LEVELING THE PLAYING FIELD IN DAVID V. GOliATH: REMEDIES TO AGENCY OVERREACH

DAMIEN M. SCHIFF & LUKE A. WAKE*

I. INTRODUCTION...........................................................................98
II. REGULATORY OVERREACH AND SACKETT V. EPA............102
III. INCENTIVES FOR REGULATORY OVERREACH.................107
   A. Institutional Advantages over Private Litigants..............107
   B. The Cost of Vindicating Constitutional Rights ..........109
IV. PRACTICAL ADMINISTRATIVE REFORMS TO LEVEL THE
    PLAYING FIELD ....................................................................113
   A. Amending the Administrative Procedure Act............113
      1. Clarifying the Right to Challenge
         Jurisdictional Determinations.............................113
      2. Cabining Agency Discretion on Jurisdictional
         Questions..............................................................116
   B. Amending the Equal Access to Justice Act............118
      1. Expand Opportunities for Recovery of
         Attorney’s Fees ....................................................119
         a. Attorney Fee Awards as a Matter of Right.....119
         b. Lowered Standards in Cases of Dire
            Financial Need................................................119
      2. Authorize Damages for Entirely Unfounded
         Positions..............................................................120
V. THE NEED FOR SUBSTANTIVE REFORMS.........................121
VI. CONCLUSIONS.......................................................................123

* Damien M. Schiff is a principal attorney with Pacific Legal Foundation and counsel
  of record representing Michael and Chantell Sackett in Sackett v. EPA, 132 S. Ct. 1367
  (2012). Luke A. Wake is a staff attorney with the National Federation of Independent
  Business Small Business Legal Center. The views expressed herein are the authors’ and
  do not necessarily reflect those of their organizations.
I. INTRODUCTION

For the past two decades, small business owners have consistently reported that regulatory burdens, and the onerous paperwork that compliance requires, are among their top concerns. They know firsthand how difficult it can be to obtain the necessary approvals and to meet multifarious regulatory requirements simply to make an honest living. They must navigate through the complexities of an ever-changing regulatory system governing their daily activities.

Whereas a Fortune 500 company will have a team of compliance officers and attorneys ready to tackle regulatory issues like a swarm of wasps, a typical small business has only ten employees and lacks the financial resources to address regulatory roadblocks in the same manner. Without a standing army of experts, small businesses cannot efficiently clear regulatory hurdles; therefore, the cost of compliance is necessarily higher for them. Indeed, small business owners are put in a real bind when they cannot obtain or afford necessary permits, when their costs of compliance are too high, or when they are faced with litigating a case against a federal agency with a large and comparatively bottomless budget. Regulatory burdens bar entry into the market. They prevent many potential businesses from


2. Bruce D. Phillips & Holly Wade, Nat’l Fed’n of Indep. Bus. Research Found., Small Business Problems & Priorities, 9 (June 2008), available at http://www.nfib.com/Portals/0/ProblemsAndPriorities08.pdf ("[Unreasonable government regulation] costs small businesses in several ways: understanding and keeping up-to-date with compliance requirements, cost of consultants, employee time, management time, direct outlays, lost productivity and/or sales, foregone opportunities, etc. The federal government alone proposes approximately 150 new rules every year that cost business owners over $100 million per rule in compliance costs. Adding state and county laws that sometimes duplicate federal laws, merely raise the cost and frustration level.").


4. Joseph A. Castelluccio III, Sarbanes–Oxley and Small Business: Section 404 and the Case for a Small Business Exemption, 71 Brook. L. Rev. 429, 444 (2005) ("In the case of small businesses, the relative costs of compliance with federal regulations can be disproportionately high, both in terms of dollars and manpower. This is the result of economies of scale, the idea that the average costs per dollar of proceeds decrease as the size of the company or transaction increases because fixed costs can be spread out.") (citations omitted).
Small business owners understand how frustrating it can be to work with regulators because they must do so on a regular basis. A typical individual, however, will inevitably feel the same frustrations when confronted with a regulatory problem in his or her personal life. Something as seemingly simple as obtaining a permit to build a modest addition to a home—on one’s own property—can become an administrative nightmare. Most individuals, like most small businesses, lack the resources to defend their rights when they fall under the bureaucratic thumb of indiscriminate regulators.

Regulators exacerbate this problem when they adopt a “shoot first, ask questions later” mentality, as demonstrated in Sackett v. Environmental Protection Agency. Decided this past Term in the United States Supreme Court, the case concerned the troubles of Mike and Chantell Sackett—an ordinary couple of modest means. In 2007, the Sacketts received a compliance order from the EPA alleging that they had violated the Clean Water Act (CWA) when they began construction on their dream home on an approximately half-acre patch of dry land in the Idaho panhandle. In the compliance order, the EPA asserted that the Sacketts’ property was a jurisdictional wetland, but the order provided no evidence to substantiate the allegation.


10. Id.
Sacketts wished to contest the EPA’s jurisdiction over their property, but the couple was denied any opportunity to challenge the Agency’s compliance order. According to the EPA, their only option was to take immediate action to remedy the alleged violation or face ruinous fines of as much as $75,000 per day. The Sacketts had to fight all the way to the Supreme Court simply for the chance to contest the EPA’s jurisdiction to issue the compliance order—an order that was issued without any probable cause that the Sacketts had violated the law and without on-site analysis to confirm the existence of federally regulable wetlands. The absence of probable cause and supporting evidence is particularly troubling given that a jurisdictional wetlands determination is very fact-intensive and site-specific. Ultimately, the Supreme Court would hold that

11. Id. at 1371.
12. By the time the case got to the Supreme Court, the Sacketts were subject to daily fines of up to $37,500 for allegedly violating the CWA, and additional daily fines of $37,500 for violation of the compliance order (totaling up to $75,000 in daily fines). Sackett, 132 S. Ct. at 1370. The justices were unmoved by the Agency’s argument that it rarely seeks the statutory maximum when it brings a civil action. During oral argument, Justice Scalia scoffed at that suggestion: “I’m not going to bet my house on that.” Transcript of Oral Argument at 30–31, Sackett, 132 S. Ct. 1367 (No. 10-1062). The threat of ruinous fines is coercive because it is an effective psychological weapon. The EPA meant to scare the Sacketts into compliance—regardless of whether their property was a jurisdictional wetland. One can only imagine the sinking feeling that Mike and Chantell Sackett must have felt—the shock, the fear, and the feeling of exasperation—upon receiving the compliance order. The EPA’s message was clear: Resistance is futile (and never mind your constitutional rights).
14. Jonathan Adler, Wetlands, Property Rights, and the Due Process Deficit, 2011–2012 CATO SUP. CT. REV. 139, 141 (2012) (citing Sackett, 132 S. Ct. at 1375 (Alito, J., concurring)) (“The CWA is ‘notoriously unclear’ as to the extent to which it projects federal regulatory authority over private land.”). The Supreme Court’s most recent decision addressing CWA jurisdiction is Rapanos v. United States, 547 U.S. 715 (2006). In Rapanos, the Court rejected the Government’s expansive understanding of its regulatory authority but could not produce a single rationale supported by a majority of the justices. The Rapanos plurality of four justices asserted that federal jurisdiction under the CWA extends only to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to bodies which are ‘waters of the United States’ in their own right.” Id. at 739, 742. Justice Kennedy wrote a separate concurring opinion in which he agreed with the plurality “that the statutory term ‘waters of the United States’ extends beyond water bodies that are traditionally considered navigable[, but he] . . . concluded that wetlands are ‘waters of the United States’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” ENVTL. PROTECTION AGENCY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT’S DECISION IN RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES 2–3 (2008) (quoting Rapanos, 547 U.S. at 767, 780 (Kennedy, J., concurring)), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf (last visited Dec. 21, 2012). The federal circuit
the Sacketts had a right to sue the EPA pursuant to the Administrative Procedure Act.\textsuperscript{15}

