

May 2013

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Jonathan D. Sater

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Recommended Citation

Sater, Jonathan D. (2013) "Sackett v. EPA: The Murky Confluence of Due Process and Administrative Compliance Orders Under the Clean Water Act," *Liberty University Law Review*. Vol. 7 : Iss. 3 , Article 3. Available at: https://digitalcommons.liberty.edu/lu_law_review/vol7/iss3/3

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NOTE

SACKETT V. EPA: THE MURKY CONFLUENCE OF DUE PROCESS AND ADMINISTRATIVE COMPLIANCE ORDERS UNDER THE CLEAN WATER ACT

Jonathan D. Sater[†]

I. INTRODUCTION

Private property rights are some of the most fundamental and important rights that American citizens possess and cherish.¹ Americans have a long tradition and history of private property rights that can be traced back to the Magna Carta.² The American people decided to specifically mention private property right protections in the Constitution by enacting the Due Process Clauses of the Fifth and Fourteenth Amendments.³ Today, property rights face threats on numerous fronts.⁴ One of the most serious of these threats is overzealous enforcement of far-reaching environmental laws by the Environmental Protection Agency (“EPA”) and the Army Corps of

[†] *Marketing Director*, LIBERTY UNIVERSITY LAW REVIEW, Volume 7. J.D. Candidate, Liberty University School of Law (2013); B.A., Political Science, Thomas Edison State College (2007). The author would like to acknowledge and thank the family members, friends, mentors, teachers, and professors, but especially his parents, Ron and Diane Sater, that have invested in his life and inspired him to do all for the glory of God. This Note would not have been possible without them. *Soli Deo Gloria*.

1. *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) (suggesting that the nation values due process and private property).

2. See BERNARD H. SIEGAN, *PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT* 1–2 (2001) (quoting Supreme Court Justices Joseph Bradley and John Harlan discussing the rights of Englishmen that Americans inherited, among which is the right of property).

3. The Fifth Amendment’s Due Process Clause states, “nor shall any person . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The Fourteenth Amendment’s Due Process Clause states, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

4. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 477, 490 (2005) (5–4 decision) (“[A] city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment.”). In 1983, Professor Harold Berman declared that the Western legal tradition is at a turning point. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 36 (1983). One aspect of this is that there has been “a break with its emphasis on private property and freedom of contract.” *Id.*

Engineers (“the Corps”).⁵ These environmental agencies are bringing more individuals and businesses within the reach of environmental laws, such as the Clean Water Act (“CWA”),⁶ by arbitrarily increasing the jurisdictional reach of those laws.⁷ This unapologetic power grab has been disastrous for many unfortunate people, businesses, and even government entities.⁸

Imagine you are an ordinary, middle-class American citizen.⁹ After acquiring a residential lot with a view of a scenic lake, you and your spouse finally begin taking the steps to realize your dream of building your own modest home. You first acquire all of the necessary building permits. Next, the site preparation of filling and grading begins. Shortly thereafter, however, federal agents sent by the EPA suddenly arrive without warning and demand that work stop immediately because you have filled in a wetland¹⁰ subject to the CWA without a permit. The EPA maintains this

5. Jonathan H. Adler, *Wetlands, Property Rights, and the Due Process Deficit in Environmental Law*, 11 CATO SUPREME COURT REV. 139, 149 (2012) [hereinafter *Wetlands*] (“Given both agencies’ history of overzealous assertions of their own authority, one could excuse landowners for doubting the jurisdictional claim made by an agency enforcer—yet acting on such doubts could have serious legal and financial consequences, as the Sacketts discovered.”). “Of all federal programs, however, the federal regulation of wetlands under section 404 of the Clean Water Act is arguably the single most expansive federal regulation of private land use.” Jonathan H. Adler, *Once More, with Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, in THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS 82 (Vt. Law Sch. ed., 2007) [hereinafter *Limits of CWA Jurisdiction*], available at <http://www.vjel.org/books/pdf/PUBS10004.pdf>.

6. Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (2012).

7. *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) (“Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase [‘the waters of the United States’] as an essentially limitless grant of authority.”).

8. Press Release, Sen. Rand Paul, Today: Senator Paul Hosts Roundtable Forum “Property Wrongs: A Discussion with Victims of the U.S. Government’s Assault on Private Property (Oct. 12, 2011) (summarizing the testimony of various individuals, businesses, and government entities that have suffered greatly from oppressive enforcement actions by the EPA and other agencies), available at <http://www.randpaul2016.com/2011/10/today-senator-paul-hosts-roundtable-forum-%E2%80%99Cproperty-wrongs-a-discussion-with-victims-of-the-u-s-government%E2%80%99s-assault-on-private-property%E2%80%99D/>.

9. This hypothetically posed scenario is an expansion of a similarly hypothetically posed scenario in *Sackett v. EPA*. *Fact Sheet*, PAC. LEGAL FOUND. 1, <http://www.pacificlegal.org/document.doc?id=566> (last visited Feb. 24, 2013) [hereinafter *Fact Sheet*].

10. By regulation, the environmental agencies have included “wetlands” as a part of the “waters of the United States,” thereby subjecting them to CWA jurisdiction. See 33 U.S.C. § 1362(7) (2012); 33 C.F.R. § 328.3(a) (2012); 40 C.F.R. § 230.3(s)(7) (2012). The

contention despite the absence of standing water or a continuous flow of water—such as a spring or creek—off of your property. Moreover, the EPA has not required any of your neighbors to obtain a permit to fill a “wetland.”

Convinced that you have done everything right and that the EPA is mistaken, you request a written statement of the wrong you allegedly committed and an opportunity to contest the decision. In the meantime, you hire an engineer who determines that the property does not contain any wetlands. After waiting several months for a formal, written reply, the EPA sends you an administrative compliance order (“ACO”). The order requires you to remove all of the dirt and gravel; restore your property to its original condition, including replanting lost vegetation; allow the EPA to monitor your property for three years; and allow EPA officials free access to your property, while you must leave it undisturbed. The EPA further informs you that only after you have fully complied with the order may you then apply for the necessary permit to undo all of the work required by the ACO. If you fail to comply with the order, you face potential civil penalties of up to \$75,000 *per day* as well as potential criminal penalties. Complying with the order, however, will cost you \$27,000, which is more than what you paid for the lot. Furthermore, the EPA denies you any kind of hearing or opportunity to contest its decision. EPA bureaucrats also inform you that you cannot ask a court to review their determinations. Outraged, yet devastated, you are at a loss what to do. In the words of Justice Alito, “most ordinary homeowners would say this kind of thing can’t happen in the United States.”¹¹

In 2007, Mike and Chantell Sackett found themselves facing this exact dilemma.¹² They decided to fight the EPA in court. The District Court of

Code of Federal Regulations, however, does not further define the term “wetlands.” According to the Sacketts, “Wetlands are themselves defined by complex criteria [explained in the 143-page Corps of Engineers Wetland Delineation Manual]—including soil type, vegetation, and hydrology—which defy consistent application and are not apparent to the average citizen.” Brief for Petitioners at 4, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 4500687 at *4 (footnote omitted). The environmental agencies have even found wetlands “on land that appears to be totally dry.” *Id.* For a historical summary of the evolution of the federal regulations defining and regulating wetlands—from prohibitions on walking through a wetland to the “glancing goose” test—see *Wetlands*, *supra* note 5, at 141–49.

11. Transcript of Oral Argument at 37, *Sackett v. EPA*, 132 S. Ct. 1367 (No. 10-1062) [hereinafter Transcript].

12. While the literature on this subject matter often refers to this dilemma as a “Hobson’s choice,” the use of that phrase is somewhat imprecise. See Andrew I. Davis,

Idaho sided with the EPA by granting its motion to dismiss.¹³ On appeal, the Ninth Circuit Court of Appeals affirmed.¹⁴ On June 28, 2011, the Supreme Court granted certiorari to determine two issues: (1) whether the Administrative Procedure Act¹⁵ (“APA”) precludes pre-enforcement judicial review of ACOs, and (2) if the APA does preclude it, whether the unavailability of pre-enforcement judicial review is a violation of due process.¹⁶ In a unanimous decision, the Supreme Court held that the APA does not preclude pre-enforcement judicial review of ACOs.¹⁷ With this ruling, the Sacketts will finally have their day in court.¹⁸ Despite yet another setback for the EPA and the Corps, it appears that they are once again skirting the Supreme Court’s ruling, as they have in the past, by continuing to subject other private property owners and businesses to their arbitrary exercise of authority.¹⁹

The EPA and the Corps, however, are not entirely at fault for the confusion and heartache they cause private property owners by abusing their rule-making and enforcement powers under the CWA. Congress is also at fault: first, for granting the EPA and the Corps this broad, discretionary power and second, for not reining them in. By failing to define the phrase “waters of the United States,” Congress further muddled

Judicial Review of Environmental Compliance Orders, 24 ENVTL. L. 189, 211 (1994) (using the phrase “Hobson’s choice” to describe dilemmas where a party is forced to choose between “costly compliance or the threat of penalties”); Christopher M. Wynn, *Facing a Hobson’s Choice? The Constitutionality of the EPA’s Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 WASH. & LEE L. REV. 1879 (2005). The Third Circuit explained the origin of the phrase: “Livoryman Thomas Hobson, who died in 1630 at the age of eighty-five or eighty-six, obliged customers ‘to take the horse which stood near the stable door’ or none at all.” *Solar Turbines Inc. v. Seif*, 879 F.2d 1073, 1084 n.2 (3d Cir. 1989) (quoting STEELE, *THE SPECTATOR*, no. 509, Oct. 14, 1712). The phrase means “[n]o real choice at all—the only options being to either accept or refuse the offer that is given to you,” i.e., take it or leave it. *The Meaning and Origin of the Expression: Hobson’s Choice*, THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/hobsons-choice.html> (last visited Feb. 22, 2013). The dilemma faced by the Sacketts and similarly situated individuals is not a take-it-or-leave-it choice but rather a lesser-of-two-evils choice.

