scholars who have subjected this ossification thesis to empirical review, however, have indicated that the problem may not be as widespread as initially feared. See, e.g., Cary Coglianese, *Empirical Evidence and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1127-31 (suggesting that available evidence on judicial review of rulemaking does not support the ossification thesis, but calling for further research); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, GEO. WASH. L. REV. (forthcoming 2012) (manuscript at 108, 153-64), available at http://ssrn.com/abstract_id=1699878 (examining rules promulgated by the Department of the Interior, finding "mixed and relatively weak evidence" that ossification is a serious and widespread problem, supporting the conclusion that rules take longer to develop now than in the past, and determining that agencies have not turned to "more informal policy devices as substitutes for notice-and-comment rulemaking").

⁹⁶ See EPA & U.S. ARMY CORPS OF ENG'RS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* & *CARABELL V. UNITED STATES* (2008), available at http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf (updating the original guidelines from June 5, 2007 and identifying the waters over which the EPA and Corps will and will not assert

meant that the agencies were not subject to the dense procedural requirements regarding informal rulemaking imposed by the Administrative Procedure Act, but could proceed via nonbinding interpretation with room for flexibility.⁹⁷

Substantively, the Guidance attempted to harmonize the plurality and Kennedy tests, asserting relatively automatic jurisdiction over traditionally navigable waterways (TNWs), wetlands adjacent to TNWs, and nonnavigable tributaries that meet the plurality's "relatively permanent" test (i.e., relatively permanent waterways, or RPWs), and wetlands adjacent to RPWs.⁹⁸ The Guidance incorporated the Kennedy test by directing the agencies to perform a "fact-specific analysis" to determine if there is a significant nexus with a TNW for nonnavigable tributaries that are "not relatively permanent," wetlands adjacent to those tributaries, and wetlands "adjacent to but that do not directly abut a relatively permanent non-navigable tributary."⁹⁹ This significant nexus analysis directs the agencies to consider the "chemical, physical and biological integrity of downstream traditional navigable waters."¹⁰⁰ In a question-and-answer document accompanying the Guidance, the

jurisdiction following *Rapanos*). The agencies had been close to releasing guidelines in September 2006, but those guidelines were pulled back at the last minute. See Broder, *supra* note 74. Environmental groups, after examining a leaked version of the earlier 2006 guidelines, claimed that subtle differences made it easier to evade permitting requirements under the released 2007 version, which was allegedly influenced by political lobbyists. *Id.*; see also *supra* notes 78-79 and accompanying text (detailing the Bush administration's response to allegations that changes in the guidelines were influenced by lobbyist pressure).

⁹⁷ See Administrative Procedure Act (APA), 5 U.S.C. § 553(b)(A) (2006) (excepting "interpretative rules" and "general statements of policy" from notice-and-comment requirements). This loophole has been widely criticized for decades, as scholars challenge the transparency and legitimacy of lawmaking not subject to APA regulation. See Robert A. Anthony, "Well, You Want the Permit, Don't You?" *Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31, 39-40 (1992) (arguing that the APA should be interpreted to require agencies to proceed through binding rulemakings under § 553 in some circumstances, such as when an agency asserts jurisdiction in a new area where it does not have obvious authority); James Hunnicutt, Note, *Another Reason to Reform the Federal Regulatory System: Agencies' Treating Nonlegislative Rules as Binding Law*, 41 B.C. L. REV. 153, 155 (2000) ("[B]y treating nonlegislative rules as binding law, agencies undermine the APA's propitious objectives of clarity, uniformity and public participation.").

⁹⁸ EPA & U.S. ARMY CORPS OF ENG'RS, *supra* note 96, at 1.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

agencies urged that their purpose in drafting the Guidance was to “promot[e] clarity and consistent application of legal mandates enunciated in the *Rapanos* decision,” but conceded that “some ephemeral tributaries and their adjacent wetlands will not be jurisdictional under the CWA.”¹⁰¹

The new Guidance also added additional procedural layers, requiring administrative recording and web publication of jurisdictional determinations (JDs).¹⁰² Corps districts are required to submit copies of completed JDs to headquarters for review prior to asserting or denying jurisdiction,¹⁰³ and the EPA has the ability to “elevate” such JDs to an EPA Regional Administrator or to Corps headquarters if there is significant disagreement over the findings.¹⁰⁴ The agencies acknowledge that these new requirements, both substantive and procedural, will result in an increased “workload for field staff as they document and make significan[t] nexus determinations.”¹⁰⁵ To manage this anticipated increase, the agencies recommend that applicants shoulder the burden themselves by hiring independent consultants to “help perform” the JDs.¹⁰⁶ In addition to imposing additional costs on the regulated parties, this expectation erodes the independence of JDs, inviting external and potentially biased expert assessments into the process. While JDs are envisioned as agency determinations, the required participation of paid third parties potentially subjects the assessments to industry capture.

The agencies opened the Guidance for public comment on June 5, 2007, and extended the comment period until January 21, 2008.¹⁰⁷ In

¹⁰¹ U.S. ARMY CORPS OF ENG’RS, *supra* note 71, at 6, 11.

¹⁰² *Id.* at 12.

¹⁰³ U.S. ARMY CORPS OF ENG’RS, GUIDANCE HIGHLIGHTS FOR *RAPANOS* AND *CARABELL* DECISION 1 (2007), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/guidhigh_06-05-07.pdf.

¹⁰⁴ U.S. ARMY CORPS OF ENG’RS, *supra* note 71, at 12.

¹⁰⁵ *Id.* at 14.

¹⁰⁶ *Id.* at 16. Districts support this fee-shifting to the regulated community and agree to accept the workload for “mom and pop” requests, but they encourage large real estate developers to hire independent environmental consultants to assist with the “labor-intensive” delineation process. See, e.g., *Jurisdictional Determinations*, U.S. ARMY CORPS OF ENGINEERS, PHILA. DISTRICT, <http://www.nap.usace.army.mil/cenap-op/regulatory/jurisdet.html> (last visited Feb. 15, 2012).

¹⁰⁷ EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction After *Rapanos*, 72 Fed. Reg. 67,304 (Nov. 28, 2007).

December 2008, after receiving 66,047 public comments, the agencies issued an updated Guidance reflecting only a few relatively minor changes.¹⁰⁸ The comments addressed four substantive areas: interpretation of the term “significant nexus,” the treatment of tributaries, the definition of RPWs, and the scope of TNWs.¹⁰⁹ Generally, conservationists and environmental groups complained that the new Guidance interpreted “significant nexus” and the other terms too narrowly, arguing that the agencies should consider all waterways within a particular watershed to be jurisdictional.¹¹⁰ The regulated community, on the other hand, argued that the agencies were still stretching their jurisdiction too far.¹¹¹ The agencies issued perfunctory responses to these substantive comments, explaining that they had already considered most of the positions expressed and had “struck a careful balance when interpreting the *Rapanos* opinions.”¹¹²

Environmentalists and industry commentators united to take issue with the delay in processing JDs and the complicated coordination between agencies.¹¹³ The agencies responded to these criticisms by shortening the EPA’s review time and by citing a Regulatory Guidance Letter clarifying the procedure for the issuance of preliminary JDs.¹¹⁴ The preliminary JD process empowers the Corps to issue an initial, nonbinding JD, allowing the permitting process to proceed without forcing a party to wait for a formal JD. However, these preliminary JDs should not be relied upon and are not subject to appeal.¹¹⁵ Finally, the

¹⁰⁸ See EPA & U.S. ARMY CORPS OF ENG’RS, QUESTIONS & ANSWERS REGARDING THE REVISED *RAPANOS* & *CARABELL* GUIDANCE 1-2 (2008), available at <http://www.sas.usace.army.mil/regulatory/documents/RapanosRevisedGuidanceQandAs.pdf> (noting that the Revised Guidance clarifies the terms “traditional navigable waters,” “adjacent wetlands,” and “relevant reach”).