In their victory in the Supreme Court, the Sacketts not only vindicated their individual rights, they established the important precedent that a federal agency cannot issue a compliance order without giving its recipient a meaningful opportunity to contest the agency’s jurisdiction.\textsuperscript{16} Previously, the EPA could issue compliance orders on a whim, based only on speculative conjecture as to whether the property in question was in fact a jurisdictional wetland.\textsuperscript{17} At the Supreme Court, the EPA argued against judicial review in part because it would force the Agency to make a more thorough assessment before issuing such orders.\textsuperscript{18} The EPA asserted that concerns for administrative expediency should allow the Agency to take quick action to prevent possible environmental harms.\textsuperscript{19} But, in holding that the Sacketts may challenge the EPA’s compliance order, the Court made clear that the Agency must be prepared to defend its jurisdictional assertion if it insists on issuing compliance orders.\textsuperscript{20}

Because of Sackett, agencies have a disincentive to issue compliance orders without substantiating the facts necessary to justify their issuance. Hence, the decision is a victory for individual rights not only because it establishes the right of courts are split as to which test controls, and the question of how to apply these tests remains one of the most vexing issues in environmental law today. See Cathryn Henn, 

\textsuperscript{15.} Sackett, 132 S. Ct. at 1374.

\textsuperscript{16.} This is at least true with regard to statutes that do not explicitly foreclose the possibility of judicial review. Id. But the absence of any opportunity for judicial review raises serious due process concerns. See Damien Schiff, Sackett v. EPA: Compliance Orders and the Right of Judicial Review, 2011–2012 CATO SUP. CT. REV. 113, 120 (2012) (“[W]e argued that another reason why the Sacketts should not have to wait until an EPA lawsuit for them to get judicial review is that it would violate the principle of Thunder Basin and \textit{Ex parte Young}—that the right to judicial review would be conditioned on the Sacketts’ violating the compliance order and thereby risking significant civil liability.”).

\textsuperscript{17.} See Adam D. Link, United States Supreme Court Reverses Ninth Circuit, Holds Individuals May Bring Action Under Administrative Procedure Act Challenging U.S. Environmental Protection Agency Compliance Orders, SOMACH SIMMONS & DUNN (Apr. 3, 2012), http://www.somachlaw.com/alerts.php?id=162 (“[T]he EPA issues approximately 1,500 to 3,000 compliance orders annually, and while many of these will not be challenged because the grounds for enforcement and liability may be clear, [Sackett v. EPA] will afford those who question the validity of that order an opportunity to challenge [the] EPA at an earlier stage of the proceedings.”).

\textsuperscript{18.} See Brief for the Respondents, Sackett, 132 S. Ct. 1367 (No. 10-1062), 2011 WL 5908950, at *22 (noting that the EPA can better conserve resources outside judicial-enforcement settings).

\textsuperscript{19.} Id.

\textsuperscript{20.} Id.
judicial review for compliance orders, but also because it reduces the incentive for agencies to adopt cavalier positions when threatening individuals with ruinous fines. Nevertheless, agencies after Sackett still have perverse incentives to take unnecessarily aggressive positions, a fact that endangers our rights. The phenomenon persists because: (a) most individuals lack the resources to vindicate their rights; (b) the costs of litigation will often outweigh the benefits of vindicating one’s rights; and (c) agencies benefit from rules that stack the deck against private litigants.

The Sacketts’ rights would never have been vindicated if they had not had pro bono counsel from the Pacific Legal Foundation. Like most of us, the Sacketts lack the resources to challenge the EPA on their own. Are there remedies for folks targeted by administrative agencies who do not have unlimited resources or the assistance of pro bono counsel? As we explain below, Congress could provide such remedies by instituting certain reforms. In Section II, we discuss the problem of regulatory overreach in the context of Sackett. In Section III, we address the incentives that may contribute to self-aggrandizing agency behavior at the expense of individual rights. In Section IV, we offer a number of suggestions to help level the playing field and to discourage agencies from advancing unfounded legal positions. Finally, in Section V we argue that substantive reforms would help to better secure individual rights. We conclude that we can more effectively protect individual rights, without discouraging prudent administrative action, if these policy proposals are adopted.

II. REGULATORY OVERREACH AND SACKETT V. EPA

The EPA’s compliance order put the Sacketts in a particularly unenviable position. The Agency issued the order after the Sacketts had begun developing the land for their planned

21. See id. at 1375 (“The Court’s decision provides a modest measure of relief…. But the combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA’s tune.”) (Alito, J., concurring).

No. I  Remedies to Agency Overreach

home.23 The EPA demanded that the Sacketts spend thousands of dollars to remove the gravel and to return their property to its alleged pre-disturbance wetlands condition.24 But the Sacketts believed that the Agency was wrong to assert that their property was a jurisdictional wetland.25 Although the parcel was in the vicinity of Priest Lake, it was surrounded by developed lots and country roads.26 It even had an existing sewer hookup.27 And once the compliance order was issued, the Sacketts also obtained expert opinions supporting their contention that the property is not a wetland.28 Accordingly, the Sacketts felt confident in their position and wished to stand their ground despite the threat of ruinous fines which hung over them like a Damoclean sword. But without a procedure to contest the EPA’s jurisdiction, they had no meaningful way to fight back.

Before the Supreme Court’s decision in Sackett, every court to address the issue had ruled that a landowner has no right to sue to challenge a compliance order.29 The courts had concluded that a landowner has only two unpleasant choices: ignore the order and risk financial ruin by incurring incalculable civil-penalty liabilities, or submit to the agency’s demands. Under this pre-Sackett scenario, the better option was to comply—even if at great expense—with the order, even if one firmly believed that it

24. Id. at 1371. (“On the basis of [the EPA’s] findings and conclusions, the order directly the Sacketts, among other things, ‘immediately [to] undertake activities to restore the Site in accordance with [an EPA-created] Restoration Work Plan’ and to ‘provide and/or obtain access to the Site . . . [and] access to all records and documentation related to the conditions at the Site . . . to EPA employees and/or their designated representatives.’

25. Adler, supra note 14, at 149 (“Given [the EPA and the Corps’] history of overzealous assertions of their own authority, one could excuse landowners for doubting the jurisdictional claim made by an agency enforcer—yet acting on such doubts could have serious legal and financial consequences, as the Sacketts discovered.”).


