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Course: Constitutional Law and Judicial Politics

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### Research Design Proposal

**Research Question:** How does this destabilization of the Commerce Clause pertain to the enforceability of current federal environmental regulation? What is most important for a Supreme Court ruling to successfully destabilize an environmental regulatory regime? What about a ruling will be destabilizing? In other words, I plan to assess the causal power of Supreme Court rulings that narrowed the Commerce Clause and determine whether this precedent had to first penetrate the lower courts before having an effect on the capacities of the Environmental Protection Agency.

### Theory and Case Selection:

*SWANCC*<sup>1</sup> marks the first time the jurisprudence of *Lopez*<sup>2</sup> has been applied to an environmental case.<sup>3</sup> The Court ruled that applying the Clean Water Act (CWA) to isolated wetlands “would result in a significant impingement of the States’ traditional and primary power over land and water use.” *Rapanos*<sup>4</sup> followed the logic from *SWANCC* and further specified how the EPA would be limited in its jurisdiction under the CWA. Legal scholarship tends to avoid examining the effects of court rulings outside the field of legal theory. This research design aims to bridge the gap between legal and political questions. Most importantly, it intends to increase understanding of the importance of legal precedent for the stability and enforcement of law.

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<sup>1</sup> *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (99-1178) 531 U.S. 159 (2001) [191 F.3d 845, reversed.] In this case section 404(a) of the Clean Water Act which indicated the act is applicable to the “navigable waters” of the United States. The Army Corps of Engineers had been applying this rule to wetlands using the “Migratory Bird Rule” (because they provide habitat for migratory birds). The Corps refused to grant the *SWANCC* a permit to fill ponds owned by the municipality. The Court found that section 404(a) of the CWA could not be interpreted so broadly as the “migratory bird rule.”

<sup>2</sup> *United States v. Lopez* (93-1260), 514 U.S. 549 (1995). This case held that the Gun Free School Zones Act of 1990 exceeded the constitutional power of Congress to regulate interstate commerce. Rehnquist wrote the opinion with a 5-4 majority that has continued to narrow the jurisdiction of legislation under the “Commerce Clause”

<sup>3</sup> *Percival* 2002.

<sup>4</sup> *Rapanos v. United States* 547 U.S. 715 (2006). Developers (*Rapanos*) were charged with felonies for filling wetlands. The Court opinion in this case limits the Clean Water Act to jurisdiction over only wetland with a “significant nexus” to “navigable waters.” Wetlands very often do not obviously fulfill this requirement.

Determining the effects and the mechanisms whereby the CWA was destabilized will help predict the antecedent conditions that favor such destabilization in the future. This case also speaks to the power of the Supreme Court to affect other branches of government through its activist decisions and disregard for precedent.<sup>5</sup> The Environmental Protection Agency (EPA) has already officially acknowledged its frustration with these recent rulings and goes so far as to say that these rulings have directly diminished their enforcement capacity<sup>6</sup>.

“There are significant water quality problems facing too many communities; there are expanding universes of diffuse pollution sources, many which are not effectively regulated by the CWA; and there are significant limitations that affect EPA’s ability to identify serious problems quickly and take prompt action to correct them. Among these limitations are two Supreme Court decisions – its 2001 decision in *Solid Waste Agcy. of Northern Cook Cty. v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”) and its 2006 decision in *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”) – that added layers of confusion regarding which water bodies are covered by the CWA in many parts of the country”<sup>7</sup>

Given the EPA’s insistence that these rulings have had a negative effect on their enforcement of the CWA, the research design is less concerned with determining whether or not there is any effect. The inclination that there has been an effect can be verified fairly easily by measuring the level of enforcement over time and controlling for other changes. Measurement of the before-after effect is part of this study. However, the more important question is how and why did the EPA begin to sense the Court’s effects on the stability of the CWA? Answering this question will help explain what components of the precedent and its interpretation in the lower courts were most lethal for the EPA’s understanding of its own jurisdiction. It is not as if all Supreme Court decisions are heeded by other branches of government with great immediacy. Therefore, process-tracing of this case will shed light on the conditions that lead to greatest instability of precedent and most dramatic effect on the enforcement of environmental law.

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<sup>5</sup> Duhigg and Roberts 2010. “Rulings Restrict Clean Water Act, Foiling EPA.” *New York Times*.

<sup>7</sup> From the Office of Enforcement and Compliance Assurance Clean Water Action Plan. October 15, 2009.