¹⁰⁹ EPA & U.S. ARMY CORPS OF ENG’RS, RESPONSE TO COMMENTS: “CLEAN WATER ACT JURISDICTION FOLLOWING THE SUPREME COURT’S DECISION IN *RAPANOS V. UNITED STATES* & *CARABELL V. UNITED STATES* GUIDANCE” ISSUED JUNE 5, 2007, at 1 (2008), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_Comments_Response_120208.pdf.

¹¹⁰ *Id.* at 2.

¹¹¹ *Id.*

¹¹² EPA & U.S. ARMY CORPS OF ENG’RS, *supra* note 108, at 2.

¹¹³ *Id.*

¹¹⁴ *Id.* at 5-6.

¹¹⁵ U.S. ARMY CORPS OF ENG’RS, REGULATORY GUIDANCE LETTER NO. 08-02, at 3 (2008), available at <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rg108-02.pdf> (citing 33 C.F.R. § 331.2 (2007)).

agencies reiterated their commitment to proceeding through flexible informal guidance instead of rigid rules in order to “gain experience” with the new regime.¹¹⁶

In addition to these relatively straightforward, if controversial, interpretative guidance documents, the Corps also publishes a comprehensive “Instructional Guidebook” to performing JDs.¹¹⁷ This sixty-page handbook, with multiple appendices, walks Corps engineers through each portion of the Approved JD Form and includes analysis of multiple examples of watershed areas and their appropriate JD verdicts.¹¹⁸ Significantly, the Guidebook depicts the jurisdictional analysis—both procedural and substantive—as a series of complicated flowcharts.¹¹⁹ These flowcharts explain what is, even by federal agency standards, an incredibly complicated series of steps to determine whether a particular body of water is isolated (implicating that the Corps does not have jurisdiction), subject to significant nexus analysis (implicating that an additional procedural flowchart must be consulted), or adjacent to traditionally navigable or relatively permanent waters (implicating that the plurality test should be applied).¹²⁰ These three substantive flowcharts are followed by three even more complicated procedural flowcharts, illustrating the processes for intra- and interagency coordination for significant nexus evaluations, isolated waters, and approved JDs not linked to a permit application.¹²¹

The ultimate purpose is for engineers issuing JDs to determine whether they can issue a JD under their own authority, or whether the district requires approval from headquarters, an EPA regional office, or some other player in the decisionmaking process.¹²² These materials were modified in the aftermath of the *Rapanos* decision and the EPA Guidance in order to reflect the agencies’ policy decisions on how to incorporate the plurality and Kennedy tests, adding the agencies’

¹¹⁶ EPA & U.S. ARMY CORPS OF ENG’RS, *supra* note 109, at 3.

¹¹⁷ U.S. ARMY CORPS OF ENG’RS, JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK (2007), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf.

¹¹⁸ *Id.* at 17-39, 49-60.

¹¹⁹ *See id.* at 8-13.

¹²⁰ *Id.* at 8-10.

¹²¹ *Id.* at 11-13.

¹²² *Id.*

treatment of both tests as well as the procedural and consultation requirements between the agencies.¹²³

These charts represent a strange collision of court doctrine and the scientific method, and reveal the limitations when an agency comprised of engineers—experts in assessing geologic, chemical, and physical characteristics of wetlands—attempts to incorporate a judge-made doctrine into its everyday decisionmaking process. The results, with more than fifteen boxes in one flowchart alone, are decidedly clunky.¹²⁴

V. IMPLEMENTING THE GUIDANCE: A CASE STUDY OF JURISDICTIONAL DETERMINATIONS

Has the Army Corps been able to effectuate the JD process in the face of the new restrictions imposed by *Rapanos*, as interpreted by the agencies? Industry critics tend to focus on the agencies' failure to resolve contentious questions; as two industry advisors commented, "[t]he regulated community and the courts are left in no better a position with the Guidance than they were pre-*Rapanos*."¹²⁵ Yet there have been relatively few analyses, critical or favorable, of the Guidance's effect on internal agency procedures.¹²⁶

¹²³ See *id.* at 6-7, 16 (summarizing *Rapanos* and explaining its influence on JD policies and procedure).

¹²⁴ See *id.* at 13.

¹²⁵ Bruce S. Flushman & Wendy L. Manley, *Post-Rapanos Guidance from EPA: "You Figure it Out,"* WENDEL ROSEN BLACK & DEAN LLP (June 2007), <http://www.wendel.com/index.cfm?fuseaction=content.contentDetail&id=8855>.

¹²⁶ For one of the few studies on the Guidance's influence, see Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of Rapanos v. United States*, 30 U. ARK. LITTLE ROCK L. REV. 413 (2008). Gould found that after *Rapanos*, the JD process suffers from the imposition of additional costs and delay and the "abandonment of the established methods of science for the contrived process imposed by the Supreme Court." *Id.* at 440-49. Anecdotal evidence supports Gould's assessment of the effects of the Guidance document, as industry insiders have complained about procedural density and delay. See Comment of Raymond R. Ashcraft, Jr., Manager, Evtl. Affairs & Permitting, AllianceCoal, LLC, Doc. ID EPA-HQ-OW-2007-0282-0244 (Jan. 22, 2008) ("We are extremely concerned that the *Rapanos* Guidance sets forth cumbersome, inefficient and time-consuming procedures that will invariably cause further confusions and costly delays in the CWA permitting program."), *in response to Request for Comment*, 72 Fed. Reg. 67,304 (Nov. 28, 2007). Other scholarship has been critical of the agencies' response to *Rapanos*. Focusing on the 2007 Guidance document, scholars have argued that it only confuses the issue and have recommended that the agencies promulgate new regulations through notice-and-comment rulemaking. See, e.g., Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The*

To answer these questions, I examined a sample of JDs from a variety of types of wetlands.¹²⁷ The central Corps website has posted thirty JDs, which are classified by geographic feature and offer representative examples of how Corps engineers are performing their new role as enforcers of the *Rapanos* doctrines.¹²⁸ The key takeaway from my study is that the *Rapanos* decision has forced the agencies to reason more like courts, concurrently applying legal tests and scientific analysis in an interesting and rather puzzling phenomenon I dub “scientificolegal” reasoning. This has forced the Corps—an organization designed to operate based on scientific expertise—to conform its decisionmaking to legal tests established by Justices with little sense of how their judicial standards would play out in the real world.