29. Sackett v. EPA, 622 F.3d 1139, 1143 (9th Cir. 2010), rev’d, 132 S. Ct. 1367 (2012); see also Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995); S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418 (6th Cir. 1994); S. Pines Assocs. v. United States, 912 F.2d 713 (4th Cir. 1990); Hoffman Grp., Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990).
was unconstitutional. The lower courts reasoned that once the landowner had complied with the order, he or she could apply for a costly wetlands fill permit. At that point, the landowner would have to wait for the Army Corps of Engineers to deny the permit application before being allowed to challenge the Agency’s assertion of jurisdiction over the property.  

30 But, as the Sacketts successfully argued, it would be grossly unfair to require a landowner to spend thousands of dollars to comply with a compliance order when the owner believes that the Agency lacks jurisdiction to issue or enforce the order in the first place. And it would simply be absurd to then require the landowner to apply for a permit to build on “wetlands” when the owner thinks he or she should not need a permit at all. But the only alternative—according to the courts—was for the landowner to wait and see whether the EPA would sue to enforce the order in court, at which point the landowner would be able to challenge the EPA’s jurisdiction. The landowner, however, would stand to lose everything if he or she lost the case.  

31 Instead of acceding to the government’s demands and submitting to these unjust procedures, the Sacketts chose to fight a protracted legal battle for the right to challenge the compliance order up front.  

But the district court dismissed the Sacketts’ suit and the Ninth Circuit affirmed, 32 holding that the Sacketts had no right to contest the EPA’s jurisdiction until either the EPA brought its own civil action or the Sacketts had obtained a decision from the Army Corps on a wetlands fill permit.  

33 At that point their suit was all but lost; their only hope was in a Hail Mary—a petition for certiorari to the United States Supreme Court. But, in June 2011, the Court granted review, and, in a decision issued in March 2012, the Court unanimously ruled in the Sacketts’ favor.  

30. Under the CWA, the Corps has primary responsibility for regulating the discharge of dredge and fill material. See 33 U.S.C. § 1344(a); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 266 (2009).  

31. Sackett, 622 F.3d at 1146 (“The Sacketts further allege that forcing them to wait until the EPA brings an enforcement action ‘ignores the realities of [their] circumstances,’ because of the ‘frightening penalties’ they risk accruing by refusing to comply.”).  


34. Sackett, 132 S. Ct. at 1374.
In an opinion authored by Justice Scalia, the Court held that the Sacketts were entitled to review under the Administrative Procedure Act (APA) because the compliance order was a final agency action and the CWA does not preclude judicial review.\(^{35}\) The Court rejected the EPA’s assertion that the CWA foreclosed the possibility of judicial review of compliance orders. The APA provides that final agency action is presumed judicially reviewable, and the Court was unimpressed by the EPA’s suggestion that the presumption should be overcome by concerns over administrative efficiency.\(^{36}\) (Arguably, \textit{Sackett} has resurrected the Court’s older, stricter standard of “clear and convincing evidence” to prove that Congress has foreclosed judicial review of otherwise final agency action.\(^{37}\)) In so holding, the Court rebuffed the EPA’s cavalier position while expressing grave concern over the plight of ordinary landowners caught in the EPA’s regulatory trap. In holding that the Sacketts could seek review under the APA, the Court avoided having to determine whether the preclusion of such review would violate the Sacketts’ due process rights. Yet despite the absence of a due process analysis, due process concerns seemed to have influenced the Court’s decision.\(^{38}\)

Indeed, the Court recognized the fundamental injustice of denying the Sacketts an opportunity to contest an order of this nature.\(^{39}\) As Justice Alito aptly noted, most homeowners upon hearing the facts of a case like this “would say this kind of thing can’t happen in the United States[.]”\(^{40}\) Yet it happened, and with the blessing of the lower courts. How could all the lower courts have gotten it so terribly wrong?

This failure may be explained, in part, because courts tend to

\(^{35}\) \textit{Id.}  \\
\(^{36}\) \textit{Id.} at 1373.  \\
\(^{38}\) See \textit{Sackett}, 132 S. Ct. at 1375 (“In a nation that values due process, not to mention private property, such treatment is unthinkable.”) (Alito, J., concurring).  \\
\(^{39}\) \textit{Id.} at 1374 (majority opinion) (“The APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA’s jurisdiction.”); see also Transcript of Oral Argument, \textit{supra} note 12, at 42 (Kagan, J., commenting, “[The EPA is] arguing that the presumption of reviewability does not apply . . . . And that seems a very strange position. Why would the presumption of reviewability not apply?”).  \\
\(^{40}\) Transcript of Oral Argument, \textit{supra} note 12, at 37.
give significant deference to agency positions. This is especially true in environmental cases. The increasingly aggressive and ambitious regulatory agenda of administrative agencies derives support from the advantage that regulators have in litigation. Agencies are emboldened to take more aggressive and daring positions on the assumption that courts are unlikely to rebuff their actions.

Perhaps the judicial tendency to side with government may be justified by the assumption that government acts virtuously because it represents the public good. This view, however, embodies collectivist-utilitarianism, which would sacrifice the individual for the sake of administrative expediency and societal progress. It also discounts the institutional self-aggrandizing interests of regulatory agencies, which do not necessarily comport with Congress’s intent or with the constitutional principle that government should act to protect, not to undermine, individual rights.

Still other factors encourage regulatory overreach in cases involving normal individuals and typical small businesses. As we explain below, the country needs policies that guard against agency self-aggrandizement. Without meaningful protection against administrative abuse, there is little reason to expect that regulators will err on the side of respecting individual rights.

---


42. See Adler, supra note 14, at 163 (“The EPA and Army Corps of Engineers exercise their regulatory power without due regard for the limits on their own authority or the need to provide private landowners with adequate notice of what federal law may require of them.”).

43. Mary Sigler, Private Prisons, Public Functions, and the Meaning of Punishment, 38 FLA. ST. U. L. REV. 149, 171 (2010) (“Because utilitarianism conceives of the public good in the aggregate, it fails to take seriously the distinction between persons and is formally indifferent regarding the allocation of benefits and burdens.”); Christopher Roederer, Negotiating the Jurisprudential Terrain: A Model Theoretic Approach to Legal Theory, 27 SEATTLE U. L. REV. 385, 438 (2005) (“For [Dworkin], utilitarianism and pragmatism do not take the rights of individuals seriously enough. This is because individuals in hard cases would not necessarily have their rights vindicated, as any such notion of rights could be sacrificed to the common good or to progress (as dictated by utilitarianism or pragmatism).”).


