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Removing Mud in the Clean Water Act: The Ninth Amendment as a Limiting Factor in Chevron Analysis

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REMOVING MUD IN THE CLEAN WATER ACT: THE NINTH AMENDMENT AS A LIMITING FACTOR IN *CHEVRON* ANALYSIS

ARTICLE ABSTRACT:

This Comment discusses the consolidated case Rapanos v. United States[1] *and the challenged scope of the Clean Water Act*[2] *as an example of where the Ninth Amendment should serve as a counter-balance to* Chevron[3] *deference when agencies act against individual liberties without specific enabling statutory authority.*

The Comment examines historical evidence revealed and discussed in recent scholarship to establish the various legal views concerning the Ninth Amendment and the protection it was intended to provide. While some commentators see an expansive "natural law" Ninth Amendment,[4] *others see a mere rule of construction that cannot be used to reject a law as unconstitutional.*[5] *However, this Comment finds common ground within all of the accepted legal views that give the Ninth Amendment any substance, even when these views collide in many other respects. This Comment asserts that any effective reading of the Ninth Amendment should find it protects individuals against expansive interpretations by federal agencies of vague statutes. As an example, this Comment asserts that the Supreme Court should employ Ninth Amendment reasoning to restrict the jurisdiction of the Army Corps of Engineers in* Rapanos *to include only those lands directly connected to navigable waters.*

This Comment makes no broad claims of Ninth Amendment protection for every activity not mentioned in the Constitution, nor does it make any attempt to establish what the outer contours of the Ninth Amendment should encompass. This theory threatens no floodgate of newly discovered rights, nor does this theory invalidate any federal law. However, it would remove some of Judge Bork's perceived inkblot from the Ninth Amendment and thereby restore some substance to the Ninth Amendment that the Court has given to the rest of the Bill of Rights.

1. Rapanos v. United States, 126 S. Ct. 2208 (2006).
2. Clean Water Act of 1972 (CWA) § 404, 33 U.S.C. § 1344.
3. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).
4. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 1 (2006).
5. *See* Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 260–61 (1983).

"He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."
—Thomas Jefferson, The Declaration of Independence

"[T]he U.S. Army Corps of Engineers exercises the discretion of an enlightened despot."
—Justice Scalia, from *Rapanos v. United States*

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I. INTRODUCTION

This Comment begins by giving background information on several subjects foundational to the discussion of how the Ninth Amendment should interact with agency law. This background information includes information in three main subjects:

(1) The consolidated case of *Rapanos v. United States*, addressing the facts of the Corps of Engineers' expansive interpretation of the Clean Water Act's scope, and current status;[6]

(2) *Chevron* deference, used to determine the proper credence given to agencies in litigation challenging an agency's interpretation;[7] and

(3) Ninth Amendment[8] history, starting with Federalist objections to a bill of rights, formative case law in the Post-Colonial era, impact of the Civil War, and its New Deal emasculation.

Once the background is given, this Comment offers the thesis that a *Chevron* analysis should include the impact of the Ninth Amendment as a limiting factor on federal agency interpretation and rulemaking. To support the thesis, the various interpretations of the Ninth Amendment are discussed with regard to their usefulness in a *Chevron* analysis. This analysis will include discussion regarding the deafening silence from the courts when a party has attempted to invoke the Ninth Amendment.

Though never the most popular amendment to cite by courts, the Ninth Amendment has virtually disappeared since the New Deal, when both the Ninth and Tenth were rendered ineffectual to stop the government expansion under FDR.[9] Though various interpretations of the Ninth Amendment vary significantly in their impacts, if every reasonable interpretation of the Ninth Amendment has a similar impact in a particular situation, then courts can safely apply it to a given scenario with assurance that they are acting with the Constitution's blessing.

In this Comment, the Corps of Engineers has provided just such a scenario with its claim that the Clean Water Act (CWA)[10] effectively gave it jurisdiction over all land, based on the need to control run-off into "navigable waters."[11] The CWA gives jurisdiction over navigable waters, but in *Rapanos*, the Corps denied a building permit for land more than ten miles away and connected to navigable waters through

6. *See Rapanos*, 126 S. Ct. 2208.

7. *See Chevron*, 467 U.S. at 843.

8. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

9. *See* Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 394–99 (2004).

10. Clean Water Act of 1972 (CWA) § 404, 33 U.S.C. § 1344.

11. *See Rapanos*, 126 S. Ct. at 2215.

man-made run-off drains.[12] The Court remanded the case for fact-finding after a *Chevron* analysis denying the Corps its claimed unlimited jurisdiction.[13]

None of the Court's three opinions discussed any need to evaluate the Corps's rule construction with regard to the Ninth Amendment, but this Comment asserts that the Court should restrict the Corps's jurisdiction because using any reasonable interpretation of the Ninth Amendment, federal agency jurisdiction should be narrowly construed in cases where Congress has not clearly delegated authority, particularly when states have concurrent power in that arena.

The conclusion will also demonstrate why the same sort of evaluation given to other Bill of Rights litigation will not result in toppling the administrative state. The theory espoused by this Comment provides little support to those who want to use the Ninth Amendment to invalidate drug laws, set aside restrictive marriage laws, or overturn any other statute.

A. Rapanos v. United States—*Facts, Discussion, and Holding*

In 1972, Congress passed the Clean Water Act (CWA), a statute giving the Army Corps of Engineers the responsibility of cleaning up 'navigable waters' by implementing a strict regulatory program.[14] In subsequent case law, the Supreme Court recognized claims that efficient enforcement of the CWA had to include lands that "abutted" navigable waters.[15] The law now also includes those lands commonly known as swamp or wetlands that are difficult to classify as either water or land.[16] Had the Court reached the opposite conclusion, polluters would have been able to elude jurisdiction of the CWA by stepping a few feet farther than the water line.[17]

When the Corps of Engineers sought to enforce provisions of the CWA against John Rapanos for filling in land more than ten miles from the nearest navigable water, he fought the Corps's claim of jurisdiction, and the fight has been ongoing for more than a decade.[18] The Corps claimed that the man-made drainage ditches and run-off culverts with intermittent water connecting the Rapanos land and the navigable waters amounts to a sufficient hydrological connection to claim jurisdiction over the Rapanos land.[19] The trial court and Sixth

12. *Id.* at 2211.
13. *Id.* at 2235.
14. *See* CWA §404.
15. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985).
16. *See* 33 C.F.R. § 328.3(b) (2006) (defining wetlands to "generally include swamps, marshes, bogs, and similar areas").
17. *See Riverside*, 474 U.S. at 133–34.
18. *See Rapanos*, 126 S. Ct. at 2214.
19. *Id.* at 2219. *Rapanos* was consolidated with *Carabell v. Army Corps of Eng'rs*, 391 F.3d 704 (Mich. 2004), a case where the Corps of Engineers sought jurisdiction over a tract of land, based on its proximity to a run-off ditch that eventually emptied

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Circuit supported the Corps's interpretation of the CWA.[20] Both courts determined that they should accept the Corps's interpretation of the CWA due to the teaching of *Chevron v. Natural Resources Defense Council*.[21] In *Rapanos*, the Supreme Court agreed that *Chevron* governed, but issued three opinions, each of which found a different part of the *Chevron* rule to control.[22]

Justice Scalia wrote the plurality opinion, representing himself and three other justices, finding that the law could not be reasonably interpreted to allow regulation of ordinary land many miles from navigable waters.[23]

Justice Stevens wrote for the four-judge dissent, which found the law was vague, and blessed the Corps's claim of unlimited jurisdiction over all land and water in the United States.[24]

Justice Kennedy found the law vague enough to allow the agency to interpret the statute, but he said that the Corps of Engineers' interpretation was unreasonable.[25] Kennedy said that the "significant nexus" test found in *United States v. Riverside Bayview Homes, Inc.*,[26] requiring any land regulated under the Clean Water Act to have a significant nexus to navigable waters, should be the test for the Corps of Engineers.[27]

Though all nine justices were working under the *Chevron* paradigm designed to reduce confusion and increase predictability, three separate conclusions resulted. Neither of the parties in the case received the bright line ruling desired. Worse, the Court failed to provide a clear majority opinion to assist lower courts in future cases. To divine the teaching in such splintered cases, the Court has often employed the tenet of *Marks v. United States*, which decided that the holding of a court should be the position taken by the justices concurring in the court's judgment on the narrowest grounds.[28] Though mentioned by Justice Roberts's plurality opinion, the Court's holding comes from Justice Kennedy's opinion combined with two different pluralities.[29]

Justice Kennedy's opinion is considered the Court's holding because he agreed with the four-Justice dissent of Justice Stevens that the law was vague enough to allow the agency to interpret the statute,

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into a lake more than a mile away. The tract was separated from the ditch by a four-foot berm. No claim was made that water ever flowed from the tract, over the berm, and into the ditch, but the Corps claimed jurisdiction anyway.

20. *See* United States v. Rapanos, 376 F.3d 629, 640–41 (6th Cir. 2004).

21. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

22. *Rapanos*, 126 S. Ct. at 2214–65.

23. *Id.* at 2214–35.

24. *Id.* at 2252–65 (Stevens, J., dissenting).

25. *Id.* at 2236–52 (Kennedy, J., concurring).

26. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133–34 (1985).

27. Marks v. United States, 430 U.S. 188 (1977).

28. *Rapanos*, 126 S. Ct. at 2236 (Roberts, J., speaking for the plurality).

29. *Id.* (Kennedy, J., concurring).

but Justice Kennedy also agreed with the four-Justice plurality of Justice Scalia that the unlimited jurisdiction claimed by the Corps (and dissent) was unreasonable.[30] The practical effect of applying the ruling is that the significant nexus test should be used to adjudicate CWA enforcement cases.[31] However, the *Rapanos* case record provided insufficient evidence to resolve that question, so the Court (J. Kennedy and the Scalia plurality acting together) remanded the case for further evaluation on that point.[32]

With the case on remand, the twelve-year dispute remains unresolved. At this point, one of several scenarios can develop:

(1) The Corps of Engineers can seek to establish that the lands in question have a significant nexus with a lake ten miles away;

(2) The Corps of Engineers can walk away and accept the significant nexus test as the controlling rule and present evidence sufficient to pass the test in future cases; or

(3) The Corps might present John Rapanos with sufficient evidence for him to capitulate knowing that the Corps will satisfy the significant nexus argument.

One of the virtues of our legal system is the unity of judicial interpretation brought by Supreme Court rulings, which lower courts are compelled to apply in their judicial proceedings. The Supreme Court speaks rarely, in comparison to other courts, but does so with a finality that eliminates ambiguity and gives definition to imprecise statutes. However, the *Rapanos* holding gives lower courts no way of knowing how much "significance" is required to pass the significant nexus test between a parcel of land and navigable waters. Unless *Rapanos* makes its way back to the Supreme Court with evidence that can be weighed, the scope of the Clean Water Act remains vague, without objective criteria to give repeatable results across the country.