To show the evolution and effects of this phenomenon, I start with a discussion of how the JD process works and how it differs procedurally from judicial decisionmaking. JDs, unlike judicial opinions, have limited precedential value and are authored by scientific, as opposed to legal, experts. Next, I explore the effects of the *Rapanos* test on the Corps’s JD analysis by examining specific examples of JDs. I conclude that the changes brought on by *Rapanos* undermine the JDs’ nonjudicial characteristics and that the Corps’s new scientificolegal methodology represents a paradigm shift in the Corps’s procedures that forces

Deference Conundrum of a Divided Supreme Court, 61 EMORY L.J. 1, 66-67 (2011) (recommending that the EPA and the Corps issue new regulations on the meaning of “waters of the United States” via notice and comment in order to increase the likelihood of receiving *Chevron* deference); Gregory H. Morrison, Comment, *A Nexus of Confusion: Why the Agencies Responsible for Clean Water Act Enforcement Should Promulgate a New Set of Rules Governing the Act’s Jurisdiction*, 42 MCGEORGE L. REV. 397, 409-11, 413-17 (2011) (discussing the criticism that the Guidance fails to correctly interpret the Court’s opinion and recommending the adoption of narrower regulations that better account for the plurality and significant nexus tests).

¹²⁷ The Corps publishes JDs to comply with its public transparency requirements. Each district is obligated to publish all of its approved JDs on its local website. See U.S. ARMY CORPS OF ENGINEERS, *supra* note 115, at 6. However, some district offices have yet to achieve in practice what their regulations contemplate in theory.

¹²⁸ The website dubs these samples “HQ Field Memos Implementing the *Rapanos* Guidance.” CWA Guidance, U.S. ARMY CORPS ENGINEERS, <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RelatedResources/CWAGuidance> (last visited Feb. 15, 2011). Additional samples are available from local district websites. See *id.* (follow “Division and District JD Forms Links” hyperlink) (cataloguing links to district websites); see also, e.g., *Jurisdictional Determination Information Sheets*, U.S. ARMY CORPS OF ENGINEERS, PHILA. DISTRICT, <http://www.nap.usace.army.mil/cenap-op/regulatory/jdis.html> (last visited Feb. 15, 2012) (listing approved JDs for the district).

agency personnel selected and trained for their scientific expertise to engage in a sort of quasi-jurisprudence.

A. *An Overview of Jurisdictional Determinations
and Section 404 Permitting*

The 1972 amendments to the Clean Water Act govern the wetlands permitting requirements that the Corps has implemented.¹²⁹ The amendments added what is commonly known as section 404 authority, which authorizes the Corps to issue permits, after notice and opportunity for public hearing, for the discharge of “dredged or fill material into the navigable waters” of the United States at “specified disposal sites.”¹³⁰ This scheme ensures that developers obtain a permit from the Corps before filling wetland areas to facilitate building or farming. The statute also confers a procedural and oversight role to the EPA.¹³¹

The Corps primarily issues individual permits,¹³² which are granted unless the district engineer, relying on a variety of factors, determines that doing so would be “contrary to the public interest.”¹³³ The Corps will provide a JD to any landowner, permit applicant, or “affected party” when asked to do so, when jurisdiction is contested, or when the Corps determines that jurisdiction does not exist over a particular water body or wetland.¹³⁴

In practice, procedures vary from district to district, since the Corps is a “highly decentralized organization” and “[m]ost of the authority for administering the regulatory program has been delegated to the thirty-six district engineers and eleven division engineers.”¹³⁵ When making JDs, however, each district must complete a nationally standardized JD form prior to engaging in the full permitting process in

¹²⁹ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, sec. 2, § 404, 86 Stat. 884 (codified as amended at 33 U.S.C. § 1344 (2006)).

¹³⁰ 33 U.S.C. § 1344(a).

¹³¹ See *id.* § 1344(b) (requiring the EPA to develop guidelines for the Corps).

¹³² See U.S. ARMY CORPS OF ENGINEERS, *supra* note 31 (explaining the Corps’s statutory authorization and stating that “[t]he basic form of authorization . . . is the individual permit”). The Corps can also issue “[l]etters of permission” and general permits. *Id.*

¹³³ See 33 C.F.R. § 320.4 (2011) (enumerating a variety of factors to be considered in determining whether a permit would be consistent with the public interest).

¹³⁴ See U.S. ARMY CORPS OF ENGINEERS, *supra* note 115, at 1-2.

¹³⁵ 33 C.F.R. § 320.1(a)(2) (2011).

accordance with guidance from Corps headquarters.¹³⁶ In response to *Rapanos*, this form, as well as the associated Guidance, has been modified to reflect both the plurality and Kennedy tests.¹³⁷

The JD form is not structured to mirror the analysis of a court opinion. They differ in two important respects: JDs have only limited precedential value, and they are authored by scientific, not legal, experts. In general, the requesting party may rely on an approved JD for five years and may use it in a CWA citizen's suit brought to challenge the JD's legitimacy or determination.¹³⁸ JDs can also be appealed immediately through the Corps's administrative appeals process.¹³⁹ The precedential effect of a JD on subsequent determinations is limited; in some cases, the JD expressly disclaims any applicability to future requests, even for waterways in the same area.¹⁴⁰ Likewise, the regulations make clear that appeals of JDs have limited precedential effect:

Because a decision to determine geographic jurisdiction . . . depends on the facts, circumstances, and physical conditions particular to the specific project and/or site being evaluated, appeal decisions would be of little or no precedential utility. Therefore, an appeal decision of the division engineer is applicable only to the instant appeal, and has no other precedential effect. Such a decision may not be cited in any other administra-

¹³⁶ See U.S. ARMY CORPS OF ENG'RS, *supra* note 117, at 7.

¹³⁷ See Press Release, EPA, EPA, Army Corps Issue Joint Guidance to Sustain Wetlands Protection Under Supreme Court Decision (June 5, 2007), available at <http://yosemite.epa.gov/opa/admpress.nsf/01cce72ba7e92d97852572a000658ef5/e7240f5d30236d2b852572f1005e1809!OpenDocument>.

¹³⁸ U.S. ARMY CORPS OF ENG'RS, *supra* note 115, at 2.

¹³⁹ *Id.* Preliminary JDs, by contrast, are nonbinding and are not appealable. *Id.* at 3 (citing 33 C.F.R. § 331.25(b)). On appeal, the district engineer's initial JD decision is reviewed by the division engineer. 33 C.F.R. § 331.9(a). The standard is deferential, and the division engineer should overturn a decision only if it is "arbitrary, capricious, an abuse of discretion, not supported by substantial evidence," or plainly contrary to a requirement of law or Corps policy guidance. *Id.* § 331.9(b).

¹⁴⁰ See, e.g., Memorandum from the EPA & U.S. Army Corps of Eng'rs to Decline Jurisdiction for LRC-2009-00053 (Aug. 14, 2009) [hereinafter Memorandum to Decline Jurisdiction for LRC-2009-00053] (on file with author) (emphasizing that the related JD is a "case-specific determination . . . that . . . sets no policy or precedent with respect to any other situation"); Memorandum from the EPA & U.S. Army Corps of Eng'rs for NWS-2006-82, at 1 n.3 (Dec. 10, 2007) (on file with author) (indicating that the designation of the nearest traditionally navigable waterway does not bind the agencies in future upstream determinations).

tive appeal, and may not be used as precedent for the evaluation of any other jurisdictional determination¹⁴¹

Nevertheless, to ensure “consistency with law, Executive Orders, and policy,” the regulations instruct that all appeals decisions be forwarded to Corps headquarters and subject to periodic review.¹⁴² Thus, because of the fact-dependent nature of each determination, individual JDs bind the parties to the action, but explicitly do *not* bind the agencies in future cases. Despite this insistence for case-by-case determination, the Corps’s Guidebook for JDs includes numerous photographs and illustrations designed to represent commonly occurring physical features and provide guidance to Corps engineers about when such features meet the tests under the agencies’ *Rapanos* Guidance.¹⁴³