45. Id. at 1549.
Instead, they will predictably push the proverbial envelope.46

III. INCENTIVES FOR REGULATORY OVERREACH

Most Americans operate with the basic understanding that government exists to serve the people.47 This notion means different things to different people, especially in the age of the modern welfare state. But the founding generation—inspired by the ideas of classical liberalism in the struggle for independence—held a near uniform and crystallized concept of the proper role of government when ratifying the Constitution.48 Indeed, scholars have meticulously documented that the Framers, and the delegates to the ratifying conventions, intended the Constitution and the Bill of Rights to institutionalize the Lockean concept that government exists for the sole purpose of protecting individual rights.49

Regardless of whether one expressly subscribes to this Lockean view of government’s relationship to its citizens, agencies should be deterred from violating our legal rights. Although individuals may disagree as to the nature and scope of legal rights, society should promote rules that both encourage prudent regulatory decisions and minimize the risk of self-aggrandizing regulatory powers. To that end, society should promote policies and rules that encourage individuals to vindicate their rights and that remove unfair advantages that an agency may have over private litigants.

A. Institutional Advantages over Private Litigants

Only weeks before agreeing to hear the Sacketts’ case, the
Supreme Court denied a petition from General Electric (GE) on a similar issue. In *General Electric Co. v. Jackson*, GE, like the Sacketts, raised due process concerns over an EPA “unilateral administrative order” issued under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). But unlike the Sacketts, GE acknowledged that the statute in question foreclosed pre-enforcement review. Thus, the Court’s decision to take up the Sacketts’ case is probably explained by the fact that *Sackett* gave the Court an opportunity to expand judicial review without having to hold enforcement provisions of environmental laws unconstitutional. Perhaps even more importantly, the Sacketts presented an attractive and sympathetic story. Presumably, the Sacketts’ case was more attractive to the Court than GE’s because the former concerned average people. Mike and Chantell Sackett could have been anyone—your neighbors, friends, or relatives. Indeed, the Court recognized that the EPA was advocating for a rule that would have allowed the Agency to issue draconian compliance orders against potentially any landowner in the country without any accountability.

These facts may have made the Sacketts more sympathetic litigants than GE simply because multinational corporations are generally in a better position to protect their rights against regulatory overreach. The Sacketts were lucky enough to have pro bono counsel. Most individuals in their circumstances could not have afforded representation, and would have been forced into dire financial straits if they had fought for their rights. And even if private litigants have the financial resources to protect their rights, they are still at a disadvantage when contesting agency overreach.

Agencies, when interpreting statutes that they administer or enforce, routinely assert that they are entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council*.

52. See *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) (“The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.”).
No. 1

Remedies to Agency Overreach

Setting aside the many apt criticisms that scholars have levied against the *Chevron* doctrine, there remain significant questions in the wake of *Mead Corp. v. United States* as to whether agencies should be entitled to *Chevron* deference on jurisdictional questions. Although some courts have held that agencies are not entitled to deference when interpreting the scope of their own authority, agencies still assert *Chevron* deference on jurisdictional questions. Granting deference to the agency’s view of its own jurisdiction only emboldens regulators to take more expansive positions on the scope of their powers because it significantly lowers the possibility that they will be rebuffed in court.

**B. The Cost of Vindicating Constitutional Rights**

Agencies also have an inherent advantage over small businesses and ordinary individuals because they have substantial resources to prosecute their claims and defend their actions. For the average person, a battle with the federal government truly is a fight with Goliath. But without resources it is impossible to stand up for one’s rights.

The solution does not lie in giving additional funding to legal aid programs, or in compelling attorneys to work pro bono hours. It is unfair to demand that an attorney’s labor go uncompensated. Legal representation comes at a price like any other commodity or service, and the value of an attorney’s work,

---

55. See, e.g., ROBERT A. LEVY & WILLIAM MELLOR, THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM 75 (2008) (“And by opening the door for unelected bureaucrats to improvise liberally when they construe federal statutes, *Chevron* exacerbated the problem. First the Court permitted agencies to exercise legislative power that the Constitution was designed to withhold. Then the Court stood aside when those same agencies abused their newly conferred power.”)
57. Sales & Adler, supra note 44, at 1549 (“A deference rule reduces the probability of judicial invalidation. That in turn increases the anticipated benefit to the agency of aggrandizement, thereby increasing the incidence of aggrandizement.”). In its 2012 Term, the Supreme Court will address whether *Chevron* deference can apply to agency “jurisdictional” interpretations in *City of Arlington v. Federal Communications Commission*, 668 F.3d 229 (5th Cir. 2012), *petition for cert. filed*, No. 11-1545 (Jun. 27, 2012). The Court will review the Fifth Circuit’s application of *Chevron* deference to the issue of whether the FCC has “jurisdiction” to interpret Section 322(c)(7) of the Communications Act of 1934, or instead whether the interpretation of that provision is reserved to the courts. See id. at 247–48. Accordingly, it is possible that the Court may provide through judicial decision the remedy for which we advocate in the text.
as with anything else, depends on market conditions.  

If an individual values legal services, he will be willing to pay the cost of representation. This assertion, however, presumes that: (1) a competent attorney is willing to undertake legal services at a rate the individual can afford; and (2) the anticipated benefits of legal action outweigh the costs. Although the costs and benefits may be measurable in purely financial terms, the economic analysis often includes intangible considerations, such as the cost of stress associated with waging a legal battle or the value the individual places on vindication.  

In cases where constitutional rights are at issue, individuals typically place great value on their intangible idea of justice, but the cost of vindication is often excessive. In many cases, individuals would be forced into financial ruin if they were to press their rights with litigation, especially if they had to continue fighting all the way through appeal. For the typical small business owner struggling to keep the doors open, or the average homeowner living on a tight budget, the cost of litigation can be prohibitive.  

By comparison, government agencies have mammoth budgets for enforcement and litigation efforts, which allow regulators to operate with shock-and-awe legal tactics. Naturally, individuals are intimidated when they raise a federal agency’s ire, regardless of the merit of any case they might have.  

That was certainly true of the Sacketts. They had obtained all the necessary building permits from the local authorities when

58. George C. Harris and Derek F. Foran, The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession’s Shift to a Corporate Paradigm, 70 Fordham L. Rev. 775, 799 (2001) (“The allocation of ‘lawyers’ efforts are thereby skewed to those who place high monetary value on legal services and are able to pay these large sums: generally, commercial clients.”).  

59. Id.  

60. See Steven D. Smith, Unprincipled Religious Freedom, 7 J. Contemp. Legal Issues 497, 500 (1996) (“[L]awyers are familiar with clients who persist in litigation that is irrational in cost-benefit terms simply because of ‘the principle of it.’”).  

61. The practice of imposing unconscionable fines to coerce compliance with an agency’s regulatory program is nothing new. As with the Sacketts, this practice can be used to scare the regulated community into submission. See, e.g., Hobby Lobby Sues over HHS Mandate, THE BECKET FUND FOR RELIGIOUS LIBERTY (Sept. 19, 2012, 6:18 PM), http://www.becketfund.org/hobbylobbysueshhs/ (“Today, Hobby Lobby Stores, Inc., a privately held retail chain with more than 500 arts and crafts stores in 41 states, filed a lawsuit in the US District Court for the Western District of Oklahoma, opposing the Health and Human Services mandate, which forces the Christian-owned-and-operated business to provide, without co-pay, the ‘morning after pill’ and ‘week after pill’ in their health insurance plan, or face crippling fines up to 1.3 million dollars per day.”).
they began laying gravel for the foundation of their home.62 They had also sought expert advice to be sure that their property was not a jurisdictional wetland once the EPA asserted that it was.63 Yet, as confident as they were in their position, the Sacketts had no meaningful way of fighting back until the Supreme Court ruled in their favor.