Lower courts have already shown that the *Rapanos* holding is not clear. The federal district court in Lubbock refused to apply the significant nexus rule, saying it was vague and subjective.[33] That court followed the Scalia plurality opinion and Fifth Circuit precedent to use the more narrow scope of jurisdiction for the CWA.[34] The First Circuit determined that the government could satisfy the jurisdiction question by meeting the Scalia plurality test of "navigable waters" or the Kennedy significant nexus test.[35] The Seventh and Ninth Circuits

30. *Rapanos*, 126 S. Ct. at 2236–52 (Kennedy, J., concurring).

31. *See id.* (encouraging the use of the significant nexus test for CWA disputes).

32. *Id.* at 2235 (Scalia, J., plurality), 2252 (Kennedy, J., concurring).

33. *See* United States v. Chevron Pipe Line, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

34. *Id.*

35. *See* United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006).

have begun using the significant nexus test, remanding a case to determine if the lands have that nexus with the navigable waters.[36]

Unless the Supreme Court speaks with more precision on this issue, courts are likely to handle these issues on an ad-hoc basis with a results-oriented view toward "significance." Courts that lean toward environmentalism will adopt a low threshold of significance, and those courts that prefer more limited governments will require a connection to navigable waters.

B. *Review of Agency Statutory Interpretation*

"For forms of government let fools contest,
that which is best administered is best."

—John Adams, Thoughts on Government, Apr. 1776 Papers 4:86–93

In *Rapanos*, the Court turned to the process developed in *Chevron* for adjudicating claims against an agency's interpretation of statutes.[37] Before effectively suggesting any changes to the rule of *Chevron* deference, one must know the background of agency rulemaking and how the Court handles claims that an agency has misinterpreted or overreached its congressional boundaries.

1. Court Examination of Agency Rulemaking Pre-*Chevron*

During the New Deal era (forty years before *Chevron*), the courts were inundated with challenges to the substantial increase in federal agency creation and the unprecedented power given to at least 15 new federal bureaucracies.[38] To handle the multitude of claims regarding agency rules, the Supreme Court issued opinions that bifurcated those challenges into "legislative rule" or "interpretative rule" categories.[39]

The term "legislative rule" referred to rules made by agencies in areas where Congress had specifically delegated authority. In *NLRB v. Hearst Publications*, for example, the Court examined the National

36. *See* N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1001 (9th Cir. 2007) (affirming the district court's holding that the pond and its surrounding wetlands were subject to the CWA because they had a significant nexus to the river); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006) (remanding the case for further proceedings as necessary to determine whether the Corps had jurisdiction over the wetland in question under Justice Kennedy's "significant nexus" test).

37. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

38. Between 1932 and 1938, Congress created the following: Food and Drug Administration, Federal Trade Commission, Federal Communications Commission, Soil Conservation Service, Social Security Administration, Federal Power Commission, Securities and Exchange Commission, National Labor Relations Board, Federal Housing Administration, Public Works Administration, Tennessee Valley Authority, Rural Electrification Administration, Civilian Conservation Corps, Federal Deposit Insurance Corporation, and Federal Home Loan Bank Board.

39. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 131 (1944).

Labor Relations Act, observed that it gave plenary power to the newly established National Labor Relations Board to regulate employer-union relationships, and allowed it to define for itself what constituted an "employee."[40] The Court said it would accept agency determinations of this sort so long as it had "warrant in the record" and "a reasonable basis in law."[41] Later cases often refer to this as "the reasonableness test" when adjudicating legislative rules.[42]

The term "interpretative rule" referred to discretionary decisions by agencies in areas where they exercised no delegated legislative power. Judicial treatment for interpretative rules was developed in *Skidmore v. Swift & Co.*[43] In *Skidmore*, the Administrator of the Fair Labor Standards Act (FLSA) determined that firemen could not claim overtime pay for hours when they were on call.[44] The Court had to determine what level of deference to give the Administrator's determination, without any statutory provision by which to judge it.[45] The Court decided to give weight to the agency interpretation equal to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[46]

For decades, *Skidmore* was the controlling case for evaluation of interpretative rules, and courts referred to "*Skidmore* deference" in later opinions.[47] This procedure recognized that an agency has a body of knowledge and experience that courts should consider during the evaluation of an interpretation, and in such cases, courts may substitute their own rule if the agency's rule is found unacceptable.[48]

This bifurcated judicial treatment of agency rules lasted for forty years until *Chevron.*[49] During that time, the legal system slowly revealed that the reasonableness test and *Skidmore* deference gave inconsistent results, created rules that were too rigid for agency administration, and commentators believed that judges were giving deference to agencies on the basis of how well they personally approved of the resulting rule.[50]

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40. *Hearst Publ'ns, Inc.*, 322 U.S. at 130.

41. *Id.* at 131.

42. *See, e.g.*, Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 789 (S.D. Me. 1972).

43. *Skidmore*, 323 U.S. 134.

44. *Id.* at 136.

45. *Id.* at 139.

46. *Id.* at 140.

47. *See, e.g.*, Ariz. State Bd. for Charter Schs. v. U.S. Dep't of Educ., 464 F.3d 1003, 1007 (9th Cir. 2006).

48. *See id.*

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

50. *See* Richard W. Murphy, *A "New" Counter-*Marbury*: Reconciling* Skidmore *Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 3 (2004).

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2. *Chevron* Deference: The Counter-*Marbury* of Administrative Law

In *Chevron*, the EPA changed its method of definition of a "stationary source" of air pollution to allow a polluting facility more flexibility because President Reagan had just been elected on a platform dedicated to a less intrusive government than that of the previous administration.[51] The Court stated that the error of the lower court was to disallow change in the definition, locking the agency's ability to make changes over time, a common complaint made regarding the *Skidmore* approach and the reasonableness test.[52] The *Chevron* Court never stated that this ruling invalidated other approaches, and it even used language consonant with the reasonableness test.[53]

Similarly, the Court never stated that it was replacing *Skidmore*, and it even discusses some of the rulemaking activities that would have garnered the Corps's decision respect from the Court under a reasonableness test or *Skidmore* analysis.[54] Writing for the Court, Justice Stevens explained the two-step rule:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[55]

Chevron is arguably the most cited case in modern American history, with more than 9,000 citations in case law, and more than 6,000 law review articles.[56] According to Justice Scalia, the major impact of *Chevron* is its replacement of a "statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."[57] However, members of the Supreme Court view the impact of *Chevron* very differently. Though Justice Scalia considers *Skidmore* to be an anachronism,[58] Justices Breyer and Ginsberg consider *Chevron* to be "no relevant change."[59]

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51. *See id.* at 14.

52. *Chevron*, 467 U.S. at 842.

53. *See id.* at 863 ("[The EPA's] reasoning is supported by the public record developed in the rulemaking process.").

54. *See id.* at 853–59.

55. *Id.* at 842–43.

56. From Westlaw, Jan. 1, 2007 (using search term "chevron & 467" in ALLCASES and JLR databases).

57. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989).

58. *See* Christensen v. Harris County, 529 U.S. 576, 589 (2000) (Scalia, J., concurring).

59. *See id.* at 596 (Breyer, J., dissenting, *joined by* Ginsberg, J.).

Regardless of what individual members of the Court believe, commentators have noticed that *Chevron* has caused a number of other important changes to agency interpretations and behavior. *Skidmore* analysis typically resulted in a multitude of geographically dispersed court decisions regarding a single federal regulation, but under *Chevron*, the court system invites the agency to make a single determination to resolve an ambiguity, and the resulting judicial process impacts are felt nationwide.[60] These agency determinations are more flexible than the judicial determinations because there is no search for the sole "right" interpretation, but a range of possible interpretations that are acceptable, and an agency can choose among them, or change from one to another as it gains experiences with a new statute.[61] Because the *Chevron* analysis significantly shifts interpretation authority toward agencies to decide what the law is, rather than the courts, *Chevron* has also been called the "counter-*Marbury*" of administrative law.[62]

3. The *Chevron* Analysis Broadens with Exceptions and Step Zero

The apparent simplicity of the "*Chevron* Two-Step" did not last long. The courts observed that there were exceptions to the general rule that an agency's expertise would result in the correct interpretation. These exceptions can include:

(a) Interpretations of statutes taken during or in preparation of litigation;[63]
(b) Agencies acting in a prosecutorial role;[64]
(c) Agency interpretation of the Administrative Procedure Act;[65]
(d) Agency interpretation of statutes enforced by many other agencies;[66]
(e) Mere policy statements, agency manuals, and enforcement guidelines;[67]
(f) A dramatic change in public policy without clear Congressional input;[68]
(g) Interpretations that raise serious Constitutional questions.[69]

60. *See* E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts, and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 4 (2005).
61. *Id.* at 11–12.
62. *See* Cass Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 189 (2006).
63. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212–14 (1988).
64. *See* Crandon v. United States, 494 U.S. 152, 158 (1990).
65. *See* Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137–38 n.9 (1997).
66. *See* DuBois v. U.S. Dep't of Agric., 102 F.3d 1273, 1285 n.15 (1st Cir. 1996).
67. *See* Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 449 (2003). *But see* Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002).
68. *See* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–61 (2000).
69. *See* Kent v. Dulles, 357 U.S. 116, 129–30 (1958).

The Supreme Court has also determined that a *Chevron* analysis cannot be performed until the court has determined that the question lies within the scope of the *Chevron* framework.[70] Introduced in *United States v. Mead Corporation*, the Court decided to give *Skidmore* respect to a tariff classification by the Customs Service rather than *Chevron* deference, after an examination of legislative history and its absence of formal procedures to determine the tariff classification.[71] This pre-analysis analysis is referred to as "Step Zero" in case law, and commentators recognize it as an effort to create a more nuanced determination of how much deference to give an agency's interpretation.[72]

The Supreme Court has continued to make the analysis more complex since *Mead*. For example, in *Barnhart v. Walton*, the Court said it gave *Chevron* deference to informally promulgated interpretative rules, if the totality of the circumstances suggests an implicit congressional delegation of law-interpreting authority.[73] The Court's analysis accorded weight to the length of time an agency had maintained a rule before changing it.[74] Concurring in the holding, Justice Scalia agreed with the deference given to the agency, but disagreed that the length of time a rule had been in place was relevant.[75]

In response to this ongoing disagreement within the Court, litigants and judicial opinions tend to point out that both *Skidmore* and *Chevron* usually reach the same conclusion.[76] Even when the Court is split, the disagreement comes in step one, when it is making a determination of whether the text of the statute is clear and therefore needs an interpretation.[77]

In summary, the *Chevron* two-step procedure remains the foundational rule for rule adjudication. However, the trend has been toward a more complete analysis of a statute's text and the expertise shown by the agency before determining if *Chevron* should apply, and if it does, the level of deference that an agency's interpretations should receive. This Comment suggests that the Ninth Amendment should be part of that analysis in particular circumstances.