There appears to be a contradiction here: the Corps has proclaimed that JDs are too circumstance dependent to be afforded precedential weight and yet enough similarities exist to allow them to publish guidance with specific, illustrated examples and a recommended outcome. This tension indicates that the Corps *could* assign precedential value to JDs but, for other institutional reasons, *chooses* not to. Presumably, these reasons encompass institutional competency, which is often used to justify entrusting decisions to agencies.¹⁴⁴ In other words, the Corps has explicitly determined that retaining institutional flexibility to proceed based on a broader understanding of constitutional purpose produces better results than relying on inflexible precedent.¹⁴⁵

B. *How Rapanos Has Changed the JD Process*

The *Rapanos* decision, as filtered through the agencies’ Guidance documents, has profoundly affected the way the Corps performs and publishes JDs. First, the Corps’s new procedures have undermined the flexibility previously afforded by the JDs’ limited precedential value. These procedural complexities open the JD process to industry cap-

¹⁴¹ 33 C.F.R. § 331.7(g).

¹⁴² *Id.*

¹⁴³ See U.S. ARMY CORPS OF ENG’RS, *supra* note 117, at 17-39.

¹⁴⁴ See *infra* notes 184-87 and accompanying text.

¹⁴⁵ The Corps’s decentralized structure further encourages the agency to proceed through ad hoc, nonbinding JDs. See *supra* note 135 and accompanying text.

ture in a new and deeper way. Second, and more profoundly, the Corps has been forced to squash its scientific determinations into a rigid rubric of legal analysis, resulting in the uncomfortable graft I call scientificolegal reasoning. This forced legalism has increased administrative costs, rendered JDs more confusing, and significantly restricted the agencies' ability to perform constitutional interpretation in a way that capitalizes on their superior expertise. The characteristics of agencies that make them better than courts at performing this type of constitutional interpretation—their scientific knowledge, flexibility, institutional memory, and prospective and broad-based policy accommodations—have been significantly eroded by the *Rapanos* decision's forced legalism.

1. Procedural Density: Undermining the Limited Precedential Value of JDs

The new reasoning imposed by the post-*Rapanos* Guidance has modified the procedural mechanisms for issuing JDs and changed the precedential weight the Corps affords them. Both the EPA and the Corps are decentralized: they comprise numerous independent districts under the general oversight of one Washington-based headquarters.¹⁴⁶ To combat the complete devolution of policy, Corps headquarters promulgates guidance documents to its thirty-six district offices, citing consistency and the reduction of uncertainty as primary goals.¹⁴⁷ The Corps's success in administering the section 404 permitting program over the last thirty years has been due in large part to its ability to proceed flexibly, to trust the district engineers conducting public interest review, and to work with repeat players to experiment with different potential standards and methods. Flexibility and experimentation have been at the heart of the Corps's section 404 "jurisprudence" to date, even under the more convoluted and restrictive requirements set out in *Rapanos*.

¹⁴⁶ See *About EPA*, EPA, www.epa.gov/aboutepa/index.html#offices (listing the EPA's ten regional offices); *supra* note 135 and accompanying text.

¹⁴⁷ See, e.g., Letter from Kenneth Babcock, Chairman, Env'tl. Advisory Bd., to Lt. Gen. Carl A. Strock, Chief of Eng'rs, U.S. Army Corps of Eng'rs, *supra* note 94, at 1 (urging the Corps to issue post-*Rapanos* guidance that "provides clear direction" and "promotes consistency across districts").

Given the Guidance's requirement of internal agency review for a variety of JD scenarios, however, this policy of decentralized control is in jeopardy. As discussed above, each district across the country is now required to complete an identical JD form.¹⁴⁸ Moreover, an engineer completing a JD must now proceed rigidly through the plurality and Kennedy tests, applying each legal lens to determine if jurisdiction is warranted rather than focusing on the region's hydrology as a whole.¹⁴⁹ For example, in a JD addressing jurisdiction over two ditches and their abutting wetlands in Crook County, Oregon, the Corps progressed mechanically through the required tests.¹⁵⁰ The agencies' analysis, as evidenced by even a cursory reading of its headings, reads like a flowchart: "Location," "TNW Determination," "Jurisdictional Determination," "Relatively Permanent Waters," "Wetlands with a continuous surface connection to RPW," "Significant Nexus," "Conclusion."¹⁵¹

While one may contend that this structure merely facilitates judicial review of agency JDs to ensure compliance with the *Rapanos* regime, this ease of review arguably comes at the expense of the agencies' ability to make independent determinations free from the constraints of judicial oversight and reasoning. As noted above, agencies are neither designed nor intended to function like courts. They address more than one controversy at a time and have the ability—and the mandate—to accommodate broad policy considerations across a wide array of similar, yet distinct, factual circumstances. Forcing this type of broad statutory mandate into a rigid framework to facilitate second-guessing by courts undermines the agencies' express decision to proceed through non-binding, nonprecedential decisionmaking.¹⁵²

Moreover, the administrative appeals process takes a significant toll on agencies' human and financial capital. Undermining the limited precedential nature of agency decisions and forcing them into formulaic legal tests will cause these costs to escalate. The agencies expressly acknowledge that these increased costs will be shifted not to taxpayers,

¹⁴⁸ See *supra* note 136 and accompanying text.

¹⁴⁹ See *supra* Section IV.B.

¹⁵⁰ See Memorandum from the EPA & U.S. Army Corps of Eng'rs to Assert Jurisdiction for NWP-2007-945 (Jan. 23, 2008) [hereinafter Memorandum to Assert Jurisdiction for NWP-2007-945] (on file with author).

¹⁵¹ See *id.*

¹⁵² See 33 C.F.R. § 331.7(g) (2011) (establishing that Corps decisions on jurisdiction and permitting, because of their fact-specific nature, have no precedential value).

but to large developers with pockets deep enough to hire environmental consultants.¹⁵³ This shift has the potential to further erode agency expertise by outsourcing agency determinations to external parties who are not accountable to the government in the same way that agencies are. Fears of industry capture are common among critics of administrative agencies,¹⁵⁴ and the *Rapanos* decision is apparently forcing the Corps closer to this problematic outcome because it lacks the institutional capacity to comply with post-*Rapanos* procedural demands. Although the changes in response to *Rapanos* were designed to constrain agency decisionmaking and encourage conformity, in practice the modifications may push the agencies to rely more heavily on outside parties, thus moving further from the executive control contemplated by the Constitution.

Another negative outcome of the procedural requirements is the increased costs to the Corps of the JD appeals process. The appeals taken thus far have seemingly confused the issue further, as some courts have analyzed jurisdiction under both the Kennedy and plurality tests,¹⁵⁵ while others have concluded that the agencies need only satisfy one.¹⁵⁶ When faced with a decision like *Rapanos*, in which no opinion is clearly controlling, the Supreme Court has made clear that lower courts should rely on the opinion with the “narrowest” holding.¹⁵⁷ The Court

¹⁵³ See U.S. ARMY CORPS OF ENG'RS, *supra* note 71, at 16 (suggesting that in order to minimize delays, developers should hire consultants to assist with the jurisdictional determination and the permit application); see also Comment of Raymond R. Ashcraft, Jr., *supra* note 126, at 12 (describing the regulated community's concerns about the increased costs and delay imposed by updated Guidance documents); *supra* notes 105-06 and accompanying text.