The Sacketts were lucky. Only a very small percentage of petitions for certiorari are granted.64 And it is unlikely that the Sacketts could have reached the Supreme Court without pro bono representation from a public interest firm dedicated to advancing individual rights and curbing regulatory abuse. Rather, most landowners in the Sacketts’ position would have been coerced into submission, simply because it would have been less costly than fighting for their rights. Even assuming that a landowner has the resources to challenge an agency when it overreaches, the idea of taking on the federal government may be overwhelming for many. Moreover, individuals know that litigation is a gamble, no matter how strong their case is.65 As such, many would rationally opt against litigating.

This is particularly true when the costs of litigation outweigh the benefits to be gained. Suppose for example that the Sacketts had sought and been denied a wetlands fill permit, as the EPA insisted they needed to do before challenging its assertion of jurisdiction.66 This tack would have required the Sacketts to spend thousands of dollars on permit-processing fees and for numerous environmental studies. The average cost of an individual CWA permit exceeds $270,000.67 And beyond

---

63. See Middleton, supra note 28.
64. Aaron Tang, The Ethics of Opposing Certiorari Before the Supreme Court, 35 HARY. J.L. & PUB. POL’Y 933, 936 (2012) (“[T]he odds of cert being granted in any given case are less than 1.”).
65. Tonja Jacobi, The Judicial Signaling Game: How Judges Shape Their Dockets, 16 SUP. CT. ECON. REV. 1, 16 (2008) (“Pursuing litigation is a gamble, with high costs and uncertain payoffs.”).
66. The Ninth Circuit appeared to labor under the misapprehension that the Sacketts could apply for a permit even while the compliance order was still outstanding. See Sackett v. EPA, 622 F.3d 1139, 1146 (9th Cir. 2010). But at oral argument in the Supreme Court, the EPA’s attorney essentially conceded that such an “after-the-fact” permit would not be considered until the Sacketts had complied with the order. Transcript of Oral Argument, supra note 12, at 41.
permitting costs, it might not make economic sense to commit to the additional costs of going to court. Jurisdictional disputes under the CWA are notoriously difficult, highly fact-intensive cases that often will require an appeal.

Regardless of whether in the Sacketts’ case the expected economic benefits of establishing that their property is not a wetland might justify the costs of litigation, the calculus will be different for every landowner. Suppose a property was valued at $30,000 before the EPA asserted jurisdiction. In such a case, it might not make sense to proceed with litigation, even if the property would be rendered entirely valueless. Indeed, if the landowner has only modest development plans in mind, the economic benefit of litigation might well be less than the anticipated costs.68 This rationale may well dissuade individuals from vindicating their rights when dealing with any regulatory regime—whether in the context of a labor dispute, an employment issue, a tax question or anything else.69

Economic calculations are inevitable, but there are potential free market solutions that may help lower the costs of vindicating one’s rights, and that may also help deter regulatory abuse up front. The following are a few simple policy reforms that, if implemented, would discourage regulatory overreach by encouraging individuals to vindicate their rights. While we acknowledge that it would be inappropriate to attribute Machiavellian motives to government regulators in all cases, we suggest that we may better control the regulator’s tendency to aggrandize its powers by lowering the costs associated with

---

68. Ironically, these sorts of environmental regulatory burdens may encourage more intensive land uses because the economic benefits of more modest plans might not exceed the high costs of overcoming the regulatory hurdles. It may not be economically feasible to challenge a jurisdictional determination for the right to build a modest and ecologically friendly cabin. A large home, however, may be justified, and a lavish hotel even more so.

69. For example, a land-use authority might seek to leverage its position of power to exact valuable concessions from a landowner seeking approval for a development permit. But if the permit condition has no connection—no “essential nexus”—to any adverse impact that the development might have, then it is an unconstitutional condition on the landowner’s right to be free from uncompensated takings of private property. See Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 837 (1987). In the words of Justice Scalia, the imposition of such unrelated conditions would amount to an “out-and-out plan of extortion.” Id. And yet, the cost of challenging the condition may far surpass the cost of waiving one’s constitutional rights in that instance. Although the government cannot constitutionally insist on a permit condition that lacks an essential nexus, a landowner may nevertheless rationally conclude that acceptance of the permit with the unconstitutional condition is tolerable because the value of the exaction is less than the cost of litigating.
vindicating one’s rights in court and by raising the agency’s risks in pursuing questionable legal positions. These proposed policies would both enable the vindication of our rights and provide a prophylactic against regulatory abuse.

IV. PRACTICAL ADMINISTRATIVE REFORMS TO LEVEL THE PLAYING FIELD

A. Amending the Administrative Procedure Act

We can directly take away certain institutional advantages over private litigants with amendments to the Administrative Procedure Act\(^7^0\) that would ensure a fair fight on the legal issues and discourage unreasonable administrative actions. Many reforms may be appropriate; we suggest two.

1. Clarifying the Right to Challenge Jurisdictional Determinations

_Sackett_ established that individuals have a right to challenge certain pre-enforcement actions, but federal agencies likely will argue that the opinion should be narrowly construed as applying only to compliance orders issued under the CWA. Thus, the EPA and the Army Corps of Engineers may continue to deny that individuals have any right to challenge jurisdictional determinations issued by the Corps, even though such a determination provides a formal statement on whether the agency has CWA authority over the property.\(^7^1\) According to this position, a landowner has no meaningful right to challenge a jurisdictional determination with which he disagrees. Rather, the landowner can contest jurisdiction only after having gone through the permitting process.\(^7^2\) These procedural hurdles discourage individuals from bringing claims against agencies, and therefore inhibit the free exercise of their right to build on their property. If the property in question is beyond the agency’s


\(^7^1\) See Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs, 543 F.3d 586, 591 (9th Cir. 2008) (“As a matter of first impression, we hold that the Corps’ issuance of an approved jurisdictional determination finding that Fairbanks’ property contained waters of the United States did not constitute final agency action under the APA for purposes of judicial review.”).

\(^7^2\) As of 2002, the average CWA permit cost over $270,000. See Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion) (citing David Sunding & David Zilberman, _The Economics of Environmental Regulation and Licensing: An Assessment of Recent Changes to Wetland Permitting Process_, 42 NAT. RESOURCES J. 59, 74–76 (2002)).
jurisdictional reach, this procedural impediment would prejudice the owner’s ability to vindicate and enjoy his or her common law—and constitutionally protected—right to make reasonable use of the property.