13. *Sackett v. EPA*, No. 08-cv-185-N-EJL, 2008 WL 3286801, at *3 (D. Idaho Aug. 7, 2008), *aff’d*, 622 F.3d 1139 (9th Cir. 2010), *rev’d*, 132 S. Ct. 1367 (2012).

14. *Sackett v. EPA*, 622 F.3d 1139, 1147 (9th Cir. 2010), *rev’d*, 132 S. Ct. 1367 (2012).

15. 5 U.S.C. §§ 551–559, 701–706 (2012).

16. *Sackett v. EPA*, 131 S. Ct. 3092 (U.S. Jun. 28, 2011) (mem.).

17. *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

18. *Id.*

19. See *infra* note 154; *infra* Part III.A.3.

the waters.²⁰ Going even further back, Congress originally created this murky situation when it passed the APA.²¹ The APA was a compromise measure passed in response to the conservative congressmen's reaction to President Roosevelt's New Deal and the accompanying administrative regime.²² The New Dealers' goal of administrative "efficiency" threatened individual rights and caused conservatives to push for administrative reform to protect those rights.²³ Congress's supposed purpose for passing the APA was to balance these two competing objectives.²⁴ Since the APA's passage, however, "efficiency" has triumphed over individual rights.²⁵ Lying at the bottom of these murky legal waters is § 701(a) of the APA.²⁶ This provision allows subsequent statutes to preclude judicial review of agency actions taken to enforce that statute.²⁷ Courts have interpreted § 701(a) to mean that the statute can preclude judicial review explicitly or implicitly if

20. 33 U.S.C. § 1362(7) (2012).

Congress . . . should have . . . in the first place[] provide[d] a reasonably clear rule regarding the reach of the Clean Water Act. When Congress passed the Clean Water Act in 1972, it provided that the Act covers "the waters of the United States." But Congress did not define what it meant by "the waters of the United States"; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate. Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority.

Sackett, 132 S. Ct. at 1375 (Alito, J., concurring) (citation omitted). "Scalia joked in summarizing the decision from the bench that the Sacketts were surprised by the EPA's decision that their land contained 'waters of the United States,' since they had 'never seen a ship or other vessel cross their yard.'" Robert Barnes and Juliet Eilperin, *Supreme Court Allows Idaho Couple to Challenge EPA on Wetlands Ruling*, WASH. POST, Mar. 21, 2012, available at http://www.washingtonpost.com/politics/supreme-court-allows-idaho-couple-to-challengeepa-on-wetlands-ruling/2012/03/21/gIQAfgdsRS_story.html?wprss%02rss_politics.

21. 5 U.S.C. §§ 551–559, 701–706 (2012).

22. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558–61 (1996).

23. *Id.* at 1680.

24. *Id.*

25. *Id.* at 1681–83. Shepherd notes, "In most respects, the administration won the battle" over the nature of the APA, and "[t]he administration's interpretation [of the APA] has prevailed." *Id.* at 1681–82.

26. 5 U.S.C. § 701.

27. See *id.* ("This chapter applies . . . except to the extent that—(1) statutes preclude judicial review . . ."); *Sackett v. EPA*, 622 F.3d 1139, 1142–44 (9th Cir. 2010) (finding that the CWA impliedly precludes judicial review), *rev'd*, 132 S. Ct. 1367 (2012).

“congressional intent . . . is fairly discernable in the statutory scheme.”²⁸ Given the essence of due process, however, it is difficult to understand how courts have upheld this interpretation and even § 701(a) itself.²⁹ By enacting § 701(a), Congress essentially created an autonomous agency that would be its own judge, jury, and executioner.³⁰ This provision plainly contradicts what the Framers intended when they adopted the concept of separation of powers within the Constitution.³¹ Wrongs such as these compelled the Founders to sign the Declaration of Independence.³²

28. See, e.g., *Sackett*, 622 F.3d at 1143 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1367 (2012).

29. See *infra* Part III.B.

30. *Lou Dobbs Tonight: Is the EPA Out of Control?* (Fox Business television broadcast Oct. 18, 2011), available at <http://video.foxbusiness.com/v/1225418977001/is-the-epa-out-of-control> (“You’ve got an agency [EPA] here that answers to no one. They act as the judge, the jury, and the executioner on whatever they want to do.” (quoting Sen. James Risch (R-ID))).

31. See THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed [sic], or elective, may justly be pronounced the very definition of tyranny.”).

32. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (listing the King’s tyrannical wrongs that disregarded, supplanted, or undermined legitimate governments and laws and that concentrated power in the King).

[The King] has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

....

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

....

For depriving us in many cases, of the benefits of Trial by Jury:

....

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

Id.

This Note proposes that the laws and government officials of the United States must adhere to the fundamental principle Chief Justice Marshall referenced in *Marbury v. Madison*.³³ Chief Justice Marshall asserted that when legal rights are infringed, there must also be a legal remedy.³⁴ Since the infringement of legal rights nearly always involves a situation where someone acts without proper authority or refuses to act when compelled to do so by proper authority, a judicial determination of the infringing party's jurisdiction must be an available legal remedy.³⁵ Hence, the corollary to the *Marbury* principle is that an agency cannot exercise federal jurisdiction over private property without the availability of judicial review.³⁶ Accordingly, the courts should strike down as unconstitutional any statute that precludes judicial review.³⁷ Congress must also act to clear the murky legal waters by amending the APA and the CWA to conform to the due process protections guaranteed to property owners in the Constitution. The longer Congress

33. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

34. *Id.* at 163 ("In all other cases," [Blackstone] says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23)).

35. *Id.* at 162-66.

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

....

But when the legislature proceeds to impose on [an executive branch] officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

Id. at 165-66.

36. *See id.*

37. *Id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

fails to take these steps, the longer property owners will be denied true due process in disputes concerning whether their property is in fact subject to CWA jurisdiction.³⁸

Part II of this Note summarizes the legislative history of the APA, describes the pertinent provisions of the APA and the CWA, and provides the background of *Sackett v. EPA*. Using *Sackett* as the feature case, Part III demonstrates how the APA, the CWA, the environmental agencies, and the courts have created and maintained an oppressive regime that threatens private property owners such as the Sacketts. Finally, Part IV proposes specific actions that the courts and Congress must take to re-conform our legal system to the fundamental legal principles that comprise due process.

II. BACKGROUND

The issues in *Sackett* arise from the confluence of environmental law, administrative law, and constitutional law. To fully appreciate the significance of the issues presented in *Sackett*, one must have an understanding of the Administrative Procedure Act,³⁹ the Clean Water Act,⁴⁰ the interplay between the two Acts, and the judiciary's interpretation and application of them. This Part will examine the relevant laws and the background of *Sackett*.

A. *Administrative Compliance Orders, Judicial Review, and the Statutory Scheme*

The APA is the foundation of the administrative statutory scheme.⁴¹ Congress structured the APA to largely exempt administrative agencies from judicial review and to accommodate subsequent statutes addressing certain administrative areas of regulation.⁴² The CWA, being a subsequent statute that addresses the specific regulation of "waters of the United States," builds on the APA's foundation.⁴³ Consequently, one must interpret the CWA in light of the APA.⁴⁴

38. See *infra* Part III.B.

39. 5 U.S.C. §§ 551–559, 701–706 (2012).

40. Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251–1387 (2012).

41. See Shepherd, *supra* note 22, at 1558–59.

42. See, e.g., 5 U.S.C. § 701(a).

43. See, e.g., *id.* §§ 554, 556.

44. See, e.g., *id.*

1. The Administrative Procedure Act

The APA is the heart of administrative law. Author and law professor George B. Shepherd described the APA as “the bill of rights for the new regulatory state.”⁴⁵ In 1946, toward the close of the New Deal era, Congress passed the APA after a decade of debate and political struggles.⁴⁶ The impact and significance of the APA cannot be overstated. Describing this significance, Professor Shepherd wrote:

[T]he APA established the fundamental relationship between regulatory agencies and those whom they regulate—between government, on the one hand, and private citizens, business, and the economy, on the other hand. The balance that the APA struck between promoting individuals’ rights and maintaining agencies’ policy-making flexibility has continued in force, with only minor modifications, until the present. The APA’s impact has been large. It has provided agencies with broad freedom, *limited only by relatively weak procedural requirements and judicial review*, to create and implement policies in the many areas that agencies touch: from aviation to the environment, from labor relations to the securities markets. The APA permitted the growth of the modern regulatory state.⁴⁷

In detailing the history of the APA, Professor Shepherd noted that the key struggle over the APA involved the conservatives’ desire to protect individual rights through adequate procedures and judicial review and the New Dealers’ desire to increase agency “efficiency.”⁴⁸ “Efficiency” was actually a New Dealer code word that “meant agencies’ ability to implement

45. See Shepherd, *supra* note 22, at 1558. “In a new era of expanded government, [the APA] defined the relationship between government and governed,” much as the Bill of Rights did following the ratification of the Constitution. *Id.* at 1678.

46. See *id.* at 1558–61.

[T]he fight over the APA was a pitched political battle for the life of the New Deal. The more than a decade of political combat that preceded the adoption of the APA was one of the major political struggles in the war between supporters and opponents of the New Deal.

Id. at 1560.

47. *Id.* at 1558–59 (emphasis added) (footnote omitted).

48. *Id.* at 1680. In 1983, Professor Berman noted that numerous fields of administrative law, including environmental regulation, had achieved predominance over the prior structure that deferred more to self-regulation and individual rights. BERMAN, *supra* note 4, at 34.

New Deal programs quickly, without interference from either cumbersome procedural requirements or intrusive judicial review.”⁴⁹

In contrast, conservatives sought “individual rights,” which were individuals’ and businesses’ rights to prevent an agency from implementing New Deal programs unless the agency both jumped through numerous procedural hoops and received the blessing of a conservative federal judge—until late in the Roosevelt administration, most federal judges were conservatives who would often strike down New Deal programs. Strong individual rights would hinder implementation of New Deal programs because of both administrative and judicial procedural delay and because of judicial rejection of the programs.⁵⁰

This historical background is critical to understanding not only the issues in *Sackett* and similar cases but also how to resolve them.