¹⁵⁴ See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713-15 (1975) (discussing the “widely accepted” view that “comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests”). For an overview of agency capture literature, see generally Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (1990).

¹⁵⁵ See *United States v. Cundiff*, 555 F.3d 200, 210-13 (6th Cir. 2009) (concluding that jurisdiction was appropriate under both tests).

¹⁵⁶ See *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (holding that the “Corps has jurisdiction over wetlands that satisfy either the plurality or Justice Kennedy's test”); see also *id.* at 798-99 (cataloging the decisions of the other circuit courts on this issue).

¹⁵⁷ *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

has also conceded, however, that it is not “useful” to pursue this “inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts.”¹⁵⁸ The Sixth Circuit, in 2009, noted that *Rapanos* easily satisfied this “bafflement” requirement and declined to choose one test over the other.¹⁵⁹ This pervasive confusion among the lower courts imposes even steeper costs on regulated parties ex ante, requiring further investigation and, potentially, further expenditure on independent consultants.

Not only is the threat of judicial review thus undermining the agencies’ choice to proceed through nonprecedential decisions, but judicial review itself is adding further confusion to an already muddled process. The confusion at all levels of review emphasizes the fundamental problem with forcing an agency to act like a court when making constitutional decisions: it undermines the very advantages that led Congress to delegate those determinations to an agency in the first place. These added procedural requirements impose costs on agencies, courts, regulated parties, and environmental groups, as every stakeholder must scramble to understand where exactly the Corps will set its constitutional boundaries. Rather than relying on scientific information, this new regime prioritizes “legalese,” precedent, and inflexible ties to past decisions, both agency made and judicial. Prior to *Rapanos*, the Corps had affirmatively chosen to proceed through nonprecedential, ad hoc determinations and flexible interpretative guidance in order to avoid the structural constraints inherent in judicial decisionmaking. Unfortunately, this choice has been unmade by the requirements of *Rapanos*, rendering the agencies’ procedural burdens equivalent to those of a court.

2. Scientificolegal Reasoning

The *Rapanos* Guidance requires expert agencies to grapple with judicially derived tests—confusing enough to baffle judges—each time its staff performs a JD. In this subsection, I explore this combination of legal and scientific expertise, a graft I call scientificolegal reasoning. At the most basic level, JDs apply the *Rapanos* doctrines, filtered through

¹⁵⁸ *Nichols v. United States*, 511 U.S. 738, 745-46 (1994).

¹⁵⁹ *Cundiff*, 555 F.3d at 208.

agency Guidance, to unique sets of facts.¹⁶⁰ While in theory wetlands should be easy to delineate,¹⁶¹ the JDs indicate that in practice identifying which wetlands are jurisdictional can be complicated. To cope with this difficulty, some Corps's engineers engage in a thorough, fact-intensive analysis, often attaching topographic maps to illustrate their points.¹⁶² Others, however, reach similar conclusions based only on perfunctory treatments of the underlying science.¹⁶³ In general, despite the added layer of legal reasoning now required, the Corps continues to find that most waterways satisfy either one or both of the tests set out in *Rapanos* and affirmed in the Guidance.¹⁶⁴

Still, district engineers and their supervisors do seem to be imposing the jurisdictional limits set out in *SWANCC* and *Rapanos*. The JDs posted by the Corps fall into one of three general categories: an assertion of jurisdiction, a decision not to assert jurisdiction, or a remand from headquarters to reconsider whether an assertion or denial of jurisdiction was proper. The Corps appears to be applying *SWANCC*'s mandate consistently with regard to isolated waters, as the agencies

¹⁶⁰ See *supra* Section V.A.

¹⁶¹ See Ruhl & Salzman, *supra* note 27, at 81 (“We can identify and map wetlands relatively easily, and thus record their losses and gains over time.”).

¹⁶² See, e.g., Memorandum to Assert Jurisdiction for NWP-2007-945, *supra* note 150 (engaging in a lengthy analysis of navigability, depth, regularity of flow, and other factors supporting jurisdiction); Memorandum from EPA & U.S. Army Corps of Eng’rs to Assert Jurisdiction for SPL-2007-261-FBV, at 2-3 (Dec. 6, 2007) [hereinafter Memorandum to Assert Jurisdiction for SPL-2007-261-FBV] (on file with author) (discussing peak flow rates, high water marks, hydrologic connections, boat registrations, and other factors supporting jurisdiction); Memorandum from EPA for JD SWG-2007-1769, at 5 (June 13, 2007), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/epa_swg_2007-1769.pdf (including a topographic map along with its analysis).

¹⁶³ See, e.g., Memorandum to Decline Jurisdiction for LRC-2009-00053, *supra* note 140 (declining jurisdiction with little fact-specific discussion and a brief explanation that “jurisdiction could not be supported based solely on links to interstate commerce”); Memorandum from EPA and U.S. Army Corps of Eng’rs to Assert Jurisdiction for NWS-2007-435-NO, at 1-2 (Aug. 29, 2007) (making a determination based primarily on direct hydrologic connections and providing few additional facts to support a finding of a significant nexus).

¹⁶⁴ The majority of the JDs studied asserted jurisdiction. *But see, e.g.*, Memorandum from EPA and U.S. Army Corps of Eng’rs to Decline Jurisdiction for POA-2000-1109 (Apr. 2, 2008) (on file with author) (retracting a prior determination after new information was presented showing that the wetlands were not adjacent).

denied jurisdiction in all the samples addressing such waters.¹⁶⁵ Some denials provide conclusory reasoning with little substantiation in the record,¹⁶⁶ while others are reasoned more thoroughly and include citations to the *Rapanos* Guidance and a step-by-step procession through its substantive flowchart.¹⁶⁷

In cases where the waterway at issue is not adjacent to a TNW, the Corps engages in explicit Commerce Clause analysis. For example, in a JD assessing Bah Lakes in Minnesota, the EPA analyzed its “susceptibility to interstate and foreign commerce.”¹⁶⁸ The EPA decided that Bah Lakes is a TNW, based on public access for small watercraft, accessibility to out-of-state travelers for recreational commercial navigation, and its proximity to public roads and a waterfowl preserve.¹⁶⁹

In the more thoroughly reasoned JDs, the parallels to legal opinions are striking: the Corps cites *Rapanos* and its tests, the *Rapanos* Guidance, and other authority to justify its scope of review and then applies these tests to the underlying scientific evidence. For example, in a JD declining jurisdiction over an isolated wetland, the analysis begins with a legal definition:

EPA and Corps regulations define “waters of the United States” to include wetlands adjacent to other covered waters. Under the regulations, a wetland is “adjacent” when it is “bordering, contiguous or neighboring” another water of the U.S. The *Rapanos* Guidance states that finding a continuous surface connection is not required to establish adjacency under this definition.¹⁷⁰

The agencies have framed their supposedly scientific analysis with legal interpretation, defining adjacency by directly citing to the binding authority of the *Rapanos* Guidance. This introduction sets the stage

¹⁶⁵ See, e.g., *id.*

¹⁶⁶ See *id.* (dispensing with the jurisdictional determination in less than one page).