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70. *See* United States v. Mead Corp., 533 U.S. 218, 218–20 (2001).

71. *Id.*

72. *See* Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 349 (2003).

73. Barnhart v. Walton, 535 U.S. 212, 225 (2002).

74. *Id.* at 219–20.

75. *Id.* at 226 (Scalia, J., concurring).

76. *See, e.g.*, A.T. Massey Coal Co. v. Holland, 472 F.3d 148, 165–69 (4th Cir. 2006); Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1183 (M.D. Fla. 2006).

77. *See generally* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) (considering whether Congress intended the word "take" to include habitat modification); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994) (considering whether the FCC could make tariff filing optional for all nondominant long-distance carriers using its authority to "modify").

C. *Review of the Ninth Amendment*

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
> —Ninth Amendment, United States Constitution

1. Addition of the Ninth Amendment to the Constitution

The history of the Ninth Amendment begins with the debate over ratification of the United States Constitution. The Federalists opposed a Bill of Rights because they believed any such list would shortchange unenumerated rights, and the whole point of the Constitution was that the enumeration of government powers would itself be the limit. As Hamilton explained in *The Federalist* No. 4:

> I go further, and affirm that bills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power.[78]

The Anti-Federalists eventually won this argument, in part by showing that the Constitution itself contained these types of prohibitions, e.g., protection of habeas corpus, trial by jury in criminal cases, as well as prohibitions against bills of attainder and ex post facto laws.[79] Both major points the Federalists made against a bill of rights could also be made against the Constitution itself.

Though the Constitution had been ratified, several states predicated their ratification on the promise of a bill of rights, and two of the 13 colonies were stalled in the process due to the lack of a bill of rights.[80] Because Virginia had leaned Anti-Federalist, Federalist James Madison had to promise his constituents to support a bill of rights in order to be elected to the new House of Representatives.[81] Though he took nearly two years, the "Father of the Constitution" and well-known Federalist introduced a set of resolutions for the first Congress

78. THE FEDERALIST No. 84, at 469–70 (Alexander Hamilton) (E. H. Scott ed., 1898).

79. *See* "BRUTUS" (ROBERT YATES), TO THE CITIZENS OF THE STATE OF NEW-YORK (NOV. 1, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 372, 375–76 (Herbert J. Storing ed., 1981).

80. *See* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1024–25 (1971).

81. *Id.* at 984.

to consider, including one resolution comprising most of the rights guaranteed in the first ten amendments.[82]

In the introduction of these proposals to the House of Representatives, he explained that he had come to believe that a bill of rights was necessary to unify the country and how the dangers of enumeration could be averted.[83] During this introduction, Madison discussed the importance of the judiciary in the protection of rights:

> If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights, they will be an impenetrable bulwark against every assumption of power in the legislature or executive, they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[84]

Madison's quote was nothing new; the British had no written constitution, and the common law had well established that the judiciary should invalidate unconstitutional laws as far back as 1610, when Lord Coke wrote, "[T]he common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."[85] Though much debate exists on what the Ninth Amendment[86] was intended to protect, the general expectation that the judiciary would be the guardian of rights is not questionable.

This reasoning was accepted long before the debate on proposals for a bill of rights in the new nation. In the years leading up to the Revolutionary War, for example, James Otis argued that general writs of assistance were unconstitutional,[87] and later on, Patrick Henry attacked the Stamp Acts on the basis that they were unconstitutional as against Magna Carta and the natural rights of Englishmen.[88] Whether or not the Stamp Act was unconstitutional, the important observation is that colonial leaders turned to the common law and the concept of natural rights when evaluating laws for constitutionality, and fully ex-

82. *Id.* at 1006.

83. *See* 1 ANNALS OF CONG. 431–32 (Joseph Gales ed., 1834).

84. *Id.* at 439.

85. *Dr. Bonham's Case*, 77 Eng. Rep. 638, 652 (C.P. 1610).

86. The Ninth Amendment was originally the eighth clause of Madison's fourth proposal. Early writers referred to the proposal differently, since the numbering changed as amendments were removed from consideration or reconfigured to combine with others at various times in the founding era. Rather than refer to the proposal as the tenth article when the House of Representatives first passed the set of amendments in August of 1789, or the eleventh article in the Senate a month later, the Author shall always refer to the proposal as the Ninth Amendment.

87. *See* 2 LEGAL PAPERS OF JOHN ADAMS 125 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

88. *See* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 195 (1971).

pected that laws could and should be invalidated by courts when those laws fell outside the authority of the government.

Still, passing a bill of rights was low in priority for many in the first Congress, as many of its members were Federalist minded and still believed a bill of rights to be unwarranted. They were also busy with the daunting task of setting up an entire government, so declarations of rights that "everyone" already knew and understood was not an immediate need in their eyes.[89]

Madison had a different view, in that he believed that the country would be divided until a bill of rights was adopted. His goal was to bring the country together by mollifying the fears of the Anti-Federalists with the passage of the most obvious rights that were unquestionably acceptable to all the states.[90]

One particular discussion concerning the freedom to assemble provides insight into the mental framework of the more prominent House members. The proposed amendment was the precursor to the First Amendment, and read, "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed."[91]

Theodore Sedgwick reacted to the proposal by suggesting that the right to assemble was "a self-evident, unalienable right which the people possess; it is certainly not a thing that never [sic] would be called in question; it is derogatory to the dignity of the House to descend to such minutiae."[92] Egbert Benson disagreed, responding that the whole purpose of the exercise was to provide protection from infringement of these rights, and the proceedings assumed that these rights were inherent.

The discussion then revealed the heart of the matter. Sedgwick responded that if the committee were governed by that principle, they might have made a much longer list; "they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper."[93] His point was that the listing of inherent rights that the federal government must not infringe upon could not be exhaustive, but must reflect the clear understanding that governmental powers were limited even to areas not specifically forbidden in the Constitution or the bill of rights being written.

Other representatives chimed in. Eldridge Gerry pointed out that several states had the language in their constitutions, and they were adding these amendments to gratify those who wanted to spell out

89. *See* 2 SCHWARTZ, *supra* note 80, at 1006.
90. *See id.* at 1007.
91. *Id.* at 1089.
92. *Id.* at 1089–90.
93. *Id.* at 1090.

some of the rights.[94] John Page added that the right to take one's hat off had been infringed when one was forced to remove it in the presence of authority, and that lawful assembly had been infringed (by the British).[95] Mr. Vining asserted that the addition of the right to assemble would hurt nothing, and since many of the states wanted the right listed, he agreed it should be added.[96] Mr. Hartley agreed that the right to assemble was retained since the federal government had no power to infringe it, and several states had required an express declaration in the Constitution.[97] Moreover, he believed that "every thing that was not incompatible with the general good ought to be granted if it would tend to obtain the confidence of the people in the Government."[98]

From the discussion described in these notes, it seems clear that the general consensus was that the people already possessed the right to assemble, and no written amendment was required to give them that right. Moreover, from the previous arguments against the Stamp Act and other British actions, the founders believed that the courts should protect these rights, whether they were enumerated or not. This discussion occurred after Madison had introduced the amendments in full and heard how unenumerated rights were protected by language that would become the Ninth Amendment, so the lack of discussion about whether the enumeration was going to leave any right out is not surprising.[99]

Though the legislative history in the Annals of Congress reports many pages of debate on some amendments, no amendment takes less space on its pages than the two short paragraphs discussing the eighth (and last) clause of the fourth proposition: "The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."[100] The only reported discussion concerns Gerry's motion to replace "disparage" with "deny or impair" because he thought "disparage" was not of plain import.[101] Gerry's motion received no second; apparently the body of representatives thought the motion was clear.[102]

Madison answered to the concern that enumeration of rights endangered unenumerated rights, yet he had already spoken to the purpose of this amendment and its demulcent effects toward the danger of enumeration during his introductory speech:

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1091.
98. *Id.*
99. *Id.* at 1007, 1031, 1053.
100. *Id.* at 1112.
101. *Id.*
102. *Id.*

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in the numeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.[103]

Because Madison introduced the idea of this amendment in his introduction of his proposal, asserting that its purpose was to ameliorate any conception that an enumerated right should be protected more than an unenumerated one, this quick passage of the Ninth Amendment demonstrates the unity of the body in its support and understanding of what the amendment means and protects. Though later Senate discussions made substantive changes that impacted several of the amendments proposed by Madison and passed by the House, the Senate changed no wording of what would become the Ninth Amendment.[104]

Unfortunately, this unity of understanding from more than 200 years ago does not give us the full parameters of the Ninth Amendment's umbrella of protection. Madison intended for the Ninth Amendment to protect the panoply of rights that the first Congress had not discussed or considered.[105] It would be up to future courts to develop a common law set of judicially recognized rights that the federal government had no power to infringe, with the instruction that these unenumerated rights should be protected just as if they were enumerated.

2. Judicial Treatment of the Ninth Amendment in Early Federal Court[106]

The earliest known mention of the Ninth Amendment in a Supreme Court opinion was Justice Story's dissent in *Houston v. Moore*[107] (1820), concerning a private in the Pennsylvania militia arguing that the state had no power to enforce a federal duty to serve in the federal

103. 1 ANNALS OF CONG., *supra* note 83, at 439.

104. The Senate kept no notes of its internal discussions. Only the passed legislation was recorded.

105. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 454 (Jonathan Elliot ed., 1836) (quoting James Wilson).

106. The Author is indebted to Kurt Lash for his identification of this case, and research necessary to sort out Justice Story's citations, as well as his exhaustive research in the state jurisprudence in this area, discussed in *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005).

107. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 49 (1820).

militia. The majority opinion recognized concurrent authority.[108] Justice Story recognized concurrent authority over the militia generally, but dissented because he found the court martial should be conducted at the federal level because the law being enforced was a federal law.[109]

The striking part of the opinion is his construction of what we know to be the Ninth Amendment. Justice Story suggests that powers of the federal and state governments can be divided into three categories.[110] In the first, the Constitution gives all power in some areas to the federal government, such as the creation of forts and arsenals.[111] In the second, the states are simply prohibited from acting, such as coining money.[112] In the third, the states are the inappropriate level to address a power's exercise, and therefore have no power in that area, such as the country's naturalization laws.[113] In areas other than those three categories, the states will have concurrent power with the federal government, as the Ninth Amendment dictates.[114]

Justice Story explained that the power of the federal government to appoint and provide for the training of the state militia did not proscribe that all power was given to the federal government to the exclusion of the state because the Ninth Amendment says that the existence of some enumerated powers (such as appointing officers) does not translate to the conclusion that all power went to the federal government.