Whether the agencies can continue to deny individuals the right to bring pre-enforcement challenges to jurisdictional determinations is an open question after Sackett, which supports the conclusion that jurisdictional determinations are final agency actions subject to judicial review under the APA. Indeed, a jurisdictional determination has all the hallmarks of a reviewable final decision. It is the culmination of the agency’s decision-making process affecting an individual’s right: by immediately—and severely—devaluing his property. The land can no longer be put to any meaningful use once such an assessment has been made. A landowner would risk the same ruinous fines that threatened the Sacketts if he or she proceeded with any development plans; the only option would be to apply for a wetlands fill permit, the cost of which is prohibitive and could even exceed the value of the land. For an individual of modest means, it is usually impossible to proceed if one’s options are limited to the permitting process. But, if the individual is certain that the agency is wrong in its jurisdictional assessment, should he really be required to expend these costs in applying for an unnecessary permit?

The owner may be able to afford legal representation in a challenge to the agency’s jurisdiction, but the added costs of first applying for a wetlands fill permit may well deter the individual from trying to vindicate his or her right to make reasonable use of one’s own property. The individual may rationally decide to cut his or her losses at that point and leave the property untouched, which is arguably why the agencies—all too often bent on a radical environmental crusade—insist on taking aggressive and unduly burdensome positions in the first place. But we may better protect landowners by clarifying that the APA allows individuals to seek judicial review of disputes over an agency’s jurisdiction, even in the absence of an enforcement

73. Sackett v. EPA, 132 S. Ct. 1367, 1372 (2012) (A final decision is marked by “the ‘consummation’ of the agency’s decisionmaking process.”).

74. See id. (“The mere possibility that an agency might reconsider in light of ‘informal discussion’ and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.”).
action.

The normal requirements of “final agency action” should not apply in challenges to agency jurisdiction, such as Army Corps of Engineers jurisdictional determinations. A landowner should be allowed to proceed in an action for declaratory relief, in order to clarify her rights, once the agency has expressed its view—even a tentative view—that it has regulatory authority over the landowner’s property or activity. And to prevent agencies from playing new and ingenious forms of jurisdictional cat and mouse, landowners should be allowed to use the APA’s existing petition process to compel an agency to state its position on jurisdiction, and then to allow the landowner to seek judicial review of the agency’s decision.

The agency should not be allowed to hold the individual in limbo indefinitely by hedging with a “we’ll wait and see” answer, nor should the agency be able to avoid a legal challenge to its jurisdictional determination once it has asserted jurisdiction. Within a reasonable timeframe, the agency should be required to make an affirmative assertion of jurisdiction or issue a binding statement disavowing jurisdiction. Even if the disavowal of jurisdiction is erroneous, the agency should not be entitled thereafter to prosecute an individual after assuring a safe harbor. If the agency argues that it tentatively believes that it has jurisdiction to regulate the proposed actions, it can always back away from that position later, once it is presented with additional facts that change its view. But so long as the agency stands by its assertion of jurisdiction, a genuine controversy exists if the property owner disagrees. Thus, the Case or Controversy requirement of Article III would be satisfied and the individual would have standing to challenge the jurisdictional assessment.

75. See Fairbanks N. Star Borough, 543 F.3d at 591 (holding that a CWA jurisdictional determination cannot be challenged under the Administrative Procedure Act because “it did not ‘impose an obligation, deny a right, or fix some legal relationship.’”).
76. See 5 U.S.C. § 553(e) (2006) (requiring each agency to allow for persons to petition for amendments to or repeal of rules).
77. See Muskrat v. United States, 219 U.S. 346, 357 (1911) (“[Controversy] implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.”).
79. This is important. We acknowledge that Article III does not authorize federal courts to issue advisory opinions or opine on a landowner’s legal obligations when there is no evidence that an agency even intends to initiate enforcement action. But assuming that a member of the regulated public can meet Article III’s standing requirements, then there should be no constitutional obstacle to authorizing federal courts to review the
Although an agency could moot the action by conceding that it does not have jurisdiction, that fact should not preclude the regulated community from seeking immediate judicial review. This regime would ensure that individuals will be empowered to efficiently clarify their rights and the scope of agency authority.

2. Cabining Agency Discretion on Jurisdictional Questions

As discussed above, agencies currently hold an unfair advantage over private litigants when disputing statutory questions. Even though the extent of an agency’s jurisdiction is a pure question of law, agencies generally argue that they are entitled to *Chevron* deference on the point.80 If *Chevron* deference were allowed in these instances, agencies would essentially determine the extent and reach of their own powers—so long as some ambiguity existed, an agency could essentially regulate in any rational manner it likes.81 But in Anglo–American law, a party constrained by law usually is not free to determine the meaning or extent of the constraint for the same reason that foxes should not guard henhouses.82

In 2001, the Supreme Court held in *United States v. Mead Corp.* that courts should apply the *Chevron* framework only if Congress intended to delegate the authority to “fill in” gaps in the statute.83 This holding makes two things clear. First, *Chevron* is not a constitutional doctrine; Congress may choose to cabin an agency’s discretion by refusing to delegate powers to the agency, or by expressly stating that agencies are not entitled to deference on certain questions. Second, deference should not be presumed.84 *Mead* requires that the agency bear the burden to demonstrate that Congress intended to delegate “gap-filling” sorts of jurisdictional decisions that we advocate.

80. See Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ., 550 U.S. 81, 93–94 (2007) (explaining that in step one of *Chevron*’s two-part test, a court looks to the language of the statute to determine if Congress has definitively spoken to the issue and does not proceed to step two if congressional intent is clear); Christensen v. Harris Cnty., 529 U.S. 576, 586–87 (2000) (holding that if a court determines that congressional intent is unclear and that the statute is ambiguous, the court proceeds to step two of *Chevron*, and the court will uphold the agency’s “reasonable” interpretation of the ambiguous text).

81. Sales & Adler, supra note 44, at 1548 (“In a system that extends Chevron deference to agency jurisdictional interpretations, agencies will have strong incentives to exercise powers Congress did not intend for them to wield, or to extend their powers beyond what Congress envisioned.”).

82. Id. at 1551.


84. Sales & Adler, *supra* note 44, at 1526.
authority. This burden should have the salutary effect of making it more difficult for agencies to obtain deference on the interpretation of their own jurisdiction. That outcome makes sense, given that it is unlikely that Congress would intend to delegate the power to an agency to define the scope of its own jurisdiction. Indeed, a strong presumption against delegation is appropriate because jurisdictional language is—by its nature—a limitation on the agency.

In fact, some courts have already held that statutory silence on an agency’s jurisdiction cannot by itself trigger the application of the *Chevron* framework, given that all agencies are creatures of statute and possess only those powers authorized by statute. Thus, when a statute is silent on agency jurisdiction, the presumption must be that the agency lacks the asserted power. To conclude otherwise would improperly invest agencies with plenary power and raise serious separation of powers questions. Accordingly the presumption against deference on jurisdictional questions may also be viewed as a rule of constitutional avoidance.

Nonetheless, agencies continue to assert jurisdictional deference and the federal courts of appeals are split on this issue. And this term the Supreme Court will take up this


86. Sales & Adler, *supra* note 44, at 1551 (citing Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2099 (1990)) (“Professor Sunstein and others have argued [that] it is unreasonable to suppose that Congress meant to give agencies such authority: ‘Congress would be unlikely to want agencies to have the authority to decide on the extent of their own powers.’”).