¹⁶⁷ See, e.g., Memorandum from EPA and U.S. Army Corps of Eng’rs to Decline Jurisdiction for NWP-2007-617 (Feb. 7, 2008) [hereinafter Memorandum to Decline Jurisdiction for NWP-2007-617], available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/NWP-2007-617jm.pdf (declining jurisdiction over a “remnant” of an irrigation ditch not adjacent to any traditional navigable waterway and with no connection to interstate commerce).

¹⁶⁸ Memorandum from EPA for JD # 2007-04488-EMN, at 2-4 (Jan. 16, 2008) (on file with author).

¹⁶⁹ *Id.*

¹⁷⁰ Memorandum to Decline Jurisdiction for NWP-2007-617, *supra* note 167, at 2 (footnote omitted).

for a determination of the wetland's adjacency to an RPW, which includes a discussion of its precipitation, water flow, "groundwater recharge," "nutrient/detrital cycling" and "[s]pecies biodiversity."¹⁷¹

The JD concludes, "Based on an examination of a combination of factors, primarily related to the position in the landscape and other physical characteristics of the wetland in relation to the nearest jurisdictional water, the wetland is not adjacent . . . to Lazy Creek."¹⁷² The JD's structure presents a strange juxtaposition: the agency lays out the clearly stated legal rule at the outset with citations, and manipulates the scientific data to conform to that rule. While both science and law are discussed in the same document, the tone and purpose seem markedly different in each discussion—the law is simply layered on top of the science without any attempt at integration.

In another JD that approved jurisdiction over two wetlands and remanded a third for reconsideration, the Corps employs what any good law student would recognize as textbook legal writing: it states the rule, explains it, and then applies the rule to the facts at hand.¹⁷³ The Memorandum begins by explaining why the Ochoco Reservoir is a TNW, then discusses how the two jurisdictional wetlands proximate to it meet the *Rapanos* plurality test.¹⁷⁴ To do so, it analyzes the water flow of the ditches that link the relevant wetlands to the Reservoir using years of streamflow data, and concludes that the recorded flows qualify the ditches as relatively permanent as defined by the Guidance.¹⁷⁵ Because the two wetlands abut these relatively permanent waterways, they are jurisdictional.¹⁷⁶ The Corps remanded the JD to the district to reevaluate a third wetland based on a significant nexus analysis.¹⁷⁷

The waterways described in this JD are clearly part of one larger watershed, and the reasoning is replete with descriptions of the links between the reservoir and the surrounding wetlands.¹⁷⁸ In other JDs, this connection is clearer still, since they are accompanied by aerial photo-

¹⁷¹ *Id.* at 2-3.

¹⁷² *Id.*

¹⁷³ See Memorandum to Assert Jurisdiction for NWP-2007-945, *supra* note 150, at 1-3.

¹⁷⁴ *Id.* at 1-4.

¹⁷⁵ *Id.* at 3-4.

¹⁷⁶ *Id.* at 5.

¹⁷⁷ *Id.* at 4-5.

¹⁷⁸ *Id.* at 1-4.

graphs or topographic maps that reveal the interconnected hydrology of the underlying watersheds.¹⁷⁹ These fairly obvious conclusions, however, are obscured to varying degrees by the legal judgments that the Corps has been forced to graft onto its determinations. In the JD discussing the Ochoco Reservoir, the agencies write,

For these reasons, 2 months of continuous flow is considered “seasonal” flow at this particular site in this region, and is sufficient to support the RPW designation for ditches 1 and 2. The Rapanos Guidance gave an example of waters that have a continuous flow at least seasonally as those waters that typically flow three months. Three months was provided as an example and the agencies have flexibility under the guidance to determine what seasonally means in a specific case. In this case, the agencies have determined that the case-specific facts support the RPW determinations.¹⁸⁰

Parsing the remainder of the JD indicates that there is substantial evidence for considering the wetlands at issue to be part of a larger watershed. This obvious scientific conclusion, however, is obscured because the agencies phrase it in terms of “the guidance,” and what “the guidance” defines as seasonal.

The JDs also display a kind of arbitrariness in their application of legal standards. The agencies establish that they are assessing whether there is a significant nexus. They define this standard, but then seem to ignore it as they examine the underlying hydrology without explaining the principles they are using. For example, in one JD assessing a watershed, the significant nexus standard is defined as follows:

A watercourse may have a significant nexus with a TNW where it can be demonstrated that the subject watercourse alone has the potential to contribute contaminants that would cause the TNW to exceed its water quality standards or otherwise degrade water quality of the TNW. This potential occurs when there is both the presence of the contaminants in the sub-watershed, and sufficient flows to make the likelihood such pollutants will reach the TNW and affect its chemical integrity more than speculative[] or insubstantial[¹⁸¹].

¹⁷⁹ See Memorandum from EPA and U.S. Army Corps of Eng’rs to Re-Evaluate Jurisdiction for NWP-2007-428, at 4 (Feb. 26, 2008), available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/nwp_2007_428_jdm.pdf; Memorandum from EPA for JD SWG-2007-1769, *supra* note 162, at 5.

¹⁸⁰ Memorandum to Assert Jurisdiction for NWP-2007-945, *supra* note 150, at 4.

¹⁸¹ Memorandum to Assert Jurisdiction for SPL-2007-261-FBV, *supra* note 162, at 1.

Later, the JD applies this test to the underlying watershed, determining that the nexus between Canyon Lake, a TNW, and Ambris, the waterway at issue, is significant:

The State's analysis of relationships between Canyon Lake and its tributaries helps to evaluate whether the nexus from Ambris segment to Canyon Lake is significant. . . . The data and modeling analysis supporting the [total maximum daily loads (TMDLs)] concludes that polluted runoff from urban sources (including the lands in the Ambris segment area) substantially contributed to impairment of Canyon Lake by nitrogen and phosphorous. Urban runoff such as that discharged to the Ambris segment is estimated to contribute 12-15% of nitrogen loads and 6-12% of phosphorous loads to Canyon Lake. The TMDLs conclude that, particularly under wet conditions, sources in the Quail Valley watershed such as agriculture, septic systems, and urban areas contribute significant amounts of nutrients to Canyon Lake.¹⁸²

Although the agencies set out a legal standard and purport to apply it, there is no necessary connection between the legal word "significant" and the scientific facts—in this case percentages of chemical loads—that the agencies determine satisfy that standard. Instead, it appears the agencies use a legal standard—in this case, "more than speculative[] or insubstantial[]"¹⁸³—and then simply invent a level of pollutant contribution that satisfies that standard.

Rather than trust the Corps to use its expertise and understanding of congressional intent to expand its jurisdiction to the constitutional limit it believes to be scientifically and practically feasible, the *Rapanos* decision requires the Corps to force the square peg of scientific data into the round hole of judicial doctrine. This difficult task, along with the procedural density imposed by the Guidance, the elimination of the agencies' ability to determine their jurisdiction in a flexible and nonprecedential manner, and the overall cost increases, has left the JD process divorced from its original purpose. Instead of paradigmatic administrative constitutionalism, where agencies define their boundaries in accord with the broader purpose of their underlying statutes, the *Rapanos* decision forces the agencies to reason and act like courts. Such an outcome undermines the relative institutional competencies that originally motivated the creation of three separate branches and

¹⁸² *Id.* at 4-5 (footnotes omitted).