One of the powers that the APA grants to an agency is the ability to issue legally binding orders.⁵¹ The APA defines an order as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.”⁵² The CWA expands this power by granting the EPA the ability to issue ACOs.⁵³ Regarding orders, including ACOs, the APA provides that “[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.”⁵⁴

Sections 701–706 of the APA contain the provisions concerning judicial review.⁵⁵ The Supreme Court has recognized that the APA “embodies the basic presumption of judicial review to one ‘suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.’”⁵⁶ The APA further states that “[a]gency action made reviewable by statute and final agency action for which there is

49. Shepherd, *supra* note 22, at 1680.

50. *Id.*

51. See, e.g., 5 U.S.C. §§ 554(e), 558(b) (2012).

52. *Id.* § 551(6); see also *id.* § 701(b)(2).

53. See *infra* Part II.A.2.

54. 5 U.S.C. § 558(b).

55. *Id.* §§ 701–706.

56. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977).

no other adequate remedy in a court are subject to judicial review.”⁵⁷ Section 701, however, created two exceptions to this presumption if (1) a particular subsequent statute, such as the CWA, “preclude[s] judicial review,” or (2) the “agency action is committed to agency discretion by law.”⁵⁸

2. The Clean Water Act

Congress first passed the CWA in 1948, when it was originally known as the Federal Water Pollution Control Act or FWPCA.⁵⁹ In 1972 and 1977, Congress amended and recodified the CWA.⁶⁰ Since 1977, when the Act became commonly known as the CWA,⁶¹ the CWA has remained largely unchanged.⁶² In general, the CWA “[e]stablished the basic structure for regulating pollutants discharges into the waters of the United States” and set “quality standards for all contaminants in surface waters.”⁶³ Included in the definition of pollutants are rocks, sand, and dirt.⁶⁴ In *Sackett*, the EPA’s ACO alleges that the Sacketts violated 33 U.S.C. § 1311(a).⁶⁵ This section prohibits a person from discharging pollutants except as provided for by law.⁶⁶ Section 309 of the CWA also provides the EPA with several enforcement options including the ability to seek administrative, civil, and criminal penalties.⁶⁷

Along with these enforcement options, the CWA also gives the EPA enforcement discretion.⁶⁸ Although the EPA has the option of bringing a civil action right away, its favored method of enforcement is issuing an

57. 5 U.S.C. § 704.

58. *Id.* § 701. Defining what types of actions are committed to agency discretion is an unsettled area of the law and the topic of considerable debate beyond the scope of this Note. For a discussion of this exception, see Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

59. ABA SECTION OF ENV’T, ENERGY, & RES., THE CLEAN WATER ACT HANDBOOK 6 (Mark A. Ryan ed., 2d ed. 2003).

60. *Id.*

61. *History of the Clean Water Act*, EPA, <http://www.epa.gov/lawsregs/laws/cwahistory.html> (last visited Oct. 16, 2011).

62. *Id.*

63. *Id.*

64. 33 U.S.C. § 1362(6) (2012).

65. *Sackett v. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010), *rev’d*, 132 S. Ct. 1367 (2012).

66. 33 U.S.C. § 1311(a) (2012).

67. *Id.* § 1319.

68. ABA SECTION OF ENV’T, ENERGY, & RES., *supra* note 59, at 223 & n.22.

ACO pursuant to § 309(a).⁶⁹ A violation of an ACO itself also constitutes a separate violation of the CWA and subjects the recipient to additional penalties.⁷⁰ After issuing the ACO, the EPA can impose administrative penalties,⁷¹ seek civil enforcement in the appropriate district court,⁷² and potentially bring criminal charges as well.⁷³

B. *Sackett v. EPA*

The Ninth Circuit's opinion in *Sackett v. EPA*⁷⁴ is a prime example of the problems inherent in the APA and the CWA. Judicial interpretations of these statutes have further compounded the problems in them.⁷⁵ While the

69. See Brief of the Chamber of Commerce of the U.S.A. as Amicus Curiae in Support of Petitioners at 5–7, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 4590831 at *5–7; 33 U.S.C. § 1319(a).

Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section [1311 of this title] . . . he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

Id. § 1319(a).

70. *Id.* § 1319(d) (“Any person who violates . . . any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation.”). Pursuant to its rule-making authority, the EPA has increased the maximum fine amount to \$37,500. 40 C.F.R. § 19.4 (2009).

71. *Id.* § 1319(g).

72. *Id.* § 1319(b), (d).

73. *Id.* § 1319(c).

74. *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010), *rev’d*, 132 S. Ct. 1367 (2012).

75. *E.g.*, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (holding that the Mine Safety and Health Act’s “administrative structure was intended to preclude district court jurisdiction over petitioner’s claims”); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 341, 351–53 (1984) (holding that the respondents could not seek judicial review under the APA of milk market orders issued by the Secretary of Agriculture because Congress intended to preclude judicial review) (“[W]here substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling. That presumption does not control in cases [where] the congressional intent to preclude judicial review is ‘fairly discernible’ in the detail of the legislative scheme.”); *S. Pines Assocs. v. United States*, 912 F.2d 713, 715 (4th Cir. 1990) (“The language, structure, objectives, and history of the CWA, persuade us that Congress intended to preclude judicial review.”); *Hoffman Grp., Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990) (“Congress has impliedly precluded judicial review of a [CWA] compliance order except in an enforcement proceeding.”).

Supreme Court's decision in *Sackett* did correct some of the lower courts' interpretations, other problems remain.

1. Factual Background

In 2005, Mike and Chantell Sackett bought a lot in a subdivision near Priest Lake, Idaho for \$23,000.⁷⁶ In preparation to build their family residence, the Sacketts began filling their lot with dirt and gravel in April and May of 2007.⁷⁷ Federal officials arrived and ordered the Sacketts to stop because their lot contained a wetland subject to CWA jurisdiction.⁷⁸ On November 26, 2007, the EPA issued an ACO against the Sackets alleging that the Sacketts had filled in a wetland subject to CWA jurisdiction without a CWA § 404 permit.⁷⁹ The ACO directed "the Sacketts to remove the fill material and restore the Parcel to its original condition."⁸⁰ The ACO also stated that failure to comply could result in "civil penalties of up to \$32,500 per day of violation [or] . . . administrative penalties of up to \$11,000 per day for each violation."⁸¹ The cost to remove the fill material was \$27,000.⁸²

Interestingly, the EPA had not required any of the Sacketts' neighbors to get a § 404 permit to improve their properties.⁸³ The Sacketts, however, contended that they obtained all of the necessary building permits.⁸⁴ In fact, even after the Sacketts checked to make sure that their property was not on the EPA's online wetlands inventory,⁸⁵ they received further oral confirmation that a § 404 permit was not required after Mrs. Sackett

76. *Sackett*, 622 F.3d at 1141; Greg Stohr, *Mike and Chantell Sackett vs. the EPA*, BLOOMBERG BUS.WK. (Aug. 11, 2011), <http://www.businessweek.com/magazine/mike-and-chantell-sackett-vs-the-epa-08112011.html>.

77. *Sackett*, 622 F.3d at 1141.

78. Stohr, *supra* note 76.

79. *Sackett*, 622 F.3d at 1141 & n.1. Section 404 governs the process for obtaining a permit to legally fill or alter a wetland subject to CWA jurisdiction. 33 U.S.C. § 1344 (2012).

80. *Sackett*, 622 F.3d at 1141.

81. *Id.* Pursuant to its rule-making authority, the EPA has since increased the maximum penalty to \$37,500. 40 C.F.R. § 19.4 (2009). Because a violation of an ACO is separate from the underlying statutory violation for which the ACO was issued, in the EPA's view, the fines are effectively doubled for a potential maximum of \$75,000 per day. *Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012).

82. *Fact Sheet*, *supra* note 9, at 1.

83. *Id.*

84. *Id.*

85. *Id.*

consulted with an Army Corps of Engineers official.⁸⁶ After receiving the ACO, the Sacketts also hired an engineer who concluded in his report that the property did not contain wetlands subject to CWA jurisdiction.⁸⁷ Nonetheless, the EPA refused to grant the Sacketts a hearing or opportunity to contest whether their lot was subject to CWA jurisdiction.⁸⁸ The Sacketts then filed suit in the United States District Court for the District of Idaho seeking declaratory and injunctive relief.⁸⁹

2. Procedural History

After the Sacketts filed suit, the EPA quickly moved to dismiss for lack of subject-matter jurisdiction.⁹⁰ In a sparsely reasoned opinion, the court held, in contrast to the Sacketts' contention, that the EPA's ACO was not reviewable under the APA because it did not constitute final agency action.⁹¹ Accordingly, the court granted the EPA's motion to dismiss.⁹²

On appeal, the Ninth Circuit reviewed the district court's dismissal and considered the Sacketts' three grounds for challenging the validity of the ACO.⁹³ The Sacketts contended that the ACO was "(1) arbitrary and capricious under the . . . [APA], 5 U.S.C. § 706(2)(A); (2) issued without a hearing in violation of the Sacketts' procedural due process rights; and (3) issued on the basis of an 'any information available' standard that is unconstitutionally vague."⁹⁴ Recognizing that the CWA does not expressly provide for the availability of pre-enforcement judicial review of an ACO, the Ninth Circuit considered whether Congress prohibited such review by

86. Stohr, *supra* note 76. The Corps is the agency responsible for issuing permits described in CWA § 404(a) and (d) to dredge or fill wetlands. See 33 U.S.C. § 1344(a), (d) (2012).

87. *Fact Sheet*, *supra* note 9, at 2.

88. *Sackett v. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1367 (2012).

89. *Id.*

90. *Sackett v. EPA*, No. 08-cv-185-N-EJL, 2008 WL 3286801, at *1 (D. Idaho Aug. 7, 2008), *aff'd*, 622 F.3d 1139 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1367 (2012).

91. *Id.* at *2. The court also found that the Sacketts had not carried their burden of proving that the government had waived its sovereign immunity. *Id.* On appeal, the Ninth Circuit did not address this issue. See *Sackett*, 622 F.3d at 1147.

92. *Sackett*, 2008 WL 3286801, at *3.