This interpretation is helpful for discerning the difference between the Ninth and Tenth Amendments. When discussing an enumerated power of the federal government, the Tenth Amendment is of little assistance. According to Justice Story, it is the Ninth Amendment that ensures the people retain all power not specifically given. The people may then delegate that retained power to their state or retain those powers themselves.

Though in the dissent, this view of the Ninth Amendment held sway in the Court for some time, with its reasoning used by Justice Thompson's concurrence in *New York v. Miln*, in which a ship owner claimed that the New York statute requiring ships to provide passenger lists to authorities was unconstitutional because the federal government regulated commerce.[115] The Court recognized concurrent authority of the

108. *Id.* at 32.
109. *Id.* at 49–50.
110. *Id.* at 49.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* Justice Story actually referred to the Eleventh Amendment in his opinion, but as previously noted, the amendments were not yet numbered as they are today. (The Eleventh Amendment concerns suits against states, and would be irrelevant to this desertion case.)
115. Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 143 (1837).

state, found no conflict, and upheld the law. Thompson's concurrence cited and copied Story's argument verbatim, complete with reference to the Eleventh Amendment (again referring to what is now the Ninth).[116]

This pattern repeated twice more before the Civil War.[117] In each case, Story's verbiage and reasoning was given by one or more justices in the discussion of concurrent powers.[118] None of the cases showed any judge disagreeing with Justice Story's theory of concurrent powers.

3. Post-Civil War Treatment of the Ninth Amendment

Ninth Amendment jurisprudence changed in the late 1800s, for any cry of states' rights was a painful reminder of the Civil War. The nation's balance of power between the states and federal government had just been shifted toward the federal side with the Twelfth, Thirteenth, and Fourteenth Amendments. The Legal Tender and the Slaughter House cases illustrate the changing views of the Supreme Court, as discussed below.

In 1869, in *Hepburn v. Griswold*, the Supreme Court said that the federal government was not permitted to print money.[119] A year later it overturned itself in the Legal Tender Cases; in a 5-4 opinion, Chief Justice Chase claimed that printing money is just one of many unenumerated implied powers that Congress can claim.[120] As Justice Field's dissent pointed out, this turns the whole structure of the Constitution on its head:

> The position that Congress possesses some undefined power to do anything which it may deem expedient, as a resulting power from the general purposes of the government, which is advanced in the opinion of the majority, would of course settle the question under consideration without difficulty, for it would end all controversy by changing our government from one of enumerated powers to one resting in the unrestrained will of Congress.[121]

Justice Field claimed that the Chief Justice's position is exactly what the Federalists feared when specifying rights in the Constitution; it paved the way for a judge to force his way into powers not intended. Justice Field articulated the same doctrine first described nearly fifty years earlier by Justice Story, and he cited Story's work in a footnote to his opinion without mentioning the Ninth Amendment.[122]

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116. *Id.* at 150–51.
117. *See* Smith v. Turner, 48 U.S. (7 How.) 283, 289 (1849); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 655 (1842).
118. *See Smith*, 48 U.S. at 363.
119. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 625 (1869).
120. Knox v. Lee (*Legal Tender Cases*), 79 U.S. (12 Wall.) 457, 553 (1870).
121. *Id.* at 664.
122. *Id.* at 665.

In the Slaughterhouse Cases, the Court returned to Justice Story's understanding of the split in government powers, determining that (1) the anti-slave amendments did not make fundamental changes to the governmental system that would allow the federal court to invalidate state regulations and monopolies such as the kind that Louisiana had passed and (2) the privileges and immunities mentioned in the Constitution referred only to federal actions. The Ninth Amendment was not mentioned, but the opinion states that the impact of a federal court to invalidate a police power state law would

> fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.[123]

Even before the birth of the administrative state under the administration of FDR, the Ninth Amendment's effectiveness began to wane in the early Twentieth century. The Court allowed the federal government to regulate behavior in many areas that may have been considered police powers of the states. In *U.S. v. Charter*, a district court accepted federal regulation of petty drug sales because the law also sought tax information for the IRS.[124] T.C. HURST & SON v. FTC is another prototypical example of a district court allowing Congress to regulate unfair trade practices occurring wholly intrastate.[125] The district court simply stated that Congress has the power to regulate commerce, deciding not to discuss any limits to that power.[126]

Many courts still held to the old construction, however, and in *Hammer v. Dagenhart* the Supreme Court invalidated Congressional attempts to keep minors from working, recognizing the pure police power being sought by Congress.[127] Similarly, when Congress placed an excise tax on work by those younger than 16 years old, District Judge Boyd determined that labor regulation was strictly a state function and cited the Ninth and Tenth Amendments.[128]

123. Butchers' Benevolent Ass'n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co. (*Slaughterhouse Cases*), 83 U.S. (16 Wall.) 36, 78 (1872).

124. *See* United States v. Charter, 227 F. 331, 332 (N.D. Ohio 1915).

125. T.C. Hurst & Son v. Fed. Trade Comm'n, 268 F. 874, 877 (E.D. Va. 1920).

126. *Id.* at 877–78.

127. Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918) (typically cited as a Tenth Amendment case, but the verbiage goes back to Justice Story).

128. *See* George v. Bailey, 274 F. 639, 644 (W.D. N.C. 1921).

4. Ninth Amendment Dies with the New Deal

The courts struggled with FDR's New Deal, recognizing many of the asserted federal powers as those that belonged to the states for the first century of the nation's history. The courts struck down multiple parts of the New Deal agenda, particularly parts of the National Industrial Recovery Act, citing the Ninth and Tenth Amendments as limits on federal power and protecting state power to regulate its own labor.[129]

Even as the New Deal took hold, the court system approved of some measures using a traditional analysis. For example, when Congress sought to sell power created by Tennessee Valley Authority dams, the Supreme Court approved the action after seriously analyzing its impact under the Ninth and Tenth Amendments.[130] In one of the last prototypical gasps of the Ninth Amendment, a district court refused to regulate work limits on the coal industry:

> In considering this question, we must never forget that the national government is one of delegated powers, and that Congress possesses only such legislative powers as are expressly or by implication conferred upon it by the people in the Constitution. Even though the Ninth and Tenth Amendments to the Constitution had never been adopted, it would be difficult, in the light of the history of the Constitution, of its source, and of the objects sought to be accomplished by it, to reach any other conclusion than that there is reserved to the states or to the people all the powers and rights not expressly or impliedly conferred upon the national government. But the Ninth Amendment, which declares, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or to disparage others retained by the people," and the Tenth Amendment, providing that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," put this matter beyond all question. Therefore Congress does not have all legislative power. It possesses only such legislative power as has been expressly or impliedly conferred upon it.[131]

This clear understanding of the Ninth Amendment was set aside between 1936 and 1937, when Justice Roberts joined the New Deal effort, and the one vote difference was all that was required to approve collective bargaining,[132] implement Social Security,[133] and regulate purely intrastate commerce,[134] none of which would have likely

129. *See, e.g.*, Hart Coal Corp. v. Sparks, 7 F. Supp. 16 (W.D. Ky. 1934) (fixing wages and hours for coal workers); Darweger v. Staats, 278 N.Y.S. 87, 88–89 (App. Div. 1935) (fixing prices).

130. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 330–40 (1936).

131. *Hart Coal Corp.*, 7 F. Supp. at 21.

132. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 80–81 (1936).

133. *See* Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 585 (1937).

134. *See* United States v. Darby, 312 U.S. 100, 119 (1941).

passed a review by the Court a decade prior. This change was the end of any impact of the Ninth and Tenth Amendments until 1965.

5. *Griswold* Breathes New Life into the Ninth Amendment

Modern discussion of the Ninth Amendment usually starts with *Griswold v. Connecticut*, which brought the Ninth Amendment back into legal consciousness when the Court invalidated the Connecticut law prohibiting physicians from advising patients on birth control.[135]

Writing for the Court, Justice Douglas constructed a general case for privacy by first pointing out that the courts recognized a number of unenumerated rights, including parents' right to determine how to educate their children and study a foreign language.[136] He then introduced the notion of peripheral rights with discussion of the freedom of association and the right to keep membership lists secret.[137] Referring to the First, Third, Fourth, Fifth, and Ninth Amendments, Justice Douglas built a case for a general right to privacy protected by the Constitution, though that right is nowhere mentioned in the Constitution.[138]

Joined by Brennan and Chief Justice Warren, Justice Goldberg's concurrence applied the Ninth Amendment directly: "In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment."[139] He continued with discussion of Madison's introductory speech on his proposed bill of rights and suggested that judges could not decide on the basis of their own desires:

> Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." . . . The inquiry is whether a right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." . . . "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees," and "from experience with the requirements of a free society."[140]

Justice Black attacked Goldberg's Ninth Amendment exposition, pointing out that the Framers added it to the Constitution to protect rights from federal power, not to give the federal judiciary the power to invalidate state or federal laws:

> Moreover, one would certainly have to look far beyond the language of the Ninth Amendment to find that the Framers vested in

135. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).
136. *Id.* at 482.
137. *Id.* at 483.
138. *Id.* at 483–84.
139. *Id.* at 499 (Goldberg, J., concurring).
140. *Id.* at 493.

> this court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine.[141]

For Justice Black, the Ninth Amendment protects the states from federal power, rather than gives the court a veto on state laws; "[T]he idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder."[142]

Post-*Griswold* cases find the Ninth Amendment cited in dissenting or concurring opinions, often by Justice Douglas.[143] The Court mentioned the Ninth Amendment as one of several sources of protection in *Roe v. Wade*, where Justice Blackmun stated that the privacy right found in *Griswold* encompasses the right to abortion "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people."[144]

Richmond Newspapers, Inc. v. Virginia is a particularly good case to examine this issue, where the question concerned whether a criminal trial must be open to the public.[145] In footnotes to his opinion, Chief Justice Berger retells the exchange between Messrs. Sedgwick and Page during the First Congress (discussed in the previous section of this Comment), using it to point out that the Founders discussed and agreed that not all rights guaranteed under the Constitution would be enumerated.[146] Burger concludes, "Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others."[147]

Chief Justice Burger does not mention the Ninth Amendment in the body of his opinion, though he goes through what might be considered

141. *Id.* at 519 (Black, J., dissenting).

142. *Id.* at 530 (Stewart, J., dissenting).

143. *See* Palmer v. Thompson, 403 U.S. 217, 233–34 (1971); Osborn v. United States, 385 U.S. 323, 341 (1966).