¹⁸³ *Id.* at 1.

administrative agencies. To respond to this problem, the next Part proposes a radical shift in judicial review: a parallel *Chevron* doctrine for agency constitutional interpretations when Congress has clearly delegated interpretive authority to agency expertise.

VI. TOWARD A CONSTITUTIONAL *CHEVRON*: AGENCY EXPERTISE AND THE CONSTITUTION

The Supreme Court's decision in *Rapanos* was a revolutionary change to the way the Corps and the EPA define their own jurisdiction under the Clean Water Act. After examining how the Corps and the EPA have responded, it is clear that the primary results of the ruling have been to add procedural density to the process of determining jurisdiction, and to force the Corps, populated with engineers and other scientific experts, to confine its reasoning to a judicially created doctrine instead of the flexible, case-by-case analysis previously used by the Corps and envisioned by Congress. By regulating the JD process through guidance instead of rules, the agencies have retained some flexibility, and preserved the possibility of interdistrict variation and reliance on science. This is not enough, however, to overcome the overall effect of post-*Rapanos* agency procedures, which has been to undercut the very aspects of agency decisionmaking that renders it separate, and sometimes superior, to judicial decisionmaking. To combat this problematic outcome, the Supreme Court should explicitly adopt *Chevron*-style deference for agency constitutional interpretations where Congress has expressly delegated such interpretive power to agencies.

Chevron deference is currently applied to most agency statutory interpretations, and requires courts to defer to an agency's reasonable interpretation of an ambiguous statute.¹⁸⁴ If the statute is unambiguous, however, then the agency must follow its clear meaning.¹⁸⁵ Justice

¹⁸⁴ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

¹⁸⁵ *Id.* at 842-43. A court, in determining whether an agency's interpretation is permissible, may consider all relevant sources of statutory interpretation. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427-43, 449 (1987) (analyzing a variety of sources, including legislative history, to determine whether two definitions of a statutory term had the same meaning). While it is outside the scope of this Comment, a logical corollary of my proposal may be to advocate for agencies being permitted and encouraged to consider a wider set of sources in interpreting statutes and the Constitution than

Stevens, writing for the Court in *Chevron*, was emphatic that this deference was due to institutional competence—unlike agencies, judges are not “experts in the field” and do not represent a “constituency” in the way agencies do.¹⁸⁶ Justice Stevens acknowledged the value of policy choices in agency decisionmaking, recognizing that these types of decisions are purposefully left to agencies under the assumption that they are best equipped to make them, and determined that courts should not disturb agency judgments unless they fall outside the bounds of reasonableness.¹⁸⁷

For agency actions that implicate constitutional questions, however, current Court doctrine affords no deference at all. Instead, the Court applies the avoidance canon, wherein a court construes ambiguous statutes so as to avoid interpretations that raise constitutional problems.¹⁸⁸ In a 2009 decision, the Court refused to acknowledge that agencies could have some role to play in constitutional interpretation, declined to remand the issue to the agency to reconsider its policy in light of constitutional considerations, and reserved constitutional issues exclusively for the courts.¹⁸⁹ Thus, courts apply *Chevron*’s generous standard of review to agency statutory interpretation but apply a much more restrictive antideference to agency constitutional interpretations, apparently refusing to acknowledge the broad roles agencies already play in defining the outer bounds of the Constitution.¹⁹⁰

those used by courts. See Mashaw, *supra* note 84, at 510-13 (explaining that agencies should look to a broad set of sources when conducting statutory interpretation).

¹⁸⁶ *Chevron*, 467 U.S. at 865-66.

¹⁸⁷ See *id.* at 866 (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, . . . centers on the wisdom of the agency’s policy . . . the challenge must fail.”).

¹⁸⁸ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499-501 (1979)).

¹⁸⁹ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811-12 & n.3 (2009); see also Metzger, *supra* note 19, at 484 (arguing that the Court was wrong to disregard agencies’ role in crafting constitutional law, proposing instead that “constitutional law and ordinary administrative law are inextricably linked”). For recent empirical work indicating that the Court does not always apply *Chevron* deference even when warranted, see Eskridge & Baer, *supra* note 23, at 1098-36, which proposes instead that the Court employs a “continuum” of deference.

¹⁹⁰ For a discussion of scholarly treatment of agencies’ role in constitutional interpretation, see *supra* notes 17-19 and accompanying text.

Instead, courts should uphold an agency's interpretation of an ambiguous constitutional provision so long as it is reasonable. Similar to statutory *Chevron* deference, if either the text of the Constitution or Congress, via an implementing statute, has spoken clearly on an issue, then the agency must follow that clear meaning.¹⁹¹ Where the underlying constitutional issue is ambiguous, however, the agency should be free to interpret that provision as it sees fit, provided its interpretation is reasonable. As the Court did in *Chevron*, an agency's analysis may consider numerous sources of interpretation, primarily including legislative intent, statutory purpose, and scientific or other determinations delegated to agency expertise.¹⁹²

This type of deference will accomplish two goals: first, it will acknowledge that agencies have already been defining the constitutional landscape; and second, it will recognize that this type of constitutionalism is normatively desirable. In this sense, these views complement those of Eskridge and Ferejohn, who advocate for a more limited role for the judiciary in the modern state.¹⁹³ They encourage judicial review that is both "deliberation-respecting" and "deliberation-rewarding."¹⁹⁴ Using the former type of review, courts would aggressively enforce some constitutional rights but leave a significant portion of rights to be defined by deliberative bodies such as agencies; under the latter, courts would be more likely to uphold agency decisions based on deliberation.¹⁹⁵

¹⁹¹ However, this clear meaning exception should not necessarily apply to agency treatment of Supreme Court precedents on point. I take no position in this Comment on how agencies should handle precedent they believe to be directly at odds with the Constitution, but leave this reverse-deference debate for another day. Other scholars, however, have argued that the legislative and executive branches should be free to disregard Supreme Court precedent if unconstitutional. See, e.g., Presidential Authority to Decline to Enforce Unconstitutional Statutes, *supra* note 13 (proposing that the executive branch has the authority to disregard unconstitutional Supreme Court precedent); Paulsen, *supra* note 11, at 223-25 (characterizing current executive deference to the Court as "too-feeble acquiescence" and advocating more robust power to disagree with unconstitutional Court holdings).

¹⁹² While my proposal concerns constitutional interpretation, agency constitutionalism necessarily is filtered through statutes. Agencies are created by statutes and designed to implement statutes. There are no purely constitutionally derived agencies.

¹⁹³ ESKRIDGE & FEREJOHN, *supra* note 58, at 6-9.

¹⁹⁴ *Id.* at 22-24 (emphasis omitted).

¹⁹⁵ *Id.*

In his more recent work, Eskridge has argued for antideference with respect to agency action raising serious constitutional concerns.¹⁹⁶ However, recognition of the prevalence of agency constitutionalism, coupled with a newfound understanding of the pitfalls of Supreme Court intervention in agency constitutional deliberation as exemplified by the Corps's post-*Rapanos* experience, compels the conclusion that a constitutional *Chevron* would best permit courts and agencies to fulfill their institutional expertise.