93. *Sackett*, 622 F.3d at 1141.

94. *Id.*

implication.⁹⁵ The Ninth Circuit held that Congress intended to preclude pre-enforcement judicial review of ACOs.⁹⁶

The court then examined the Sacketts' due process claim.⁹⁷ Interestingly, the court found that "[t]he civil penalty provision of the CWA is 'not a model of clarity.'"⁹⁸ The court also recognized that "[i]f the CWA is read in the literal manner the Sacketts suggest, it could indeed create a due process problem."⁹⁹ Yet in spite of these recognitions, the court rejected this interpretation of the CWA and held "that precluding pre-enforcement judicial review of CWA compliance orders does not violate due process."¹⁰⁰

In reaching its conclusion, the court glossed over the Sacketts' predicament: either comply without an opportunity to challenge the validity of the ACO or remain in violation and risk mounting administrative, civil, and possibly criminal penalties if the EPA decides to bring an enforcement action in the district court.¹⁰¹ The court highlighted an avenue of review available to the Sacketts by noting that they "could seek a permit to fill their property and build a house, the denial of which would be immediately appealable to a district court under the APA."¹⁰² The court also noted that if the EPA brought an enforcement action, the district court, not the EPA, would determine the civil penalties based on the six factors in § 309 of the CWA.¹⁰³ Based on this reasoning, the court found that the CWA's provision

95. *Id.* at 1142–43.

96. *Id.*

97. *Id.*

98. *Id.* at 1145 (quoting *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990)).

99. *Id.* The Sacketts read the CWA to mean that they are at risk of incurring "substantial financial penalties for violating the [ACO], even if they did not violate the CWA [itself], if the EPA establishes in an enforcement proceeding that the [ACO] was validly issued based on 'any information available.'" *Id.*

100. *Id.* at 1145, 1147.

101. *Id.* at 1146–47.

102. *Id.* at 1145–46 (citing 33 C.F.R. § 331.10 and 5 U.S.C. § 704). The EPA admits, however, that the Corps rarely grants Section 404 permits under these circumstances. See Brief for Respondents at 31–32, 50–51, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10–1062), 2011 WL 5908950 at *31–32, *50–51. Moreover, "getting a CWA permit is an exhausting and costly process. On average, such permits cost about \$270,000 and take more than two years to obtain." Timothy Sandefur, *Compliance—or Else: The EPA's Compliance Order Regime Creates a Hobson's Choice*, REGULATION, Winter 2011–2012, at 8, 10, available at <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2012/5/v34n4-2.pdf>.

103. In assessing the amount of the penalty, courts "shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history

for daily accrual of penalties for CWA violations did not violate due process and affirmed the district court's decision.¹⁰⁴

Following the Ninth Circuit's decision, the Supreme Court granted certiorari but reframed the question presented into two separate issues¹⁰⁵: (1) whether the APA precludes pre-enforcement judicial review of ACOs, and (2) if the APA does preclude it, whether the unavailability of pre-enforcement judicial review is a violation of due process.¹⁰⁶ Finding that the APA does not preclude pre-enforcement judicial review, the Supreme Court reversed the Ninth Circuit and remanded the case, clearing the way for the Sacketts to proceed with their action against the EPA.¹⁰⁷

III. PROBLEM

While the Supreme Court's decision in *Sackett* is a victory for private property rights, the extent of that victory remains to be seen. Given the environmental agencies' response to past Supreme Court decisions, the outlook is not promising.¹⁰⁸ Meanwhile, the struggle between individual rights and agency "efficiency"¹⁰⁹ continues in the environmental context. Unfortunately, the Supreme Court's reframing of the questions presented partially obscured the key issue of the environmental agencies' ability to arbitrarily determine the extent of CWA jurisdiction.¹¹⁰ Additionally, because the Supreme Court ruled in the Sacketts' favor on the first issue, it was not required to consider the second issue, which is even more important than the first. This Part evaluates both issues by examining the Supreme Court's opinions in *Sackett*, by discussing the lost fundamental principles of *Marbury v. Madison*,¹¹¹ by demonstrating why jurisdiction is

of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." *Sackett*, 622 F.3d at 1145–46 (citing 33 U.S.C. § 1319(d)).

104. *Id.* at 1145, 1147.

105. Damien M. Schiff, *Sackett v. EPA: Compliance Orders and the Right of Judicial Review*, 11 CATO SUP. CT. REV. 113, 122 (2012). Damien Schiff was the counsel of record for the Sacketts in *Sackett v. EPA*. *Id.* at n.*.

106. *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3092 (U.S. Jun. 28, 2011) (No. 10-1062).

107. *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

108. *See infra* Part III.A.3.

109. *See supra* text accompanying notes 45–50.

110. Schiff, *supra* note 105, at 122.

111. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

critical to this discussion—especially in light of past abuses by the environmental agencies—and by examining the essence of due process.

A. *Judicial Review and the APA*

The *Sackett* Court only decided the threshold issue of whether pre-enforcement judicial review of the ACO is available under the APA.¹¹² The Court repudiated the lower courts that had agreed with the EPA's basic position that pre-enforcement judicial review is not available under the CWA.¹¹³ In reaching this decision, the Court applied the APA's presumption of judicial review and found no implicit preclusion in the CWA scheme.¹¹⁴ While this is an encouraging recognition by the Court, it does little to resolve the underlying problem with the APA because it leaves intact the notion that judicial review can be explicitly or implicitly precluded.¹¹⁵ Regrettably, the Court also failed to consider the fundamental principles concerning judicial review outlined in *Marbury v. Madison*.¹¹⁶ Pre-enforcement judicial review is especially important given the current existence of the administrative state and its acceptance by the three branches of the United States Government. A proper understanding of jurisdiction and its relationship to judicial review, however, would provide a stronger and broader basis of relief for all private property owners potentially threatened by the environmental agencies' overextension of CWA jurisdiction.

1. The Supreme Court's Decision

Writing for a unanimous Court, Justice Scalia¹¹⁷ began the Court's analysis by considering whether the ACO constituted final agency action

112. *Sackett*, 132 S. Ct. at 1374.

113. *Id.*

114. *Id.*

115. 5 U.S.C. § 704 (2012).

116. According to Professor Jeffrey Tuomala, Chief Justice Marshall believed "that judicial review is part and parcel of the judicial power." Jeffrey C. Tuomala, *Marbury v. Madison and the Foundation of Law*, 4 LIBERTY U. L. REV. 297, 310 (2010). Writers addressing *Marbury* have erred when "they make a distinction between judicial power and the power of judicial review, a distinction that Marshall did not make." *Id.* at 310 n.69.

117. It is worth noting that Justice Scalia's specialty is administrative law. Michael A. Perino, *Justice Scalia: Standing, Environmental Law, and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135, 135 (1987). From 1981–1982, he was the chairman of the American Bar Association's Section of Administrative Law. *Biographies of Current Justices of the Supreme*

under § 704 of the APA.¹¹⁸ To answer this question, the Court analyzed the finality of the order.¹¹⁹ Drawing on past precedent to determine finality, the Court focused on three elements: (1) whether the EPA's ACO had determined the Sacketts' rights or obligations; (2) whether "legal consequences . . . flow from issuance of the [ACO]"; and (3) whether "the issuance of the [ACO] also marks the consummation of the agency's decisionmaking process."¹²⁰ Answering each of these questions in the affirmative, the Court found that the ACO constituted final agency action.¹²¹

The Court next considered the APA's other requirement that the Sacketts had "no other adequate remedy in a court."¹²² By noting that the EPA must initiate a civil enforcement action for the matter to be reviewed by a federal district court, the Court immediately recognized the Sacketts' dilemma.¹²³ The Court specifically rejected the other avenue of review that the Ninth Circuit had identified for the Sacketts:

But the Sacketts cannot initiate [the enforcement] process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional \$75,000 in potential liability. The other possible route to judicial review—applying to the Corps of Engineers for a permit and then filing suit under the APA if a permit is denied—will not serve either. The remedy for denial of action that might be sought from one

Court: Antonin Scalia, Associate Justice, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Mar. 9, 2013).

118. *Sackett*, 132 S. Ct. at 1371.

119. *Id.* at 1371–72.

120. *Id.* (citations omitted) (internal quotation marks omitted). The Court rejected the EPA's contention that the ACO was not final because it invited the Sacketts "to engage in informal discussion" about the ACO since it "confer[red] no entitlement to further agency review." *Id.* at 1372 (citations omitted) (internal quotation marks omitted). The Court continued, "The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal." *Id.*

121. *Id.* at 1371–72.

122. *Id.* at 1372 (citing 5 U.S.C. § 704).

123. *Id.*

agency does not ordinarily provide an “adequate remedy” for action already taken by another agency.¹²⁴

Having addressed § 704, the Court next considered whether the CWA implicitly precluded judicial review as permitted by § 701.¹²⁵ By glossing over § 701, the Court yet again implicitly accepted its provisions and skipped the opportunity to address the propriety of § 701. Starting with the APA’s presumption in favor of judicial review, the Court proceeded to determine whether the presumption was “overcome by inferences of intent drawn from the statutory scheme as a whole.”¹²⁶ In the Court’s view, the cases “on which the [EPA] relie[d] simply [we]re not analogous.”¹²⁷ The Court also dismissed the EPA’s last argument that Congress authorized ACOs to remedy inefficient enforcement of the CWA and that, if ACOs are subject to judicial review, the EPA would be less likely to use them.¹²⁸ Justice Scalia responded:

That may be true—but it will be true for all agency actions subjected to judicial review. The APA’s presumption of judicial review is a *repudiation of the principle that efficiency of regulation conquers all*. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into “voluntary compliance” without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA’s jurisdiction. [ACOs] will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.¹²⁹

124. *Id.* At oral argument, Chief Justice Roberts asked the EPA’s counsel Mr. Stewart what he would do if he was in the Sackett’s position. When Mr. Stewart began to mention the option of applying for an after-the-fact § 404 permit, the Chief Justice interrupted him, saying, “You wouldn’t do that, right? You know you will never get an after-the-fact permit if the EPA has sent you a compliance order saying you’ve got wetlands.” Transcript, *supra* note 11, at 36–37.