144. Roe v. Wade, 410 U.S. 113, 152–53 (1973). Similar dissenting and concurring opinions mentioning the Ninth Amendment include: Bowers v. Hardwick, 478 U.S. 186, 201–02 (1986) (where the dissent wanted a Ninth Amendment analysis to overturn a sodomy law, but when the dissent became the majority in *Lawrence v. Texas*, the same justices chose not to invoke the Ninth Amendment); Massachusetts v. Upton, 466 U.S. 727, 735–39 (1984) (where Justice Stevens, concurring in the judgment of the Court, stated that a state court should have recognized rights protected by the state); United States v. Orito, 413 U.S. 139, 147–48 (1973) (where the dissent would have overturned a law prohibiting transportation of obscene materials); Olff v. E. Side Union High Sch. Dist., 404 U.S. 1042, 1042–46 (1972) (where J. Douglas dissented from the Court's denial of certiorari).

145. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564 (1980).

146. *Id.* at 578 nn.13–14.

147. *Id.* at 579 n.15.

an extensive Ninth Amendment historical analysis to show that the common law of England and the colonies recognized the value of keeping trials public.[148] Justice Blackmun's concurrence recognizes that the Ninth Amendment is a substantive part of the analysis,[149] and Justice Rehnquist states emphatically that he disagrees with the Burger plurality that the Ninth Amendment reasoning is appropriate.[150]

In *Hodgson v. Minnesota*, the Court continues the practice of employing Ninth Amendment reasoning while mentioning the amendment only indirectly in its 5-4 decision invalidating a state parental consent law based on the Fourteenth Amendment.[151] *Planned Parenthood v. Casey* was very similar, with a 5-4 decision citing *Griswold*.[152] The difference here is that Justice Scalia identifies the majority's reasoning as that born of the Ninth Amendment, as he disagrees with the idea that it could provide a "charter for action." His main concern is that the majority's reasoning opens up a Pandora's box for "a literally boundless source of additional, unnamed, unhinted-at 'rights,' definable and enforceable by us [the Supreme Court], through 'reasoned judgment'."[153]

Justice Scalia repeats his complaint about Ninth Amendment reasoning in *Troxel v. Granville,* where the Court set aside a statute controlling child visitation, and the majority chooses to base its opinion on the Fourteenth Amendment.[154] Though the majority opinion never directly cites the Ninth Amendment, Justice Scalia remarks on the majority's Ninth Amendment reasoning in his dissent. He agrees that the right to raise children has always been an unenumerated right supported by precedent, but then states that, as a judge, he has no power to protect that right by overturning a statute.[155]

In summary, the Court's opinions rarely employ the Ninth Amendment, and when they do, it is typically as a supporting role behind one of the enumerated rights.[156] Though the Court often reasoned as though the Ninth Amendment was active, no majority opinion out of the Supreme Court has ever openly stated that the Ninth Amendment was the motivating factor for invalidating a statute.

148. *Id.* at 579–80. The interpretive theory that J. Berger uses is discussed in the next section.

149. *Id.* at 603 (Blackmun, J., concurring).

150. *Id.* at 605–06 (Rehnquist, J., dissenting).

151. Hodgson v. Minnesota, 497 U.S. 417, 447–48 (1990).

152. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852–53 (1992).

153. *Id.* at 1000 (Scalia, J., dissenting).

154. Troxel v. Granville, 530 U.S. 57, 73–75, 91–93 (2000).

155. *Id.* at 91–92.

156. *See generally* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (discussing freedom of speech and the press as reasons to determine that criminal court proceedings should be open).

II. THESIS: COURTS SHOULD USE THE NINTH AMENDMENT DURING *CHEVRON* ANALYSES

As discussed in the introduction, the *Rapanos* scope of the Clean Water Act includes all navigable waters, those "wetlands" abutting navigable waters, the immediate shoreline to navigable waters, and those waters and land with a "substantial nexus" to the navigable waters.[157] With the case in remand to determine whether John Rapanos's land has a significant nexus to a lake ten miles away, courts have had varied responses to the holding. Some courts have concluded the "significant nexus" test is unworkable, and have applied instead the Scalia plurality view that the law is not vague.[158]

When *Chevron* first introduced a standardized process to adjudicate these kinds of claims; the process was not overly complicated. First, ask if the statute is vague.[159] If it is vague, then defer to the agency enforcing the rule.[160] But as discussed in the introduction, the Court has slowly realized that there are many exceptions that complicate the rule, and under *Rapanos* the Court was evenly split on how *Chevron* should apply.[161]

Throughout our nation's history, the Ninth Amendment has been considered a rule of construction by the judiciary that, along with the Tenth Amendment, was rendered dormant in the New Deal.[162] In the recent *Lopez*[163] and *Morrison*[164] cases, the Court may have awakened the Tenth Amendment, but the Ninth Amendment remains slumbering. Case history and commentary suggest that today's judiciary loathes the idea of an active Ninth Amendment.[165] Conservative

157. Rapanos v. United States, 126 S. Ct. 2208, 2236 (2006) (Kennedy, J., concurring).

158. *See* United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006). *But see* United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006); N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1025 (9th Cir. 2006).

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

160. *See id.* at 843–44.

161. The Scalia plurality saw no vagueness in the statute, so its analysis stopped at step one, remanding for factual determination. *Rapanos*, 126 S. Ct. at 2235 (Scalia, J., plurality). Justice Kennedy saw vagueness but thought the Corps's rule to be unreasonable and wanted a different test. *Id.* at 2252 (Kennedy, J., concurring). The Stevens dissent recognized vagueness and believed the Corps's rule to be reasonable. *Id.* at 2265 (Stevens, J., dissenting).

162. *See generally* S. Buchsbaum & Co. v. Beman, 1 F. Supp. 444 (N.D. Ill. 1936) (allowing regulation of local labor by the National Labor Relations Act).

163. United States v. Lopez, 514 U.S. 549, 558 (1995).

164. United States v. Morrison, 529 U.S. 598, 648 (2000).

165. *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1989) [hereinafter *Hearings*] (statement of Robert H. Bork) (Robert Bork provides a representative sample of many commentators: "I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an ink blot and you

judges fear the veritable cornucopia of new Ninth Amendment claims to rights never before granted, such as the right for a man to marry another man,[166] or for a brother to marry his sister,[167] or to ignore drug laws.[168] Liberal judges fear a return to rights no longer recognized from the pre-New Deal, or even the *Lochner* era, where an employer might pay someone less than the federal minimum wage[169] or ignore maximum hour rules.[170]

Using the Ninth Amendment as a rule of construction in the adjudication of agency rulemaking cases would not result in any of these claims. If accepted by the courts, this theory allows the Ninth Amendment only to determine the scope of laws, rather than invalidate them.

This Comment accepts Professor Barnett's categorization into five main approaches to the Ninth Amendment.[171] Though the outer contours of these various Ninth Amendment theories are irreconcilable, there are also overlapping scenarios where all of the reasonable theories would invoke an active Ninth Amendment's protection. After evaluating the five main theories to determine their requirements and possible remedies, one can compare the facts of *Rapanos* and its agency law involvement to all of the five theories and find that the Court should recognize a constitutional requirement to strictly and narrowly construe vague statutes under the particular conditions discussed below.

A. *Modern Scholarship on the Ninth Amendment*

Before attempting to put the Ninth Amendment or any other law to work, its meaning must be determined. Unfortunately, legal scholar-

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cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot.").

166. *See generally* Smelt v. County of Orange, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (considering challenges to the constitutionality of California's man-woman marriage laws and the federal Defense of Marriage Act).

167. *See generally* Muth v. Frank, 412 F.3d 808 (7th Cir. 2005) (considering a challenge to the constitutionality of a Wisconsin incest statute insofar as it seeks to criminalize a sexual relationship between two consenting adults).

168. *See generally* Gonzales v. Raich, 125 S. Ct. 2195 (2005) (considering a challenge to the constitutionality of the federal Controlled Substances Act (CSA) insofar as it prevents those who use doctor-recommended marijuana for serious medical conditions from possessing, obtaining, or manufacturing cannabis for their personal use).

169. *See generally* Adkins v. Children's Hosp., 261 U.S. 525 (1923) (invalidating an hourly minimum wage for women).

170. *See generally* Lochner v. New York, 198 U.S. 45 (1905) (overturning a law disallowing bakery employees from working more than sixty hours); Hart Coal Corp. v. Sparks, 7 F. Supp. 16 (W.D. Ky. 1934), *rev'd on other grounds*, 74 F.2d 697 (6th Cir. 1934) (denying federal power to regulate the wages and hours of coal miners under NIRA).

171. *See The Ninth Amendment: It Means What It Says*, *supra* note 4, at 1. Other scholars have examined and separated the various approaches into fewer general categories, but Professor Barnett's five-category structure is the most detailed and takes into account modern academic progress in Ninth Amendment understanding.

ship regarding the Ninth Amendment is sparse when compared to most of the other amendments comprising the Bill of Rights.[172] Modern academic attention to the Ninth Amendment took off in the 1980s during Judge Bork's confirmation hearings. When he was asked about the Ninth Amendment Bork said:

> I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot . . . .[173]

The fireworks during Bork's failed nomination created great interest in the legal community, which suddenly found itself discussing "original intent" doctrines far more than it had in the past. Though work in all originalist theories increased, Westlaw reports that the number of law review articles mentioning the Ninth Amendment quadrupled in the five years following Bork's nomination.[174]

According to Professor Randy Barnett, the various theories of Ninth Amendment interpretation can be coalesced loosely into five different views.[175] This section summarizes these views, giving their source and points of departure from each other. Because the goal of this Comment is to evaluate the potential ability of the Ninth Amendment to be useful as part of a *Chevron* analysis in agency rulemaking, there is no attempt or need to reconcile the theories.

To examine and contrast each theory, some points of demarcation must be made between them. In an effort to make the examination more objective, the theories will be examined so that their differences can be reduced to specific issues relevant to the proposed application. Each answer found will be assessed to determine if it will support the thesis. To accurately claim that the Ninth Amendment must be used in a *Chevron* analysis such that the Court is confident of its propriety, all reasonable theories must be supportive of that thesis.

The challenge is to convince the Court that it can recognize the Ninth Amendment in this limited fashion without opening itself up to unlimited claims of new rights. To assist the courts to determine with certainty that no pandora's box will be opened by recognizing an open-ended Ninth Amendment, the scope of the general thesis that

172. Westlaw found 3,176 law review articles mentioning the Ninth Amendment, compared to more than 50,000 for the First Amendment, 22,844 for the Fourth Amendment, more than 10,000 for the Sixth, 4,743 for the Second Amendment, and 6,492 for the Tenth Amendment, using the JLR database.

173. *Hearings*, *supra* note 165, at 31.

174. Westlaw reports 62 articles discussing the Ninth Amendment before 1982, but more than 260 by 1987, quadrupling the number in the five years following Judge Bork's remarks.