87. Sales & Adler, supra note 44, at 1551.

88. *See generally* Am. Bar Ass’n v. FTC, 430 F.3d 457, 466–67 (D.C. Cir. 2005) (“We will defer to the agency’s interpretation on that subject only if the statute ‘is silent or ambiguous with respect to the specific issue.’”) (emphasis added); Ry. Labor Execs. Ass’n v. Nat’l Mediation Bd., 29 F.3d 655, 659 (D.C. Cir. 1994) (arguing that presuming a delegation of power from Congress absent an express withholding of such power “comes close to saying that the Board has the power to do whatever it pleases merely by virtue of its existence [is] a suggestion that we view to be incredible”).

89. Sales & Adler, supra note 44, at 1539 (“If an ambiguity, let alone a statutory silence, is sufficient to trigger *Chevron* deference, an ambiguous statute may become license for an agency to control the scope of its own authority, and perhaps even the ability to create regulatory authority where no such authority legitimately existed.”).

90. *Id.*

91. “In all, four courts of appeals have concluded that *Chevron* is fully applicable to jurisdictional interpretations: the Second, Third, Fourth, and Ninth Circuits. The Federal and Seventh Circuits have declined to extend *Chevron* deference. The D.C. and Eighth Circuits appear to have resolved the issue both ways.” *Id.* at 1518 (citing Connecticut ex rel. Blumenhal v. U.S. Dep’t of the Interior, 228 F.3d 82, 93 (2d Cir. 2000); Air Courier Conference of Am./Int’l Comm. v. U.S. Postal Serv., 959 F.2d 1213, 1223–25 (3d Cir. 1992); Transpacific Westbound Rate Agreement v. Fed. Mar. Comm’n, 951 F.2d 950, 952
deference question in *City of Arlington v. Federal Communications Commission*. But regardless of how the Supreme Court resolves this issue, Congress could amend the APA so as to clarify that agencies are presumed to have only those powers expressly and unambiguously delegated. This would make clear that agencies do not have discretion in determining the scope of their own powers.

This legislative tweak would discourage agency self-aggrandizement. Moreover, it would encourage agencies to make reasoned analytical judgments as to their duties under the statute in the same manner that an individual must make judgments about how to proceed on any given legal matter. More fundamentally, it would properly relegate the agency’s role to that of administrative executor, as opposed to the role of lawmaker and judge.

**B. Amending the Equal Access to Justice Act**

The Equal Access to Justice Act (EAJA) was enacted to help level the playing field between the individual and government when legal disputes arise. Under the EAJA, qualifying private litigants may collect attorney’s fees if they are the prevailing party in a legal action. But the government can avoid attorney’s fees if its position was “substantially justified,” even though unsuccessful.

Yet, as we explained in Section III, individuals and small businesses are often deterred from defending their rights—even when they may have meritorious claims—because the costs of litigation are so great. Especially for individuals or businesses operating on tight budgets, the costs of litigation usually outweigh its benefits. Although the EAJA may help embolden private litigants in cases where the government insists on an unconscionably egregious position, we submit that the EAJA could be amended more effectively to promote the principle that every individual should have access to the justice system when his or her rights have been violated.

(9th Cir. 1991); Bd. of Governors of the Univ. of N.C. v. U.S. Dep’t of Labor, 917 F.2d 812, 816 (4th Cir. 1990); Tafas v. Doll, 559 F.3d 1345, 1353 (Fed. Cir. 2009); N. Ill. Steel Supply Co. v. Sec’y of Labor, 294 F.3d 844, 846–47 (7th Cir. 2002); United Transp. Union—Ill. Legislative Bd. v. Surface Transp. Bd., 169 F.3d 474, 477 (7th Cir. 1999)).

92. *See supra* note 57.
94. *Id. at § 2412(d)(1)(A).*
1. Expand Opportunities for Recovery of Attorney’s Fees

   a. Attorney Fee Awards as a Matter of Right

   The law should encourage the vindication of individual rights. When the prevailing party has vindicated a constitutionally protected right, an award of attorney’s fees should be allowed as a matter of course.

   Our government exists not for its own sake, but for the sake of the individuals over whom it governs. We must therefore adopt policies that deter government from neglecting its most fundamental obligations. If our constitutional rights mean anything, then we should empower individuals to defend them. Accordingly, individuals should not be forced to bear the costs of successfully defending their rights, for the individual suffers enough when government breaks its fundamental constitutional commitments. Moreover, the government should not be shielded against liabilities for its failure to respect its most fundamental duties and commitments under this system.

   Requiring agencies to pay attorney’s fees in these cases may prove costly, but amending the EAJA in the manner we propose will encourage prudent decision-making. As a practical matter, agencies would likely err on the side of protecting our constitutional rights more frequently if the costs of losing a constitutional suit were to increase.

   b. Lowered Standards in Cases of Dire Financial Need

   Regulatory abuse could be further deterred by lowering the standard for collecting attorney’s fees in any case in which a private litigant prevails against the federal government, if the costs of litigation have forced the individual into dire financial straits. It is unfair to expect an individual or business to suffer significant financial hardship—bankruptcy, poverty, or loss of a

95. Sandefur, supra note 49, at 302 (“The minimum conditions of legitimate rule, therefore, are that the state’s coercive powers be used according to general principles and rationally promote the public good, respecting the equal rights of all. In short, the conditions are that all men are created equal, with certain inalienable rights, and that government, deriving its just powers from the consent of the governed, is instituted to secure those rights.”).

96. James J. Park, The Constitutional Tort Action as Individual Remedy, 38 HARV. C.R.-C.L. L. REV. 393, 393 (2003) (“Ideally, awarding damages to individuals who are harmed by a federal or state official’s violation of the Constitution compensates for some of the individual’s past injury and deters future rights deprivations.”).
homestead—in the pursuit of justice against its own government. Lawsuits will always cause economic strain, but the government should reimburse prevailing private litigants for their legal expenses to the extent that they have suffered severely.

Although the threshold for recovery is a matter of discretion, we suggest that prevailing individuals and businesses should be reimbursed to the extent that their litigation efforts have forced them to make expenditures lowering their net wealth below some established threshold—perhaps $250,000. That figure is certainly negotiable, but the essential principle is that individuals should not be relegated to a life of poverty or the loss of a homestead as the cost of vindicating their rights. Furthermore, individuals with few financial resources should be as able as the affluent to litigate, taking solace in the assurance that with vindication they will be made whole again, dollar for dollar, if their net wealth is less than the established recovery threshold.

2. Authorize Damages for Entirely Unfounded Positions

As we have emphasized throughout this article, society should promote policies that deter government overreach. Moreover, the deterrence should be proportional to the gravity of the government’s transgression. In cases where the government’s position is completely unfounded, the government should bear the additional risk of financial penalties.