Normatively, this standard allows Congress to "overlegislate" and to push its powers as far as possible. Congress can then rely on agencies to scale back to what is practical, feasible, and in line with public opinion.¹⁹⁷ This technique is particularly effective for aspirational statutes, such as those protecting rights or, as in this case, the environment, in that it allows Congress to be as protective as possible without accounting for every potential practical issue *ex ante*.¹⁹⁸ By interpreting statutes based on their broader underlying purpose and proceeding flexibly, agencies can accommodate changing attitudes and expertise while remaining faithful to Congress's underlying intent.¹⁹⁹

This proposal is controversial, particularly for those who place faith in the judiciary's role as a rights-protecting backstop.²⁰⁰ However, agencies not only are more institutionally capable of performing this power-defining role than any other branch, but they also are accountable to all three branches and public opinion to a degree that courts are not.²⁰¹ From this perspective, agencies are both better equipped to perform this constitutional analysis and more likely to reflect democratic processes when doing so. Eric Posner and Cass Sunstein have made a parallel argument, contending that the same reason that justi-

¹⁹⁶ See Eskridge & Baer, *supra* note 23, at 115-17.

¹⁹⁷ See ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 298 (1994).

¹⁹⁸ *Id.*

¹⁹⁹ An example of this is the EPA and Corps's combining initial legislative intent, overall statutory purpose, and dynamic science into one coherent model of the CWA. See *supra* notes 59-63 and accompanying text.

²⁰⁰ See, e.g., Alexander & Schauer, *supra* note 7, at 1362 (offering an unqualified defense of total judicial supremacy).

²⁰¹ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (discussing the greater accountability of administrative agencies); Lee, *supra* note 15, at 884 (arguing that the FCC's recent foray into administrative constitutionalism was "fed, shaped, and constrained by popular and democratic pressures").

fies courts' deference in the *Chevron* context—that courts are not “institutionally well equipped to make the relevant judgments”—justifies encouraging the executive branch to make similar determinations in the foreign relations context, subject to deferential review.²⁰² Beyond competency arguments, Posner and Sunstein point out that this proposal makes sense as a matter of constitutional structure, because the President has a distinct role in foreign relations.²⁰³ It would simplify the process and “ensure that the relevant judgments are made by those who are best suited to make them.”²⁰⁴

Similar logic animates the application of *Chevron* to agency constitutionalism. First, this proposal makes sense as a matter of constitutional structure, because Congress has expressly delegated to agencies powers within their expertise. Second, the results of my empirical analysis reveal that allowing agencies to answer their own constitutional questions would largely eliminate the current system's procedural density, simplify the process for all stakeholders, and allow for more public participation and less industry capture. Finally, leaving constitutional determinations to those most capable of making them makes intuitive sense: Congress delegated Commerce Clause definition, via jurisdictional determinations, to the EPA and the Corps for a reason.

Such a delegation is undermined when courts determine that they are better situated to make such determinations. To borrow language from Posner and Sunstein, this is “a sensible recognition of the inevitable role that judgments of policy and principle play in resolving . . . ambiguities.”²⁰⁵ This argument is also premised on the fundamentally forward-looking nature of legislation, which delegates the details of implementation to expert agencies. Agencies act prospectively, considering a broad range of factors and working with repeat players to develop policy flexibly and dynamically over time. Courts, by contrast, are necessarily reactive, able only to determine the rights and remedies for parties to a particular action, bound by *stare decisis*, and restricted from experimenting too aggressively with new doctrine. Absent a constitutional *Chevron*, courts risk undermining the legislature's ability to

²⁰² Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1227-28 (2007).

²⁰³ *Id.* at 1228.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

accomplish its goals by unnecessarily shrinking the scope of its legislation.²⁰⁶ To avoid treading on Congress's authority and inappropriately prioritizing the judiciary's view over that of the legislature, courts should defer to agencies' constitutional interpretations, particularly where they result from a clear congressional mandate to delegate such interpretations to agency expertise—like the EPA and the Corps's jurisdictional determinations over wetlands.

Although this constitutional *Chevron* makes normative sense from a rights-protecting and environmental-conservation standpoint, Supreme Court jurisprudence thus far has been intensely hostile to agency interpretation of the “environmental Commerce Clause.”²⁰⁷ While these decisions may seem to track cleanly with the typically conservative view of limiting regulatory authority and congressional power, my analysis shows that the results of these decisions have, paradoxically, increased bureaucracy within agencies and forced them to shift the attendant costs on to those being regulated. Thus, decisions designed to restrict the power of Congress and agencies have actually resulted in stable agency power but have forced the agencies to mask the exercise of that power in judicial terms and have shifted the enforcement costs to the private sector.

This paradox could be avoided by granting deference to agency constitutional interpretations on issues that Congress explicitly delegates to agency expertise. Interpreting statutes that take the Commerce Clause to its limits necessarily entails some on-the-ground exercise of agency judgment.²⁰⁸ While the Corps may be the only agency

²⁰⁶ See, e.g., Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680, 1711-16 (arguing that the Supreme Court's decision in the *Civil Rights Cases* undermined congressional attempts to interpret the Thirteenth and Fourteenth Amendments in line with Congress's broader mandate from victory in the Civil War).

²⁰⁷ See Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 41-47 (2003) (describing how the Court's jurisprudence “often precludes environmental regulation at both the federal and state levels”).

²⁰⁸ Cf. Stephanie Tai, *Uncertainty About Uncertainty: The Impact of Judicial Decisions on Assessing Scientific Uncertainty*, 11 U. PA. J. CONST. L. 671, 714-25 (2009) (arguing that, in the Commerce Clause context, rather than taking a “substantive” approach in which it “focus[es] on substantive constitutional concerns raised by the agency decisions,” the Court should adopt a “limited articulation” approach under which it would grant deference only where the legislature has acknowledged it was acting in an area of scientific uncertainty); Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 849-64 (2006) (pro-

with a formal process for determining the scope and extent of the Commerce Clause implemented by rank-and-file agency personnel, other federal agencies necessarily make similar constitutional decisions as part of their daily routine—just far less obviously. The Corps's experience with *Rapanos* is instructive, and reveals the dangers of courts overreaching into the territory of agency expertise. To avoid frustrating both the conservation and protective functions of federal environmental law, as well as the industry's desire to obtain permits without undue delay or unnecessary procedural hurdles, courts should defer to agency constitutional interpretations so long as these interpretations are reasonable.

CONCLUSION

Supreme Court decisions regarding the scope and meaning of agency constitutional powers can have powerful effects that should push us to reevaluate the constitutional structure of our system of government. In this Comment, I have shown how one such decision, *Rapanos v. United States*, has undermined the Army Corps of Engineers' ability to determine its jurisdiction over wetlands and has forced expert personnel to grapple with complicated judicial doctrine and legal reasoning. This graft erodes the very character of the Corps that caused Congress to delegate wetlands jurisdiction in the first place, and, as shown by my case study, inhibits the Corps from proceeding flexibly and incrementally and from making decisions based on science.

Given these results, the Supreme Court should reevaluate its deference regime and grant *Chevron* deference to agency constitutional interpretation where Congress has expressly delegated such interpretation to agency expertise. Further, these results should push all three branches of government to reconsider their own powers to interpret the Constitution and affirmatively decide where power should lie as a descriptive, normative, and practical question. There are no easy answers to this puzzle. Although my proposal represents a step in the right direction, more work needs to be done—by scholars, judges, and legislators—to fully understand how exactly the Constitution is interpreted on the ground. I hope this Comment opens such a dialogue.

posing that when defining jurisdiction under the CWA, agencies should comply with the normative principles of representing policy input from all three branches, deferring to scientific expertise, and increasing effectiveness).