125. *Sackett*, 132 S. Ct. at 1372.

126. *Id.* at 1373 (citing *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)).

127. *Id.*

128. *Id.* at 1374.

129. *Id.* (emphasis added). This passage reveals Justice Scalia’s awareness of the APA’s history. See *supra* Part II.A.1.

With that, the Court reversed and remanded, holding that the Sacketts could seek pre-enforcement judicial review of the ACO under the APA because the CWA does not preclude such review.¹³⁰

The Court's decision marks a step in the right direction. Nonetheless, many issues remain unresolved. Although this holding allows people and entities like the Sacketts to challenge final agency actions by the environmental agencies, there is nothing to prevent Congress from passing an amendment to the CWA that *explicitly* precludes judicial review based on § 701(a).¹³¹ Thus, while the problem is alleviated, the threat § 701(a) poses still lurks.¹³²

Two succinct concurring opinions accompanied the unanimous decision. Justice Ginsburg briefly highlighted that the Court was only recognizing the Sacketts' right to challenge the EPA's jurisdiction over their property.¹³³ She further noted that the Court had not decided whether the Sacketts could challenge the terms and conditions of the ACO at the pre-enforcement stage.¹³⁴ Whether the Court's holding is actually that narrow is questionable given its wording.¹³⁵ But even if Justice Ginsburg is correct, it further highlights that the Court's solution does not do enough to vindicate private property rights.¹³⁶

Justice Alito's concurrence first scathingly rebuked the EPA's treatment of the Sacketts and the enabling statutory and regulatory scheme.¹³⁷ He

130. *Sackett*, 132 S. Ct. at 1374.

131. 5 U.S.C. § 701(a) (2012).

132. In considering the Supreme Court's decision, the Sacketts' attorney wrote, Although the Court's opinion does not address this underlying jurisdictional issue, it is fair to interpret the opinion as an acknowledgment that the law is not clear, a fix has to be provided, and that the fix will come from the judiciary if Congress or the agencies do not act.

Schiff, *supra* note 105, at 130.

133. *Sackett*, 132 S. Ct. at 1374 (Ginsburg, J., concurring).

134. *Id.* at 1374-75.

135. *Id.* at 1374 (majority opinion) ("We conclude that the compliance order *in this case* is final agency action for which there is no adequate remedy other than APA review" (emphasis added)). The Sacketts' attorney believes that Justice Ginsburg's approach is what future courts will apply to the *Sackett* decision. Schiff, *supra* note 105, at 134.

136. See *infra* Part IV.

137. *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). Justice Alito also took the EPA's counsel to task during oral argument:

Well, so what? Somebody from the EPA says we think that your backyard is a wetlands; so, don't build. So, what do we -- what does the homeowner do, having bought that property?

remarked, "In a nation that values due process, not to mention private property, such treatment is unthinkable."¹³⁸ The rest of Justice Alito's concurrence laments the deleterious effect of the current statutory and regulatory scheme on private property rights and Congress's failure to do anything about it.¹³⁹ He specifically calls on Congress to clear the muddied waters by doing "what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act."¹⁴⁰

2. *Marbury's* Fundamental Principles

Marbury v. Madison is well-known in the legal profession as one of the cornerstone cases of American jurisprudence.¹⁴¹ The narrow issues in the case were whether Marbury had a right to his commission as Justice of the Peace; if so, whether Marbury had a remedy under the laws of the United States; and, if so, whether that remedy was a writ of mandamus from the Supreme Court.¹⁴² Chief Justice Marshall, however, took the opportunity to broadly examine and expound on the nature of government power and jurisdiction.¹⁴³ Chief Justice Marshall declared, "The very essence of civil liberty certainly consists in the right of every individual to claim the

....

... Well, all right, I'm just going to put it aside as a nature preserve.

....

That makes the EPA's conduct here even more outrageous: We -- we think now that this is wetlands that are -- that qualify; so, we're going to hit you with this compliance order, but, you know, when we look into it more thoroughly in the future, we might change our mind.

Transcript, *supra* note 11, at 38–39, 53.

138. *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring).

139. *Id.*

140. *Id.*

141. Gregory J. Roden, *Unborn Children As Constitutional Persons*, 25 ISSUES L. & MED. 185, 209–10 (2010) (hailing *Marbury v. Madison* "as the very cornerstone of Supreme Court jurisprudence"); Sidney St. F. Thaxter, *Will Bell v. Town of Wells Be Eroded with Time?*, 57 ME. L. REV. 117, 132 (2005) (declaring that *Marbury v. Madison* is "still one of the cornerstones of jurisprudence"); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1043 (2007) (calling *Marbury v. Madison* a cornerstone of our whole judicial system); see also Tuomala, *supra* note 116, at 297–98 & n.2 (noting that *Marbury* is one of the first cases that law students study in a constitutional law course and that the original *Marbury* decision is "the only Supreme Court case on display in the company of the Declaration of Independence and the United States Constitution" at the National Archives).

142. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154 (1803).

143. See *id.* at 138–180.

protection of the laws, whenever he receives an injury.”¹⁴⁴ Chief Justice Marshall then affirmed the fundamental principle that Blackstone recounted in his *Commentaries*, namely, that “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.”¹⁴⁵ The Supreme Court has affirmed these principles as recently as 1992.¹⁴⁶ Later in his opinion in *Marbury*, Chief Justice Marshall explained the jurisdiction of an executive officer:

But when the legislature proceeds to impose on [an executive branch] officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and *cannot at his discretion sport away the vested rights of others*.¹⁴⁷

Thus, based on this explanation, a government official (or entity) may not lawfully affect legal rights without having proper jurisdiction over the property or person.¹⁴⁸ This principle of jurisdiction is so basic that it is one of the first components of a civil complaint.¹⁴⁹ Hence, the corollary to the principle *Marbury* quotes from Blackstone is that the federal government cannot exercise jurisdiction without the availability of judicial review.¹⁵⁰

144. *Id.* at 163.

145. *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

146. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 66–67 (1992) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163, and 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

147. *Marbury*, 5 U.S. (1 Cranch) at 166 (emphasis added).

148. *See id.*

149. FED. R. CIV. P. 8(a)(1) (“A pleading that states a claim for relief must contain . . . a short and plain statement of the grounds for the court’s jurisdiction . . .”).

150. *See Marbury*, 5 U.S. (1 Cranch) at 165–66.

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

....

But when the legislature proceeds to impose on [an executive branch] officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

While *Marbury* did not receive the remedy he sought, he did have the opportunity to file suit and be heard by a court.¹⁵¹ Until the Supreme Court's decision in *Sackett*, the Sacketts and similarly situated property owners had been denied even this opportunity.¹⁵² The initial remedy that they sought—to be heard and have a judge evaluate the factual and legal basis for the EPA's jurisdictional determination—has finally been granted. Nonetheless, the current state of affairs for property owners subject to the EPA's imposition of CWA jurisdiction still leaves much to be desired. Because the CWA's current structure is far removed from the foundational principles in *Marbury*, the EPA has, and still can, “sport away the vested rights”¹⁵³ of people like the Sacketts.¹⁵⁴

3. The Environmental Agencies' History of Overextending CWA Jurisdiction

Section 558(b) of the APA states that “[a] sanction may not be imposed or a substantive rule or order issued *except within jurisdiction delegated to the agency and as authorized by law.*”¹⁵⁵ The problem is that the exact extent of the jurisdiction that Congress has delegated to the environmental

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

Id.; see also *supra* note 35 and accompanying text.

151. See generally *id.*

152. *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

153. *Marbury*, 5 U.S. (1 Cranch) at 166.

154. Indeed, less than two months after the Supreme Court handed down its decision, a news article reported that the director of the EPA's water enforcement division commented that the *Sackett* decision would have little impact on the EPA's actions: “‘What’s available after *Sackett*? Pretty much everything that was available before *Sackett*,’ Mark Pollins, director of EPA’s water enforcement division, said. [. . .] ‘Internally, it’s same old, same old.’” *News Release: Senators Urge EPA to Heed Supreme Court Decision*, U.S. SENATOR MIKE CRAPO (May 31, 2012), http://www.crapo.senate.gov/media/newsreleases/release_full.cfm?id=336914 (alteration in original) (citations omitted). Citing these comments, sixteen U.S. Senators wrote a letter requesting an explanation. *Id.*

155. 5 U.S.C. § 558(b) (2012) (emphasis added).

agencies by the CWA is far from clear.¹⁵⁶ The agencies, however, have decided to take matters into their own hands and make their own jurisdictional determinations.¹⁵⁷ By doing so, the environmental agencies have vastly overextended CWA jurisdiction over lands that do not even contain surface water.¹⁵⁸

The Supreme Court has reprimanded the environmental agencies for unreasonably overextending CWA jurisdiction in two recent cases: *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*¹⁵⁹ ("SWANCC") and *Rapanos v. United States*.¹⁶⁰ In SWANCC, a consortium of municipalities sought to construct a waste disposal site at an abandoned sand and gravel pit.¹⁶¹ Due to several decades of nonuse, the property contained some ponds that migratory birds used.¹⁶² Realizing that a Section 404 permit might be required to fill and alter some of these ponds, the municipalities consulted with the Corps.¹⁶³ The Corps responded that under its "Migratory Bird Rule," the ponds on the mining site fell within "the waters of the United States" language of the CWA because migratory birds used the ponds.¹⁶⁴ Later, the Corps denied the municipalities'

156. *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear.").

157. The Corps and the EPA have entered into various agreements delineating the role each of them would have in implementing and enforcing the CWA. See 33 U.S.C. § 1344(c) (2012) (providing that the EPA may override permits granted by the Corps); MARGARET "PEGGY" STRAND & LOWELL M. ROTHSCILD, *WETLANDS DESKBOOK* 14–15 (3d ed. 2009); *Memorandum of Agreement Between the Department of the Army and the EPA*, U.S. ENVTL. PROTECTION AGENCY, <http://water.epa.gov/lawsregs/guidance/wetlands/enfoma.cfm> (last visited Mar. 25, 2013).