Currently, attorney’s fees under the EAJA are only granted to prevailing parties in those extreme cases in which the government’s position was not “substantially justified.” But, if we truly wish to deter the government from taking inappropriately aggressive and unfounded positions, we should raise the stakes by awarding damages to aggrieved individuals or businesses. For example, the EPA would certainly have thought twice about threatening the Sacketts with $75,000 per day fines if the Agency

97. Naturally, the statute must guard against manipulative accounting practices and strategic transfers of property aimed at lowering the individual’s net wealth.

98. This is not to suggest that the wealthy should be discouraged from vindicating their rights, but it is a fair presumption that wealthy individuals are already in a better position to vindicate their rights. If necessary, the threshold for recovery could be raised higher to promote the goal of encouraging even more individuals to defend against regulatory abuse. The fundamental principles underpinning such a policy, however, would be the promotion of incentives for the prosecution of individual rights and deterrence against governmental abuse. Nevertheless, a blanket rule guaranteeing recovery of attorney’s fees—where a constitutional right has been vindicated—is preferable because it would promote these goals across the board.
had been potentially on the hook for paying additional fines to the Sacketts in the event that its position were deemed substantially unjustified in court. The effect of such rules would simply be to discourage brazen regulatory abuse, and to encourage rationally prudent decision-making. The Agency could not afford to shoot first and ask questions later.

General budgetary concerns over the national debt and our nation’s unfunded commitments should not deter imposition of monetary penalties against agencies when they have egregiously violated individual rights. But if a nod to such budgetary concerns is necessary, then a possible alternative approach would be to require the agency to pay penalties directly to the Department of the Treasury or to a fund established for the express purpose of paying down our national debt. This approach would still deter regulatory overreach, and would do so without exacerbating the public debt.

V. THE NEED FOR SUBSTANTIVE REFORMS

We offer the foregoing policy solutions to empower individuals to vindicate their rights, and to deter agencies from taking cavalier legal positions. But, the effect of these administrative reforms will be limited. If adopted, they would only discourage expansive views of regulatory authority. In the modern regulatory state, agencies are often well within their statutory bounds when they abrogate common law property rights. Thus, we ultimately need substantive reforms if we want to truly safeguard property rights.

The Founding Fathers believed that private property rights—including the freedom of contract—were the foundation of a free society, the cornerstone of liberty’s edifice. Today,
however, the Founders’ concept of natural rights has been largely dismissed, and the constitutional guarantees protecting private property rights have been dismantled. With the shift in the modern zeitgeist, substantive constitutional protections were deemed inexpedient obstructions to the progressive movement’s idea of public progress. As such, our property rights have been left largely to the whims of the democratic process and bureaucratic regulators. We are protected only by the vestiges of a political culture that once valued property rights; however, the predominant political forces are at best indifferent toward property rights, if not openly hostile. Accordingly, we have authorized government at all levels to regulate the use and enjoyment of private property such that the landowner may no longer exercise dominion over his property without first

Centuries of America 51–61 (2006); Mitch L. Walter, Comment, From Background Principles to Bright Lines: Justice Scalia and the Conservative Bloc of the U.S. Supreme Court Attempt to Change the Law of Property as We Know It, 50 Washburn L.J. 799, 804–05 (2011) (noting that President James Madison understood that “a fundamental tension existed between private property rights and democratic processes.”).

103. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395–97 (1926) (rejecting due process protections against land use restrictions, except to the extent they may be deemed irrational); Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978) (creating an amorphous and ad hoc balancing test to determine when a restriction amounts to a taking); Kelo v. City of New London, 545 U.S. 469, 494, (2005) (O’Connor, J., dissenting) (characterizing the majority holding as allowing private property to be taken and transferred to private parties); see also R.S. Radford & Luke A. Wake, Deciphering and Extrapolating: Searching for Sense in Penn Central, 38 Ecology L.Q. 731, 735–48 (2011) (calling for the Supreme Court to revisit Penn Central, and noting that the Penn Central test has been nearly universally criticized as a standardless standard, offering no practical guidance, and which almost inevitably is resolved in the government’s favor); Timothy Sandefur, Mine and Thine Distinct: What Kelo Says About Our Path, 10 Chap. L. Rev. 1, 34 (2006) (“Whenever government has power to redistribute benefits and burdens between constituents, interest groups will compete for control of that power in order to secure benefits for themselves or to impose burdens on their competitors. Modern economists refer to this contest as ‘rent seeking,’ and predict that when government begins to transfer property between private parties, those parties will start spending their time and energy trying to persuade the government to give them someone else’s property.”); Abraham Bell & Gideon Parchomovsky, A Theory of Property, 90 Cornell L. Rev. 531, 543–46 (2005) (noting the influence of Jeremy Bentham’s utilitarian thought, which rejected the natural-rights theory of property, and quoting Professor Thomas Grey’s words that “[w]e have gone . . . in less than two centuries, from a world in which property was a central idea mirroring a clearly understood institution to one in which it is no longer a coherent or crucial category in our conceptual scheme . . . .”).

104. See Eric R. Claeys, Takings and Private Property on the Rehnquist Court, 99 NW. U. L. Rev. 187, 216 (2004) (“The Progressives first developed the ‘living Constitution’ critique of constitutional property rights. Applying a Hegelian theory of the state to American politics, they insisted, as Columbia constitutional law professor Frank Goodnow did in 1911, that “[t]he basis of political society was . . . seen to be, as it probably always was, historical development . . . .”).

petitioning for permission from the authorities.106

The only effective way to protect the right to use and enjoy one’s own private property is to restore substantive constitutional protections for property rights, and that is unlikely to happen in the near future. In the interim, property rights remain subject to the largely unchecked discretion of the legislative and executive branches. And it is unlikely that these branches will institute substantive reforms of the regulatory state any time soon either.

Yet, in the absence of substantive reforms, our proposed administrative proposals would at least help guard against ultra vires regulatory action. As Justice Alito observed in *Sackett*, “[a]llowing aggrieved property owners to sue under the Administrative Procedure Act is better than nothing, but only clarification of the reach of the Clean Water Act can rectify the underlying problem.”107 Indeed, property rights will remain in troubled waters until we see real reform of the CWA and a whole host of other environmental and land-use regimes. Yet if we can at least adopt disincentives for the regulators, the regulated will be in a better position to defend their rights. To be sure, something is better than nothing.

VI. CONCLUSIONS

If we want a truly free society, we must institute substantive reforms to protect property rights. At the very least, we should empower individuals to defend their rights when they are under assault. Indeed, we want to encourage prudent and reasonable regulation, but this necessarily means both deterring regulatory abuse and emboldening individuals to stand up for their rights. After all, David should be able to look Goliath in the eye, when he knows he is in the right, and say—in the immortal words of Clint Eastwood—“Go ahead, make my day.”108

---

106. See, e.g., CCA Assocs. v. United States, 667 F.3d 1239, 1248 (Fed. Cir. 2011) (rejecting a takings claim despite the fact that the United States passed legislation specifically to void its contract with the property owner, therein forcing the owner to house low income families at below-market rates for a period of five years, and causing a loss of over eighty-one percent of the business’s net income [totaling $700,000]).