175. *See The Ninth Amendment: It Means What It Says*, *supra* note 4, at 1.

the Ninth Amendment should be used in *Chevron* analysis can be tightened by further considerations from *Rapanos*:

(1) Federal Agency. The regulating agency is the Corps of Engineers, so there are no troublesome questions regarding the Ninth Amendment on state authority or power. The *Rapanos* case will fall within the purview of any theory on this point, even if it recognizes the Ninth Amendment to have impact purely on federal issues.[176]

(2) Who are "the People" referenced in the Ninth Amendment? If a theory militates against any strength of the amendment to protect individual rights, the theory has to be convincingly dismissed or modified appropriately, or the thesis fails.

(3) Direct versus Implied Powers. The Corps of Engineers is enforcing the Clean Water Act, a federal statute seeking to reduce pollution in the navigable waters of the United States.[177] The Constitution gives no direct authority to the Congress to regulate pollution, so this must be considered an implied power. However, *Chevron* analysis is used for administrative rules addressing statutes passed by Congress that are directly authorized by the Constitution, so a supporting Ninth Amendment theory must be applicable to both direct and implied powers of Congress.

(4) Concurrent Power to Regulate Behavior. The statute at no point indicates that it supersedes and replaces all water pollution efforts by the state governments. Anti-pollution efforts in the United States are shared concurrently between federal and state governments. Nor does it expressly prohibit states from establishing higher or lower standards for pollution in unnavigable waters. Because a *Chevron* analysis sometimes addresses the impact of a proffered federal regulation on the state as a factor weighing against federal power, and no claim has ever been made that the Ninth Amendment could be employed against state rights, this thesis cannot serve as a basis to employ the Ninth Amendment to invalidate a state statute or justify a reconstruction of a state law.[178] Any Ninth Amendment theory

176. Though recognition of this thesis may raise the question of how the Ninth Amendment applies to state regulation, such a question requires another analysis involving more controversial axioms and the impact of the Fourteenth Amendment. All that is required to satisfy this thesis is that all Ninth Amendment theories accept that the Ninth Amendment operates as a limiting force in federal law affecting the federal government.

177. Clean Water Act of 1972 (CWA) § 404, 33 U.S.C. § 1344.

178. Note that this axiom eliminates the ability of many other claims made by Ninth Amendment proponents in recent years to use this analysis as supportive evidence. For example, marital laws have traditionally been state concerns, so a conclusion that the Ninth Amendment should be part of the *Chevron* analysis does not translate to a conclusion that the Ninth Amendment supports a right involving same sex marriages.

concluding that courts can use the Ninth Amendment to interfere in state concerns may have validity and carry conclusions not contrary to the thesis of this Comment, but such an issue is simply irrelevant to the discussion here.

(5) Rule of Construction. A *Chevron* analysis is only conducted when a statute is vague, so the use of the Ninth Amendment in a *Chevron* analysis gives no credibility to a claim of protective relevance when a statute is written plainly and its meaning is unchallenged. This natural limitation on the scope of the thesis provides no support to broad claims of Ninth Amendment protection.[179]

(6) Judicial Review. If a statute is found invalid, no *Chevron* analysis is needed. Because this thesis seeks to employ the Ninth Amendment in the second step of the *Chevron* analysis, the questions of validity and vagueness must already have been answered affirmatively. One of the major differences between Ninth Amendment theories is the method by which a theory allows or prohibits review and invalidity of a statute, but this thesis need not answer that question. Because a *Chevron* analysis never seeks to invalidate a law, none of the five theories are eliminated as supportive of this thesis on the basis of how they answer the question of judicial review. However, if a theory clearly does allow for invalidation of offending statutes, this analysis assumes that courts will attempt to salvage an offending statute by restricting its scope as a rule of construction.

(7) Impact of the Agency Rule. In administrative case law concerning *Chevron*, petitioners have occasionally challenged a decision by an agency to enforce a statute more expansively than the petitioner believes appropriate.[180] The Ninth Amendment is a one-sided protection that has never been cited to argue in favor of more regulation.

To summarize the restrictive points made above, a thesis asserting the use of the Ninth Amendment in *Chevron* analysis will provide further support in other questions only when the question involves a federal law enforced by a federal agency against the liberty interests of an individual engaged in behavior that is not wholly regulated by the federal government and that law is administered by a vague, but constitutionally-valid statute, whose construction is before the court. Such restrictive circumstances will rarely avail petitioners outside of *Chevron* analysis.

179. The Clean Air Act provides plenary jurisdiction and has no jurisdictional scope question. This thesis provides no support to a Ninth Amendment claim that the scope of the Clean Air Act is unconstitutionally large.

180. *See, e.g.*, Nat'l Coal. Against Misuse of Pesticides v. Thomas, 809 F.2d 875, 880–81 (D.C. Cir. 1987).

B. *Evaluation of Five Modern Ninth Amendment Theories*[181]

The purpose of Professor Barnett's article is to synthesize the various academic views on the Ninth Amendment, and then demonstrate how the historical evidence, some of it discovered only recently, supports some theories more than others. Since the goal of this Comment is not to discern the "true" interpretation of the Ninth Amendment, there is no need to accept Professor Barnett's conclusions except to dismiss those theories not supportive of the thesis. The primary use of Barnett's article is to borrow his framework of the five models in the process of proving the thesis statement.

Each of these five models is summarized below, in sufficient detail that its support for the use of the Ninth Amendment in a *Chevron* analysis can be determined. Though the models may be distinguished from each other, some of these distinguishing characteristics may not impact their support for the thesis, so the question of whether they will support the thesis is answered after the introduction of all five.

1. The State Law Rights Model

Based on an article by Russell Caplan,[182] this view of the Ninth Amendment sees the "other rights" to which the Ninth Amendment refers as state constitutional and common law rights.[183] The Ninth Amendment only prevents the idea that the Constitution changed the status of those rights at its passage.[184] This view allows the federal or state government to modify or eliminate the state and federal common law rights at will.[185]

2. The Residual Rights Model

Championed by Thomas McAffee,[186] this model asserts that the purpose of the Ninth Amendment is to protect against "the inference of a government of general powers from the provision in a bill of rights for specific limitations on behalf of individual rights."[187] McAffee writes that the Ninth Amendment, "says nothing about how to construe the powers of Congress or how broadly to read the doctrine of implied powers; it indicates only that no inference about those pow-

181. The Author is indebted to Professor Barnett for the pioneering work that he has done to awaken the legal community's interest in Ninth Amendment theory over the last two decades. Certainly the interests that this Comment explores are due to his efforts.

182. *See* Caplan, *supra* note 5, at 227.

183. *Id.*

184. *Id.* at 227–28.

185. *Id.*

186. *See* Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1317–18 (1990).

187. *Id.* at 1226.

ers should be drawn from the mere fact that rights are enumerated in the Bill of Rights."[188]

In justifying his position, McAffee cites the debate about the need for a bill of rights, pointing out that Madison considered it a prophylactic measure against possible inferences of powers the government might have because of the enumeration of some rights.[189]

McAffee appears to be concerned about bold claims being made by other writers (such as Randy Barnett) that he believes are unjustified, stating that the "critical question, then, is not merely whether the ninth amendment contemplates that there are 'rights' beyond those enumerated in the first eight amendments (or elsewhere); clearly, in some important sense, the ninth amendment does this. Rather, the question is what sort of protection the Constitution affords these rights."[190]

But McAffee's position is not as sterile as to say that the Ninth Amendment gives no protection at all. He writes, "positive legal rights, rooted in common law, statutes or state constitutions, are secured by the ninth amendment, but only to the extent that it prevents an inference of national powers by which the federal government might render those positive rights nugatory."[191] To answer the claim that these rights are meaningless if they are not cognizable as support for a suit, he points out that the enumerated powers scheme was designed to take care of the potential problem that "individuals may secure their claims to rights protected residually by alleging the lack of governmental authority to invade the protected interests."[192] McAffee supports a petitioner's ability to claim that the government has no power to behave in a particular fashion, rather than complain about the government infringing upon a right.[193]

3. The Individual Natural Rights Model

This model asserts that our rights preexisted their legal recognition by their inclusion in the Bill of Rights and the various clauses in the Constitution.[194] Professor Barnett points out that the country operated under the Constitution for two years without the enumerated rights in the first eight amendments, yet some rights were discussed

188. *Id.* at 1300 n.325.
189. *Id.* at 1264.
190. *Id.* at 1246–47.
191. *Id.* at 1221.
192. *Id.* at 1222 n.25.
193. Though Professor McAffee concludes that the Ninth Amendment's model is useful *only* for estopping a claim that the government has powers due to the recognized and enumerated powers, this Comment demonstrates that even this model is useful as a scope-limiting presumption against government power expansion without the expressed statement of Congress favoring the expansion.
194. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 235 (2004).

and recognized before the Bill of Rights was written.[195] Because these rights existed prior to the Bill of Rights, the Ninth Amendment cannot be their source, but only a means of ensuring that unenumerated rights have the same status as enumerated rights. In this model, there is no legal difference between enumerated and unenumerated rights.[196]

To support this argument, Professor Barnett points out that Madison said that they should be added "for greater caution."[197] Rather than democratically decide which rights should be protected and which others are left unprotected, this view asserts that they are all protected.[198]

Though this model supports judicial review of offending statutes, it does not provide "trump" authority over all laws. Just as in the rights to assemble or free speech, the natural rights model allows for reasonable and necessary regulation of rights.[199] When challenged, this model asserts that the government has the burden of showing the regulation is reasonable.[200] This would be a change from the current status, as courts currently assume all laws are constitutional, except when certain enumerated rights are infringed.[201] The Natural Rights Model accepts the Ninth Amendment interpretation that all rights, enumerated or not, should be respected equally, with the burden always on the government to demonstrate constitutionality when challenged.[202]

4. The Collective Rights Model

This model sees the rights discussed in the Ninth Amendment as the collective rights of the people, such as the right to abolish or change the government.[203] This is identified as a theory different from the others because the other theories do not necessarily identify collective rights as those that the Ninth Amendment is written to protect. At the same time, this theory is not hostile to other theories; the Ninth Amendment could have been written to protect both collective and individual rights.