158. Virginia S. Albrecht & David Isaacs, *Wetlands Jurisdiction and Judicial Review*, 7 NAT. RES. & ENV'T, no. 1, Summer 1992, at 31. The authors stated,

[The] EPA expanded federal authority . . . by continuously redefining wetlands delineation methodology to reach progressively drier areas. The culmination was a 1989 manual that defined certain areas as having wetlands hydrology if the water table rose to eighteen inches beneath the surface for seven days a year. Thus, an area did not even have to be wet at the surface to qualify as a wetland.

Id.

159. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (5–4 decision).

160. *Rapanos v. United States*, 547 U.S. 715 (2006) (4–1–4 decision).

161. SWANCC, 531 U.S. at 162–63.

162. *Id.* at 163–64.

163. *Id.* at 163.

164. *Id.* at 164–65.

application for a § 404 permit.¹⁶⁵ Disagreeing with the Corps's decision and its jurisdictional determination, the municipalities filed suit pursuant to § 701 of the APA and asked the district court to invalidate the Migratory Bird Rule.¹⁶⁶ The district court granted summary judgment for the Corps, and the Seventh Circuit affirmed.¹⁶⁷

The Supreme Court reversed, finding that Congress did not intend for the CWA to extend to isolated bodies of water, such as the ponds at issue.¹⁶⁸ Furthermore, the Court struck down the Migratory Bird Rule, stating that it was not supported by the text of the CWA.¹⁶⁹ The Court noted that to allow the Migratory Bird Rule to stand "would result in a significant impingement of the States' traditional and primary power over land and water use."¹⁷⁰ Nevertheless, since the Corps issued the Migratory Bird Rule in 1986, the Corps had impinged on states' rights for fifteen years.¹⁷¹

Just a few years later, the Corps and similar issues were again before the Supreme Court in *Rapanos v. United States* and *Carabell v. Army Corps of Engineers*.¹⁷² In *Rapanos*, the Corps successfully pursued civil and criminal penalties against the petitioners for allegedly filling in wetlands without a § 404 permit.¹⁷³ The Corps contended that the sometimes-saturated fields that Rapanos sought to develop were "waters of the United States"¹⁷⁴ even though "[t]he nearest body of navigable water was 11 to 20 miles away."¹⁷⁵ In *Carabell*, the petitioners filed an action under the APA against the Corps for denying them a § 404 permit to fill in an isolated wetland, which only occasionally overflowed into a ditch that eventually connected to a lake

165. *Id.* at 165.

166. *Id.*

167. *Id.* at 165–66.

168. *Id.* at 174.

169. *Id.* at 167.

170. *Id.* at 174.

171. *See id.* at 164. The Court further noted, "The Corps issued the 'Migratory Bird Rule' without following the notice and comment procedures outlined in the Administrative Procedure Act, 5 U.S.C. § 553," providing yet another example of the environmental agencies' arrogance. *Id.* at 164 n.1.

172. *Rapanos v. United States*, 547 U.S. 715 (2006) (4–1–4 decision). These two cases—*Rapanos* and *Carabell*—were consolidated into *Rapanos*.

173. *Id.* at 719–21.

174. *Id.* at 719–20 (quoting 33 U.S.C. § 1362(7), the CWA's broad and vague definition of the waters subject to its jurisdiction).

175. *Id.* at 720.

about one mile away.¹⁷⁶ Both the district court and the Sixth Circuit held for the Corps.¹⁷⁷ The Supreme Court considered “whether these wetlands constitute ‘waters of the United States’ under the [CWA], and if so, whether the Act is constitutional.”¹⁷⁸ This determination hinged on the validity of the Corps’s regulations, which defined “waters of the United States” as including wetlands adjacent to interstate navigable waters.¹⁷⁹

The Court ruled against the Corps in both cases, finding that “[t]he Corps’ expansive interpretation of the [phrase] ‘the waters of the United States’ is . . . not ‘based on a permissible construction of the statute.’”¹⁸⁰ Writing for the plurality, Justice Scalia put forth a two-part test.¹⁸¹ First, the channels adjacent to the wetlands must contain a water of the United States, which he defined as “a relatively permanent body of water connected to traditional interstate navigable waters.”¹⁸² Second, “the wetland [must have] a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”¹⁸³ The plurality also noted that following the SWANCC decision the Corps failed to “significantly revise its theory of federal jurisdiction under [the CWA]” and continued to circumvent the Court’s ruling and guidance.¹⁸⁴ Justice Scalia then excoriated the Corps, writing that it “exercises the discretion of an enlightened despot.”¹⁸⁵ He continued,

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations. In the last three decades, the Corps

176. *Id.* at 730.

177. *Id.*

178. *Id.*

179. *Id.* at 724 (citing 33 C.F.R. § 328.3).

180. *Id.* at 739, 757 (citation omitted).

181. *Id.* at 742. In the 4-1-4 split, Chief Justice Roberts and Justices Thomas and Alito joined Justice Scalia. *Id.* at 718. Justice Kennedy concurred in the judgment but proposed a “significant nexus” test based on earlier precedent. *Id.* at 759 (Kennedy, J., concurring) (quoting *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001)).

182. *Id.* at 742.

183. *Id.*

184. *Id.* at 726.

185. *Id.* at 721.

and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over “the waters of the United States” to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated “waters of the United States” include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory “waters of the United States” engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a “water of the United States.”¹⁸⁶

SWANCC, *Rapanos*, and now *Sackett* demonstrate that the environmental agencies¹⁸⁷ cannot be trusted to define the jurisdiction of the CWA.¹⁸⁸ It is unfortunate that Congress has left this power in the environmental agencies’ hands, especially since the Supreme Court has been only an occasional check on this power—and a limited one at that.¹⁸⁹ Additionally, the environmental agencies continue to find ways to circumvent the Supreme Court’s corrections by arbitrary enforcement, by promulgating new regulations defining which waters—or wet or even dry ground, as the case may be—are subject to CWA jurisdiction, or by simply

186. *Id.* at 722.

187. Although the EPA was not a party in SWANCC and *Rapanos*, and the Corps was not a party in *Sackett*, the EPA and the Corps cooperate on CWA implementation, permitting, and enforcement. See *supra* note 157.

188. For further examples of the environmental agencies’ incorrigibility, see *Wetlands*, *supra* note 5, at 141–49.

189. See *supra* note 154.

disregarding the Supreme Court's decisions altogether.¹⁹⁰ Such agency actions illustrate the necessity of congressional intervention.

B. Due Process

The second question presented in *Sackett* was whether the unavailability of pre-enforcement judicial review is a violation of due process.¹⁹¹ As noted above, the Supreme Court did not reach this issue.¹⁹² While the Supreme Court's holding is a step in the right direction, the relief that it provides is limited.¹⁹³ Hence, private property owners' due process rights are still subject to infringement.

1. The Essence of Due Process

Due process is a fundamental concept deeply rooted in the common law tradition.¹⁹⁴ In *Commentaries on the Constitution*, Justice Story traced the history of the phrase "due process of law" back to the Magna Carta and wrote that "this clause in effect affirms the right of trial according to the process and proceedings of the common law."¹⁹⁵

190. See *supra* notes 5, 154, 158.

191. *Sackett v. EPA*, 131 S. Ct. 3092 (Jun. 28, 2011) (mem.).

192. See *Sackett v. EPA*, 132 S. Ct. 1367, 1371, 1374 (2012).

193. *Id.* at 1375 (Alito, J., concurring) (noting that "[t]he Court's decision provides a modest measure of relief" and that most property owners are left "with little practical alternative but to dance to the EPA's tune").

194. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* § 1783 (Boston, Little, Brown & Co. 1833).

195. *Id.* Expounding further, Justice Story continued:

[The Due Process Clause] is but an enlargement of the language of magna charta, "*nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum, vel per legem terrae*," neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land. Lord Coke says, that these latter words, *per legem terrae* (by the law of the land,) mean by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.

Id. Professor Berman wrote, "Due process of law" is, in fact, a fourteenth-century English phrase meaning natural law." BERMAN, *supra* note 4, at 12. Accordingly, he concludes that "natural-law theory is written into the positive law of the United States." *Id.* Given this background, the root problem of the environmental agencies' enforcement of the CWA involves not only a struggle between private property rights and agency efficiency but also the respective bodies of law from which these opposing ideas ultimately originate: natural

Although the Supreme Court has held that “[d]ue process is flexible and calls for such procedural protections as the particular situation demands,”¹⁹⁶ this does not mean that the principles of due process change over time. Rather, this flexibility is merely a recognition that the principles of due process are portable and applicable in whatever context may be at hand.¹⁹⁷ Indeed, the Court has consistently recognized certain themes as inherent in due process. In 1863, a few years before the Fourteenth Amendment was adopted, the Court declared, “Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence.”¹⁹⁸ More than one hundred years later, the Court affirmed this principle by stating that “the central meaning of procedural due process [is] clear: ‘Parties whose rights are to be affected are entitled to be heard.’”¹⁹⁹ In *Armstrong v. Manzo*,²⁰⁰ the Court further recognized that “[a] fundamental requirement of due process is ‘the opportunity to be heard.’ It is an opportunity which must be granted at a meaningful time and in a meaningful manner.”²⁰¹ Additionally, in *Mathews v. Eldridge*, the Supreme Court identified three factors for evaluating due process claims:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function

law (i.e., the law of nature) and positive law respectively. For further discussion of the law of nature, see generally *id.* and Tuomala, *supra* note 116.

196. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal quotation marks omitted).

197. The author disagrees with the following formulation from the *Mathews* Court: “[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Id.* (internal quotation marks omitted). Rather, the author agrees with Professor Berman that due process derives from fixed principles contained in natural law that are equally applicable to time, place, and circumstances. See BERMAN, *supra* note 4, at 12. The fact that positive law has established an administrative regime does not mean that due process must conform to the procedures of that regime. On the contrary, the administrative law regime must conform to the enduring principles of due process.

198. *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863).

199. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin*, 68 U.S. (1 Wall.) at 233).

200. *Armstrong v. Manzo*, 380 U.S. 545 (1965).

201. *Id.* at 552 (citation omitted).

involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁰²

Not only do all of these statements demonstrate that, over the past two centuries, the Court has held a fairly consistent view of due process, but they also generally reflect the concept of due process that Justice Story espoused²⁰³ and comport with the principles articulated in *Marbury*.²⁰⁴

Against this historical backdrop, it is difficult to understand how the courts, such as the Ninth Circuit in *Sackett*, continue to hold that a statute can preclude judicial review.²⁰⁵ As Professor Jonathan Adler rightly observed, “What should be clear . . . is that the right to be heard cannot be meaningful if the government is free to penalize it.”²⁰⁶ Moreover, administrative agencies are not exempt from the requirement of due process:

The Supreme Court has recognized that an administrative action need not, by itself, deprive a landowner of title or impose direct financial consequences in order to amount to a cognizable deprivation for due process purposes. In *Connecticut v. Doehr*, for instance, the Court explained that “even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection.” On this basis, lower courts have found that even nonpossessory attachments are sufficient to trigger due process protections.²⁰⁷

The Supreme Court’s decision in *Sackett* reversed this flawed mindset in the context of the CWA. Still, it is difficult to comprehend how Congress and the judiciary have allowed the foundation for preclusion—§ 701 of the APA—to stand for several decades.²⁰⁸ As the administrative state has become more established and accepted, however, one can sense the struggle

202. *Mathews*, 424 U.S. at 335.

203. STORY, *supra* note 194, § 1783.

204. See *supra* Part III.A.2.

205. *Sackett v. EPA*, 622 F.3d 1139, 1147 (9th Cir. 2010), *rev’d*, 132 S. Ct. 1367 (2012).

206. *Wetlands*, *supra* note 5, at 158.

207. *Id.* at 157 (footnotes omitted) (citing *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991)); *Pinsky v. Duncan*, 898 F.2d 852 (2d Cir. 1990) (“[A] nonpossessory attachment of real estate deprives the owner of a constitutionally protected property interest under the fourteenth amendment.”).

208. 5 U.S.C. § 701 (2012).

between agency efficiency and individual rights.²⁰⁹ This tension is evident both in the Court's shifting view of the historical understanding of due process and also in its recognition of administrative review as an adequate substitute for judicial review in some cases.²¹⁰ The Court's traditional view of due process is a far cry from the due process, or rather the lack of due process, that the Sacketts received prior to the Supreme Court's decision in *Sackett*. Regarding the Sacketts' plight, Justice Alito aptly wrote, "In a nation that values due process, not to mention private property, such treatment is unthinkable."²¹¹

IV. SOLUTION

Because the Supreme Court's scope of review in *Sackett* was limited, its decision provided only a limited, incomplete solution to the problem of reconciling due process rights and the CWA enforcement scheme. Even if the scope of review in *Sackett* had been broader, the Supreme Court still could not have completely fixed the problem; legislative action is also required. In future cases, the Supreme Court could force congressional action by fixing the problem to the extent that it can by striking down unconstitutional provisions of the APA and CWA. Nevertheless, until the Court hears another case raising these issues, the solution belongs completely to Congress. Unfortunately, Congress will likely act only if there is sufficient public pressure. Since few Americans outside of government and the legal profession are even aware of the APA's existence, let alone its role in sustaining the current administrative scheme, it is unlikely that the public will call for Congress to amend the APA. Thus, the Supreme Court and Congress should both take action to address these problems. With this understanding, this Note proposes both judicial and legislative action.

A. Judicial Solution

The *Sackett* decision has paved the way for pre-enforcement judicial review under the APA of some challenges to environmental agencies' enforcement of the CWA.²¹² As Justice Alito noted, however, while "[t]he Court's decision provides a modest measure of relief," most property

209. See *supra* Part II.A.1.

210. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 323 (1976) (evaluating the adequacy of administrative procedures for terminating social security disability benefits).

211. *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

212. *Id.* at 1374.

owners are left "with little practical alternative but to dance to the EPA's tune."²¹³ The Court's decision leaves the underlying due process threats contained in 5 U.S.C. § 701(a) and in the CWA's enforcement scheme untouched.²¹⁴ Although unlikely to do so given the *Sackett* decision, the Court would be within its authority to strike down these statutes for violating due process: § 701(a) for permitting preclusion of judicial review and the CWA for permitting the accumulation of highly unreasonable fines.²¹⁵ With or without judicial action, Congress must act to fully protect private property and to uphold due process. In the future, however, the Supreme Court can provide the impetus and should therefore do its part.

1. The EPA Cannot Exercise CWA Jurisdiction Without the Availability of Pre-Enforcement Judicial Review.

The Supreme Court must return to the fundamental principle in *Marbury* that "where there is a legal right, there is also a legal remedy . . . whenever that right is invaded."²¹⁶ In the context of the CWA, the rights at stake are property and due process rights, and the remedy that parties, like the Sacketts, seek is a judgment in their favor, which requires judicial review. Furthermore, the Court must return to the corollary understanding of judicial review and recognize that an agency may not exercise federal jurisdiction over property without the availability of judicial review—not just judicial review limited to final agency action.²¹⁷ Therefore, it follows that the Court must strike down as unconstitutional any statute that precludes judicial review. This is especially true for jurisdictional disputes. Applied specifically to the issue in *Sackett*, these principles lead to the

213. *Id.* at 1375 (Alito, J., concurring). As the Sacketts' counsel has noted,

It is thus conceivable that the EPA will argue that the Court's decision does not make all compliance orders subject to judicial review, particularly if the agency changes its position on what an order's impacts are or if the EPA institutes a formal post-issuance administrative process. Thus, if the EPA were to change its position on the legal impacts of compliance orders, or if it were to institute a post-issuance administrative appeal process, then a reanalysis of the finality question would be warranted.

Schiff, *supra* note 105, at 134. Additionally, "The decision's application to other agency actions under the Clean Water Act is not entirely clear." *Id.*

214. 5 U.S.C. § 701 ("This chapter applies . . . except to the extent that—(1) statutes preclude judicial review . . .").

215. See *supra* Part III.A.1.

216. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

217. See *supra* Part III.A.2; see also *Sackett*, 132 S. Ct. at 1374.

following conclusion: the EPA cannot exercise federal CWA jurisdiction over the Sacketts' property without the availability of judicial review. If the courts would have merely applied fundamental principles regarding judicial review and jurisdiction, much of the Sacketts' problem would have been remediated. Rather than relying on the Constitution, however, the Court relied on the relevant statutes to reach its conclusion.²¹⁸ Consequently, the Court's holding, while similar to the conclusion proposed above, was much narrower because it applies only to final agency action, as set forth in the APA, but not to an assertion of jurisdiction in violation of fundamental principles of jurisdiction and judicial review.²¹⁹

Permitting agencies to assert jurisdiction when there is no judicial review not only allows the agency to exercise absolute authority over its realm of influence but also gives the agency the power to *define the extent of its realm of influence* with virtual impunity. Lest one should scoff that the environmental agencies would never attempt to overextend their jurisdiction and skirt the Court's reprimands and corrections, one needs look no further than to the facts of *Rapanos*²²⁰ and *SWANCC*.²²¹ Currently, the only potential check on the extension of jurisdiction by these agencies is Congress—which created the problem in the first place by abdicating this

218. See *Sackett*, 132 S. Ct. at 1374.

219. *Id.*

220. *Rapanos v. United States*, 547 U.S. 715 (2006) (4–1–4 decision) (rejecting the Corps's assertion of CWA jurisdiction over private property containing alleged wetlands as too attenuated to constitute waters of the United States under the CWA).

221. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (5–4 decision). In his concurring opinion in *Rapanos*, Chief Justice Roberts recounted,

[In *SWANCC*,] this Court rejected the position of the Army Corps of Engineers on the scope of its authority to regulate wetlands under the Clean Water Act The Corps had taken the view that its authority was essentially limitless; this Court explained that such a boundless view was inconsistent with the limiting terms Congress had used in the Act

....

. . . . Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.

Rapanos, 547 U.S. at 757–58 (Roberts, C.J., concurring) (citations omitted); see *id.* at 758 n.*. These decisions illustrate that although the agencies have suffered defeats by the U.S. Supreme Court, they still find ways to maneuver around the Court's decisions. Hence, the only real check on their power is Congress.

kind of power to the environmental agencies.²²² The EPA and the Corps do indeed act like “enlightened despots.”²²³

Interestingly, the APA lends support to the view that there are bounds to federal agencies’ jurisdiction. Section 558(b) provides that an agency may not issue a substantive rule or an order “except within jurisdiction delegated to the agency and as authorized by law.”²²⁴ Despite the Supreme Court’s rulings, this provision has had little effect on the environmental agencies’ boundless view of jurisdiction.²²⁵ In the future, the Supreme Court should clarify and expand its ruling in *Sackett* to provide that judicial review is available for any agency action, final or not, that attempts to assert CWA jurisdiction. The Court should also strike § 701(a) as unconstitutional in order to foreclose any opportunity for explicit preclusion by an amendment to the CWA.

2. The CWA Enforcement Scheme Violates Due Process.

The Supreme Court should also address the CWA’s enforcement scheme. As the Sacketts’ counsel has argued, when the provision granting the “only chance at review (which is not even guaranteed) under § 309(b) requires [the Sacketts] to violate the order and invite an enforcement action, thereby running the risk of \$37,500 per day in fines indefinitely,” the provision must be found unconstitutional as a violation of due process.²²⁶ The Sacketts supported their position with the Supreme Court’s principle in *Ex parte Young*.²²⁷ In *Ex parte Young*, the Court held that “judicial review is constitutionally inadequate if it can be obtained only by running the risk of significant civil or criminal liability, and if judicial review cannot otherwise be had while complying.”²²⁸ While some may argue that changing the

222. See *supra* Part II.A.

223. *Rapanos*, 547 U.S. at 721; see *supra* note 154.

224. 5 U.S.C. § 558 (2012).