Professor Barnett suggests this model is held by Professors Kurt Lash and Akhil Amar.[204] Professor Amar is the only scholar mentioned by Barnett who appears to hold that these are the exclusive

195. *Id.* at 235–36.
196. *See id.* at 260.
197. *Id.* at 238.
198. *See id.* at 254.
199. *See id.* at 262.
200. *See id.* at 259–61.
201. *See id.* at 260.
202. *See id.* at 261.
203. *See The Ninth Amendment: It Means What It Says*, *supra* note 4, at 16 (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 120 (1998)).
204. *Id.*

rights protected by the Ninth Amendment; Amar refers to the idea that the Ninth Amendment protects individual liberties as anachronistic.[205] Professor Lash's writings indicate that he sees collective rights as rights that are protected along with rights held by individuals and often regulated at the state level.[206]

5. The Federalism Model

Professor Barnett identifies this model as relatively recent, citing Professors Lash and Amar as its main proponents.[207] This model focuses on the idea that the Ninth Amendment is a sort of corollary to the Tenth Amendment, in that, as the Tenth Amendment limits Congress to its enumerated powers, the Ninth Amendment prohibits expansion of those enumerated powers.[208]

Professor Lash characterizes this model as a judicially enforceable rule of construction.[209] When challenged, a court employing this theory would require "a presumption in favor of the collective right of the people to state or local self-government."[210] Barnett points out that this theory dovetails with the natural rights theory, and again, no part of this theory militates against the natural rights theory, or vice versa.[211]

C. *Evaluating the Five Models as Support for the Thesis*

To prove the thesis that the Ninth Amendment should be part of a *Chevron* analysis, all of the reasonable models must support the thesis. To support the thesis, a theory must allow for a court to implement judicial review to determine if a law is infringing rights and invalidate it or to at least interpret the statute with the Ninth Amendment as a rule of construction to limit a potentially infringing statute to within a constitutional boundary. They are examined in the same order as their introduction.

1. The State Law Rights Model

In his historical analysis, Caplan asserts that Madison's Ninth Amendment was based on Virginia's proposed amendments, while also responding to Federalist concerns.[212] Caplan provides Madison's first draft of what became the Ninth Amendment, which appears to be

205. *Id.* (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 120 (1998)).
206. *See* Lash, *supra* note 9.
207. *See The Ninth Amendment: It Means What It Says*, *supra* note 4, at 18, 20.
208. *See id.* at 18 (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 123–24 (1998)).
209. *Id.* at 20.
210. Lash, *supra* note 9, at 347.
211. *Id.*
212. Caplan, *supra* note 5, at 246–48.

a rule of construction stating that the rights listed in the Constitution may not be used as a reason for federal expansion:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[213]

Caplan asserts that Article II of the Articles of Confederation is a direct source for the meaning of the Ninth Amendment.[214] Article II states, "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation *expressly* delegated to the United States, in Congress assembled."[215] (Emphasis added.) Because Article II looks for an "expressly delegated" power, a court following the State Law Rights Model of the Ninth Amendment while performing a *Chevron* analysis must restrict a statute to the powers that are "expressly" given to the agency.

Under the State Law Rights Model, if a statute has plainly (expressly) taken a power for itself or given power to an agency, the Ninth Amendment provides no cause of action to invalidate the statute. If the statute is vague, and an agency issues a rule later challenged by a party seeking less regulation (*Chevron* step two), the States Rights Model of the Ninth Amendment requires the judiciary to allow rules promulgated by an agency that interprets a statute narrowly. So even if this model disallows judicial review of the law, it supports the use of the Ninth Amendment in the rule construction required in *Chevron* analysis and the thesis stands.

2. The Residual Rights Model

This model may only protect individuals from "the inference of a government of general powers"[216] based on enumeration of state rights, but that is sufficient for the needs of this thesis. In a *Chevron* analysis, a court is not construing the powers of Congress or even discussing how much implied power Congress has, but only what power has been given to an agency, and if that agency is behaving reasonably within the parameters that Congress has given to it.

Since McAffee agrees that individuals may make claims that a governmental authority has not been given a power to invade a protected interest, the Ninth Amendment will protect individuals from a government going beyond its governmental authority.[217] Caplan cites *United*

213. *Id.* at 254.
214. *Id.*
215. *Id.* at 236.
216. McAffee, *supra* note 186, at 1226.
217. *Id.* at 1222 n.25.

States v. Butler to provide a prototypical case, which declares, "From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people."[218]

To reach a *Chevron* analysis, a court must have already determined that Congress has not "expressly granted" the agency to make the rule being challenged, because clearly written delegations of power are not going to be part of "step two" of a *Chevron* analysis. Though this model and theory discussed is referring to government-written laws, it would be absurd to think that an agency could act without expressly granted power when its authorizing authority (Congress) could act without that same expressly granted power.

Therefore, this model must act as a rule of construction for agency rules, such that vaguely expressed grants of power must be strictly construed. In *Rapanos*, this would restrict the Corps's definition of "navigable waters" to the waters adjoining wetlands and shorelines at most. Under this model, John Rapanos can move dirt on his property at least until Congress specifically gives the Corps authority to regulate all dirt that might get wet.

3. The Individual Natural Rights Model

Because the Individual Natural Rights Model accepts judicial review and invalidation of statutes, as well as the effort to employ the Ninth Amendment as a rule of construction to delimit federal statutes, this model also supports the thesis indirectly. According to Barnett, Madison viewed the Ninth Amendment as a rule against the loose construction of Congress's power.[219] Again, it would be absurd to allow an agency to create rules that Congress could not make itself.

4. The Collective Rights Model

As discussed prior, this model sees the rights discussed in the Ninth Amendment as the collective rights of the people. This view has to be reconciled with the thesis or be invalidated.[220] The most difficult view is that of Akhil Amar, who is hostile to other theories, and disapproves Ninth Amendment justifications for "countermajoritarian individual rights–like privacy."[221]

Barnett focuses on this aspect of Amar's writings because Barnett desires to show that Amar is wrong on his restrictive view of the Ninth Amendment, but because this thesis is more concerned about showing

218. United States v. Butler, 297 U.S. 1, 68 (1936).

219. RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, *supra* note 194, at 240.

220. *See The Ninth Amendment: It Means What It Says*, *supra* note 4, at 16.

221. *Id.* (quoting AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 120 (1998)).

that all reasonable views comport with its use in agency rulemaking and not protection of "countermajoritarian individual rights," other writings regarding this model have to be consulted. Professor Amar has also written:

> The Ninth is said to be about unenumerated individual rights, like personal privacy; the Tenth, about federalism; and the Preamble, about something else again. But look again at these texts. All are at their core about popular sovereignty. All, indeed, explicitly invoke "the people." In the Preamble, "We the people . . . *do*" exercise our right and power of popular sovereignty, and in the Ninth and Tenth "the people" expressly "retain" and "reserve" our "right" and "power" to do it again. If the Ninth is mainly about individual rights, why does it not speak of individual "persons" rather than the collective "the people"? If the Tenth is only about states' rights, why does it stand back-to-back with the Ninth, and what are its last three words doing there, mirroring the Preamble's first three?[222]

In the above, Amar shows that his emphasis is on popular sovereignty and an approach to lawmaking that protects the rights of the people that are reserved for them at the state level. This works well within a *Chevron* analysis framework when federal agencies reach for a larger jurisdiction, because that jurisdiction typically is being taken by the state.

For example, the Corps of Engineers wanted the Clean Water Act to give jurisdiction over all land where some run-off water might feasibly run over the property.[223] Professor Amar's Ninth Amendment would ask if the states had deliberately given away their jurisdiction to the federal government. If not, then the Clean Water Act's scope would be reduced to those navigable waters that were previously found to be logically necessary, i.e., shores and connected wetlands.

Thus, this view of the Ninth Amendment would also act as a restrictive agent in a *Chevron* analysis for federal agencies acting in a jurisdictional area where the states have at least some concurrent responsibility. The thesis remains supportable.

5. The Federalism Model

Like the Natural Rights Model, the Federalism Model directly provides for review of offending statutes and therefore supports use of the Ninth Amendment as a rule of construction in construing agency regulations. Professor Lash writes:

> This collective understanding of the people's retained rights is quite different from the more individualistic conception of rights most often expressed in contemporary law. To the Founding generation, however, federalism was a liberty of the people. For this reason, the

222. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 492 (1994).

223. Rapanos v. United States, 126 S. Ct. 2208, 2216 (2006).

> state conventions insisted that a provision be added reserving all nondelegated powers, jurisdiction, and rights to the states. They did so to better secure liberty. While Madison could have framed the Ninth in terms of limiting federal power, he chose instead to frame the Amendment in terms of rights. By doing so, he prevented enumerated power from being interpreted as a mere matter of expediency and, instead, anchored the principles sought by the states in the language of enforceable rights.[224]

Lash goes on to discuss the Ninth Amendment, claiming that the Ninth Amendment is not limited to natural law theory and was intended to manage all those affairs not meant to be handed over to the federal government. This fits perfectly with *Chevron* analysis, as most tasks are not handed over to the federal government, at least not in total.

Lash supports his position from Madison's argument against a national bank, adopting his restrictive rule of statutory interpretation: "The precision of these expressions is happily contrived to defeat a construction, by which the origin of the union, or the sovereignty of the states, could be rendered at all doubtful."[225] The thesis works well with the Federalist Model because *Chevron* analysis often involves a petitioner's claim that a federal agency has overstepped its jurisdictional boundaries. The *Rapanos* case is a typical *Chevron* analysis in that it arose when the Corps of Engineers sought to punish John Rapanos for moving dirt on his private property, and he fought back.[226] Rapanos never claimed that the state cannot tell him how and when to move dirt on his property—the issue is whether the federal agency can involve itself in the affairs typically retained by the state and individual. Therefore, the collective right of the state to regulate the moving of soil from one spot to another should be sufficient to employ the Ninth Amendment in the *Chevron* analysis.

In adjudicating agency-promulgated rules, an agency is generating a rule based on a statute passed by Congress under its constitutionally direct powers, or those implied by an enumerated power and justified by other constitutional clauses, such as regulation over commercial activities under the Commerce Clause. The thesis does not require or even ask that the Ninth Amendment should always be used in every *Chevron* analysis. Instead, it should only be used when appropriate, as with the multiple agency or agency-as-prosecutor exceptions. The Ninth Amendment impact does not automatically restrict a statute from an expansive reading because not all such readings restrict liberty.

The examination shows that Ninth Amendment considerations will typically be justified in a *Chevron* analysis when the rule is based on a

224. Lash, *supra* note 9, at 395.
225. *Id.* at 398 (quoting Madison).
226. *Rapanos*, 126 S. Ct. at 2214.

federal statute under constitutionally-implied powers where states have concurrent power, i.e., when the collective right of the state to regulate in an area is endangered by a federal statute. Faced with those conditions under the Collective Rights Model, a *state* certainly has the authority to challenge a federal rule in a *Chevron* analysis;[227] the question is whether an affected *individual* has standing to challenge the rule when the state has not addressed the issue.