225. *Rapanos*, 547 U.S. at 757–58 (Roberts, C.J., concurring). The EPA disclosed its view of virtually unlimited jurisdiction when it stated that the Sacketts face their predicament of potentially crippling fines or costly compliance “only because they discharged fill on their property without first seeking a permit or consulting with EPA or the Corps.” Brief for Respondents, *supra* note 102, at *12. By implication, this means that virtually anyone planning to alter real property must consult with the EPA or the Corps lest there be some unknown wetland present that only their experts can identify.

226. Brief for Petitioners, *supra* note 10, at *36.

227. *Id.* at *15 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

228. *Id.* (citing *Ex parte Young*, 209 U.S. at 148).

CWA's enforcement scheme would allow bad faith violators to continue to pollute waters without an immediate penalty, the EPA still has the ability to seek an immediate injunction.²²⁹

Moreover, the amicus brief of the Chamber of Commerce of the United States of America provides revealing insight into the EPA's mindset and why ACOs are its favored enforcement tool for environmental violations.²³⁰ According to the Chamber, "the sheer scope, and abusive nature, of EPA's efforts to bypass traditional remedies are startling."²³¹

EPA[] . . . issu[es] up to 3,000 orders annually under the CWA—nearly 60 per week. As another example, EPA has formalized a CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act] enforcement policy under which it "typically will compel private-party response through unilateral orders."

Indeed, EPA no longer goes to court to seek cleanup orders under CERCLA. Instead, it has issued over 1,700 aptly named Unilateral Administrative Orders ("UAOs") [analogous to ACOs under the CWA] to more than 5,400 companies—averaging "approximately six UAOs to nineteen [companies] every *month*." When there is an actual emergency, EPA will not issue a unilateral order; instead, it will clean up a site and then seek compensation from responsible parties. That makes the inversion of normal due process principles all the more remarkable—EPA circumvents traditional remedies in favor of

[T]o impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event.

Ex parte Young, 209 U.S. at 148.

229. 33 U.S.C. § 1319(b) (2012).

230. See Brief of the Chamber of Commerce, *supra* note 69, at *5–7.

231. *Id.* at *5–6.

unilateral orders only when there is no emergency, and thus no excuse for departing from traditional due process protections.

And EPA does so for the very purpose of coercing recipients into surrendering their due process rights. In a recent lawsuit . . . EPA was forced to . . . reveal that EPA actually trains its personnel to make the terms of unilateral orders “ugly, onerous, and tough” and “very unpleasant,” in order to coerce settlements. EPA’s internal documents further confirm that EPA seeks to threaten recipients with games of “Russian Roulette,” so as to further coerce their entry into “voluntary” decrees.”²³²

The Sacketts’ counsel also pointed out that

the fact that the Sacketts’ piecemeal plight is not unusual is one reason why the EPA can often take a cavalier attitude in enforcement: The agency has vastly greater technical and litigation resources than the average compliance order recipient and stands to lose much less than a resolute compliance order recipient.²³³

In the month following the Supreme Court’s decision in *Sackett*, the EPA was embroiled in an unrelated public controversy. A YouTube video that went viral revealed an EPA official’s explanation of the EPA’s enforcement strategy for alleged violators of environmental statutes and regulations: figurative crucifixion.²³⁴

In a talk to colleagues about methods [of] EPA enforcement, Armendariz[, a regional director for the EPA appointed by President Obama,] can be seen saying, “The Romans used to conquer little villages in the Mediterranean. They’d go into a little Turkish town somewhere, they’d find the first five guys they saw and they would crucify them. And then you know that town was really easy to manage for the next few years.”

And not only has Armendariz talked about crucifying oil companies, he’s tried to do it.²³⁵

232. *Id.* at *6–7 (citations omitted).

233. Schiff, *supra* note 105, at 138.

234. Christopher Helman, *EPA Official Not Only Touted “Crucifying” Oil Companies, He Tried It*, FORBES (Apr. 26, 2012, 12:53 AM), <http://www.forbes.com/sites/christopherhelman/2012/04/26/epa-official-not-only-touted-crucifying-oil-companies-he-tried-it/>.

235. *Id.*

Given this attitude and strategy, it is little wonder that the EPA prefers to issue onerous ACOs mandating costly compliance and to allow potentially exorbitant fines to accumulate for anyone who does not comply. Moreover, the EPA has a tactical advantage over those issued an ACO, as evidenced by the Sacketts' dilemma. Accordingly, the Supreme Court needs to strike the provisions of § 309 allowing for the accumulation of fines before judicial review of an ACO.²³⁶

B. Legislative Solution

Given the limited scope of the Supreme Court's decision in *Sackett*, Congress will need to take action to completely resolve the problem it created by passing § 701(a) of the APA and § 309 of the CWA and leaving undefined the phrase "the waters of the United States."

1. Judicial Review and the APA

As stated above, one of the roots of the problem is the APA's unconstitutional allowance for preclusion of judicial review in § 701(a). Because the Supreme Court has failed to strike down this provision, Congress must move immediately to repeal this provision. To remove all doubt on the issue, Congress should replace § 701(a) with a section explicitly providing that judicial review cannot be precluded. This would emphasize the proper understanding of judicial review as presented in *Marbury*.²³⁷

2. The CWA Enforcement Scheme and ACOs

The second part of this legislative solution requires Congress to amend the CWA. First, Congress must clearly define the amorphous phrase "the waters of the United States." Without a clear definition of what kinds of property contain "the waters of the United States," many property owners do not even have constructive notice that the CWA may apply to their property. As demonstrated by the cases discussed above, allowing the environmental agencies to determine what property comes under CWA jurisdiction has been an utter disaster.²³⁸ As Justice Alito noted, Congress needs to "provide a reasonably clear rule."²³⁹

236. 33 U.S.C. § 1319(d) (2012).

237. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

238. See *supra* Part III.A.

239. *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

Congress must also bring the entire CWA into compliance with due process, particularly the enforcement scheme. The new sections should provide that before the EPA can issue an ACO, the EPA must provide some form of formal notice.²⁴⁰ In cases where the potential harm is imminent or poses great danger to the protected public interest, the EPA may seek a temporary restraining order ("TRO") or an injunction.²⁴¹ Such a provision would satisfy the notice requirement of due process.

The new section should also provide that the EPA may issue ACOs only to order a party to cease actions that pose environmental harm, not to order the party to take action to remedy environmental harm. This would eliminate the problem of accumulating fines unless the ACO recipient continues to act, in which case the recipient should face the threat of fines. Additionally, the ACOs should only remain effective for a specified period, such as sixty days.²⁴² Furthermore, the EPA should not be able to issue a new ACO for the same alleged violation or subsequent alleged violations of the same nature, nor should it be able to extend the ACO "unless the [EPA] brings an action . . . before the expiration of that period."²⁴³ During this time, the EPA must make a good faith effort to resolve the dispute if the recipient of the ACO can demonstrate that the EPA is in error.

Moreover, the EPA may seek a TRO or preliminary injunction at any time and in lieu of an ACO. Thus, if the EPA believes that the situation requires an order lasting longer than sixty days, then it must seek a TRO or preliminary injunction. This would provide the affected party with the procedural protections contained in the Federal Rules of Civil Procedure and would ultimately provide an opportunity to contest the EPA's allegation before the appropriate federal court. Additionally, if the EPA believes that the alleged violator needs to take certain actions to protect the alleged wetlands in question, then it may do so only through court action. In effect, this solution would relegate the EPA's use of ACOs to its proper place of dealing with less serious situations and force the EPA to address allegations of more serious violations through the judicial system. This solution removes any due process violations or concerns that exist in the

240. *But cf.* 33 U.S.C. § 1319(a) (2012) (allowing the EPA to issue an ACO without notice to the affected party).

241. FED. R. CIV. P. 65 (authorizing courts to issue injunctions and temporary restraining orders and establishing the procedures).

242. Under the Clean Air Act, ACOs issued by the EPA for air pollution violations are only valid for sixty days "unless the [EPA] brings an action . . . before the expiration of that period." 42 U.S.C. § 7603 (2012).

243. *Id.*

current enforcement regime, provides quicker resolution of wetlands disputes, and still provides the EPA with enforcement options and flexibility.

V. CONCLUSION

The *Sackett* case presents a current example of how the EPA is abusing the power that Congress granted it by the CWA. While preserving a clean and healthful environment is an important part of responsible stewardship, preserving individual property rights is an equally, if not more important, goal—one that patriot blood has been spilled to protect.²⁴⁴ Chief Justice Marshall put it well when he stated in *Marbury*, “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”²⁴⁵ Congress faces a choice: either passively sit on its hands and let the EPA and the Corps have free rein in their over-aggressive crusade against property owners or intervene by standing up for the people that elected it and by reining in these agencies. Congress has abdicated its responsibility for setting environmental policy to the EPA and other agencies and has left these agencies and the courts to work out the conflicts. But these conflicts affect the very core of property rights and are too significant and fundamental to be left in the environmental agencies’ unclean hands with only occasional,

244. *Wetlands*, *supra* note 5, at 164–65.

The reach and force of federal environmental statutes challenge traditional conceptions of limited government power. Property rights, in particular, are routinely compromised in the name of environmental protection that extends far beyond statutory bounds. Were that not bad enough, such incursions are often for naught, as those regulatory programs least friendly to owners are often those least effective at advancing environmental values. Imposing regulatory burdens on private landowners in the name of species conservation, for example, can actually undermine the conservation of endangered species. When those landowners who own potential species habitat are burdened with land-use restrictions under the Endangered Species Act, they become less likely to cooperate with conservation efforts. At the extreme, landowners respond to the economic incentives such regulatory schemes create and take preemptive action to avoid regulatory constraints in the future—at the expense of habitat for endangered species. At the same time, promising nonregulatory means of advancing environmental protection—means that do not raise the same sorts of due process concerns—remain largely ignored.

Id. at 163–64 (footnotes omitted).

245. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

minor corrections from the courts. If judicial review of the environmental agencies' actions is not broadened to its lawful extent, then agency efficiency will have triumphed over property rights and due process. Congress must act. The environmental agencies must not be allowed to continue to "sport away the vested rights" of the people.²⁴⁶

246. *Id.* at 166.