Under our Constitution, the states originally claimed to be the fundamental building block of the country, with all powers initially residing in the states. At the founding, states were nearly unlimited in their regulatory authority, but if a state chose not to issue a law in an area, the Collective Rights Model should recognize that the state has determined to treat a right as most easily administered on a city or individual level without direct state government involvement. The right remains a collective one, since the state and city can regulate the right, but when a state or city chooses to let the issue reside with individual citizens, individual citizens become the guardians of these rights and should have standing to challenge federal regulations based on the state's decision to allow the right to be administered at the individual level.

If the Collective Rights approach is used in the case of John Rapanos, the Court should recognize that he lives in Michigan.[228] No one claims that Michigan is not perfectly capable of prohibiting and policing the private behavior of filling in swamp land many miles from any navigable water. The state has significant pollution controls, so any federal exercises of power have to be on a concurrent basis with the state.[229] The Corps of Engineers' rule effectively claims jurisdiction over all land and makes that claim without express text in the statute to support that claim.[230] Until Michigan decides that landowners are not allowed to move dirt on their own property, or prescribes a particular process that makes Rapanos's actions illegal, the Ninth Amendment should recognize *Rapanos* as the authority for exercising rights that are superior to the federal government's authority to regulate without specific congressional approval. The court may or may not allow *Rapanos* to invalidate the Clean Water Act itself, but it should recognize the Ninth Amendment as a trump card played against the

227. In his speech against the establishment of a national bank, Madison asserted that the bank's creation would directly interfere with the rights of the states to make their own rules regarding banks, including their prohibition, establishment and circulation of bank notes. As an example, Madison pointed out that Virginia had a law prohibiting the circulation of bank notes, and the national bank rules would interfere with the Virginia law. GAZETTE OF THE U.S., 23 Feb. 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 370 (William Charles DiGiacomantonio et al. eds., 1995).

228. *See Rapanos*, 126 S. Ct. at 2219.

229. *See, e.g.*, Natural Resources and Environmental Protection Act, MICH. COMP. LAWS ANN. § 324.101 (West 2007).

230. *Rapanos*, 126 S. Ct. at 2223–24.

jurisdiction of the Corps of Engineers, reducing it to the lesser scope until Congress changes the law to replace the vague language from the statute with more precise verbiage.

D. *Other Historical Evidence*

1. Madison's Bank Speech

Madison's speech against the establishment of a national bank serves to flesh out the meaning of the Ninth Amendment, as he explains that it is, at the least, a rule of construction forbidding the expansion of federal laws beyond their proper boundaries. As reported by the Annals of Congress, Madison reasoned:

> The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. . . . He read several of the articles proposed, remarking particularly on the 11th [the ninth amendment] and 12th [the tenth amendment], the former, as guarding against a *latitude of interpretation*; the latter, as excluding every source or power not within the Constitution itself.[231]

Madison's comments make clear that the language of what would become the Ninth Amendment guards against expansive readings of Congress's powers. If the Ninth Amendment is a guard against congressional power expansion, then it must also be a guard against administrative rules generated in the absence of express permission by Congress. To reason otherwise is to allow an agency to regulate in areas where Congress is prohibited from regulating.

2. The Historic Need for a Rule of Construction Limiting Agency Rulemaking

The need to restrain out-of-control agencies, unjustifiably taking greater jurisdiction and abusing their authority, has been a concern since colonial times when writs of assistance (general warrants) were authorized and admiralty courts were established. The Declaration and Resolves, passed by the First Continental Congress in 1774[232] in response to the Intolerable Acts, contained many of the standard complaints that would become parts of the Bill of Rights later, but it also included a claim that "[C]onstituent branches of the legislature [should] be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed, during pleasure, by the crown, is unconstitutional, dangerous and destructive to the freedom of American legislation."[233]

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231. 2 ANNALS OF CONG. 1901 (1791).

232. 1 JOURNALS OF THE CONTINENTAL CONGRESS 63 (Worthington Chauncey Ford ed., 1904).

233. *Id.* at 70.

The expansion of the various commissioners' duties and abuses of the British during the colonial era weighed heavy on the minds of the former colonists during the ratification of the Constitution. While the Articles of Confederation had been incapable of taking care of the nation's business, and most of the country was ready for a stronger union, the memory of the abusive central government remained fresh in their minds. During the Virginia ratification debate, George Mason remarked, "We wish only our rights to be secured. We must have such amendments as will secure the liberties and happiness of the people on a plain, simple construction, not on a doubtful ground."[234]

Although the Federalists denied that the Constitution would authorize unduly expansive interpretations of federal power, Federalists conceded that there needed to be limits to the interpretive methods of the courts. Hamilton wrote, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . ."[235]

In reviewing the writings during the writing and ratification of the Constitution, Professor Kurt Lash concludes that the Tenth Amendment's "all not delegated is reserved" language was not going to be sufficient to restrain the enumerated powers unless a rule of construction limited those powers. Without such a restriction, courts could simply bless the delegated powers with such wide latitude of construction that no real limits would exist.[236] Lash cites Brutus:

> The courts . . . will establish this as a principle in expounding the constitution, and will give every part of it such an explanation, as will give latitude to every department under it, to take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal and local affairs of the different parts.[237]

The framers of the Constitution knew well the impact of abusive agencies that went beyond their statutory boundaries, complained of these abuses on a regular basis, and in the founding documents placed their trust in what became the Ninth Amendment as a means of controlling the latitude given to Congress in writing laws.

There is no writing by any of the founding fathers that suggests that an appointed commissioner or bureaucrat should get any deference at all in their procedures and rules when those rules are challenged in court.

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234. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 271 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1891) (1836) (quoting George Marsh).

235. THE FEDERALIST NO. 78 (Alexander Hamilton).

236. Lash, *supra* note 9, at 377.

237. *Id.*

E. *Limitations of This Thesis*

Throughout this Comment, the thesis has been tested only against the use of the Ninth Amendment in agency rule adjudication that typically uses the *Chevron* analysis. The academic literature cited in this Comment is rich in strong arguments, which indicates that the Ninth Amendment should be employed in many other judicial proceedings. This Comment does not provide for sufficient reasoning to support these conclusions.

For example, Professor Barnett and others assert that the famous "Footnote Four" of *Carolene Products*[238] violates the Ninth Amendment. Though Barnett may be absolutely correct, this thesis uncritically accepts the State Law Rights Model, which would not support judicial review of statutes for violations of the Ninth Amendment. To use the argument of this Comment, the State Law Rights Model would have to be soundly refuted for courts to recognize its interpretation as clearly wrong.

The other limitation that this Comment might suggest is a full change in the presumption of the *Chevron* analysis in favor of agency interpretations. Under the *Chevron* deference approach, an agency's interpretation is accepted if reasonable under a vague statute. The courts justify this deference based on the presumption that Congress intended vagueness by not fleshing out a statute, and the courts assume that the agency filling in the gaps of the statute has expertise in the area that the statute addresses.

This Comment does not change this reasoning, nor does it support a change in the presumption that agencies should receive deference. It only establishes the exception and potential challenge to federal agency rules built on shaky interpretations when those rules appear to be enlarging jurisdiction and interfering with state powers without specific Congressional permission.

To provide the Corps of Engineers with sufficient power to evade a *Chevron* restriction on the Corps's jurisdiction, Congress could give wording similar to the Clean Air Act, which gives its administrators in the EPA jurisdiction plenary power and nationwide jurisdiction.[239] At that point the text would be clear, the *Chevron* analysis would be over, and John Rapanos would have put the dirt back where he found it.

III. Conclusion

All five models of the Ninth Amendment support the thesis—when courts perform a *Chevron* analysis to evaluate an agency interpretation of a statute and its corresponding rule, they should interpret

238. United States v. Carolene Prods. Co., 304 U.S. 144, 155 n.4 (1938).

239. *See* Clean Air Act §§ 202(a)(1), 302(g), 42 U.S.C. §§ 7521(a), 7602(g) (2000).

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vague laws so that the regulated party retains the maximum reasonable liberty when enforcing the enabling statute.

In the case of *Rapanos*, the Corps of Engineers has been given no specific authority to interfere with the private property where the runoff water must travel twenty miles through a manmade ditch, a runoff creek, and then a non-navigable river before reaching Saginaw Bay.[240] Because the Corps has been given no clear authority to reach land with such an attenuated connection to navigable waters, the judiciary should conduct the *Chevron* analysis, recognizing the Ninth Amendment as a limiting rule of construction that requires an expansion of jurisdiction to be justified by the plain language of the text because that jurisdictional expansion restricts the use of property in a way that was not clearly articulated in the text of the Clean Water Act.

The Ninth Amendment is well suited for this task, as it has always been considered a rule of construction useful to prevent unwarranted expansion of government powers. Although the judiciary has declined to recognize any substance to the Ninth Amendment in the last sixty years, except in minority opinions, the Supreme Court has stated many times that no part of the Constitution can be superfluous.[241] This use of the Ninth Amendment is a painless way of reintroducing this dormant part of our Constitution without upsetting huge precedents or encouraging a flood of claims to new rights that courts appear to fear if the Ninth Amendment were to be found a source of rights in other applications. Use of the Ninth Amendment here only limits the reach of agency interpretations of statutes and the deference they receive from courts.

If accepted, the use of the Ninth Amendment in step two of the *Chevron* analysis would have no impact on the reasoning of the Scalia plurality, since that opinion stopped at *Chevron* step one when it found no vagueness in the statute.[242] However, because Justice Kennedy and the four justices represented by the Stevens dissent found the Clean Water Act's jurisdiction to be vague, their use of the Ninth Amendment in *Chevron* step two would result in a restriction of the Corps of Engineers to regulate property far removed from navigable waters until Congress changes the statute and either removes that verbiage or makes the jurisdiction clear.[243]

The resulting opinion would give lower courts and federal agencies clear direction here, and in many issues, by protecting individuals from agencies that are tempted to expand their reach beyond what

240. Rapanos v. United States, 126 S. Ct. 2208, 2219–35 (2006).

241. *See, e.g.*, Myers v. United States, 272 U.S. 52, 228–29 (1926); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–71 (1840).

242. *Rapanos*, 126 S. Ct. at 2235.

243. *Id.* at 2252 (Kennedy, J., concurring) (concluding that under *Chevron* step two the statute was vague, but the Corps's rule was unreasonable), 2265 (Stevens, J., dissenting) (concluding that the statute was vague, but the Corps's rule was reasonable).

Congress has clearly given. Agencies would generally keep their *Chevron* presumption when making rules so long as the rules reflect a sober view of agency reach.

Two hundred years ago, the founders' outrage of British practices in its tax collection efforts was expressed in the Declaration of Independence.[244] During the period leading to the Revolution, our forefathers tarred and feathered some of those who participated in the harassment. We stopped that practice soon after the Revolutionary War, and this Comment does not call for its return. However, we can at least remember that even in a modern administrative state, government agencies should be restrained from arbitrary rule-making.

Warren Norred

244. *See* THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776) ("He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.").