**Hypothesis:** The SC rulings in *SWANCC* and *Rapanos* are sufficiently unclear that they have had a destabilizing effect on EPA capacity to regulate regardless of the ensuing inconsistency in the lower courts.<sup>8</sup> On their own, they bring into question the constitutional standing of the EPA’s Clean Water Act jurisdiction.

Confirmed if: vagueness of the Court rulings was enough to inhibit the EPA

Rejected if: The response of EPA was slow and they brought more cases to the lower courts to test the lower court’s responsiveness.

### **Case study:**

#### Setting the Stage—Lower court cases interpreting precedent and measurement of the objective change in enforcement

Before determining how the Court affected the EPA it is necessary to determine the effect of the SC ruling in *SWANCC* and *Rapanos* on the lower courts. This involves shepardizing and determining which District Courts of Appeals have referenced *SWANCC* and *Rapanos* in their decisions. It is important to understand the extent to which the precedent has been applied or rejected by lower courts. This will indicate the level of consistency in their application of Court’s precedent.

Another component of “setting the stage” is determining a good measure of the change in CWA enforcement before and after these cases supposedly made such a severe impact in the EPA. The Office of Enforcement and Compliance Assurance (OECA) publicizes the number and nature of cases brought under each statute on the EPA website.<sup>9</sup> The EPA brings both criminal and civil cases against the most egregious polluters. The objective level of enforcement on wetlands<sup>10</sup> can be compared over time, measuring the actual difference before and after these Supreme Court cases.

#### Process Tracing Methodology:

The majority of the analytical strength of the research design will come from opening the “black box” of EPA decision-making. When, why and how did the EPA decide the Supreme

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<sup>8</sup> See “Event history” (Benesh and Reddick 2002) and “Principle-Agent model” (Songer et al. 1994)

<sup>9</sup> EPA cases by statute. <http://cfpub.epa.gov/compliance/cases/index.cfm?templatePage=12&ID=3>

<sup>10</sup> “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.” from EPA <http://www.epa.gov/compliance/monitoring/programs/cwa/wetlands.html>

Court ruling was pertinent and inhibiting? In order to address these questions, I will rely on process-tracing of the period of change (from 3 years before the *SWANCC* and *Rapanos* rulings to the present.<sup>11</sup> Process tracing is appropriate for this study because the primary goal is determining the *how* destabilization of the Commerce Clause pertains to the enforceability of current federal environmental regulation. The fairly obvious independent variable (SC ruling and lower court interpretation of precedent) is affecting a clear dependent variable (EPA enforcement) but how that happened is still unclear. The most interesting findings of this case study for the purpose of further theory development are the mechanisms underlying this straightforward causal relationship.<sup>12</sup> Process- tracing within one case is often discouraged, however, George and Bennett (2005) defend this method. Ideally, they argue, “only one variable can change at the moment that divides the longitudinal case neatly in two.”<sup>13</sup> My case is characterized by such a sharp divide in one variable and is therefore appropriate for this before-after process-tracing approach.

Elite interviewing will be the main source of information for the process-tracing. This is a qualitative study because the *mechanisms* are at issue, not the *effects* of a causal variable on an outcome. In *Learning from Strangers: The Art and Method of Qualitative Studies*, Robert Weiss suggests performing pilot interviews before engaging the primary respondents. In my case, this would require talking to lower officials before approaching the heads of the EPA offices. These are the people most able to speak to the decision-making process because they were either part of this process or they are knowledgeable of the standard operating procedures that determined the outcome of considerations.

Before beginning the interviews, I will submit my proposal to the Reed College Human Subjects Research Committee<sup>14</sup> in order to assure the college that my research is in accordance

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<sup>11</sup> “In before-after research designs... the investigator can use process-tracing to focus on whether the variable of interest was causally linked to any change in outcome and to assess whether other independent variables that change over time might have been causal.” George and Bennet 2005. *Case Studies and Theory Development in the Social Sciences*. MIT Press: p. 221

<sup>12</sup> “In process tracing the investigator explores the chain of events or decision-making process by which initial case conditions are translated into case outcomes” (Van Evera 1997 p.64).

<sup>13</sup> p.166

<sup>14</sup> Reed College Human Subjects Research Committee [http://www.reed.edu/human\\_subjects/#submission](http://www.reed.edu/human_subjects/#submission)

with the federal Dept. of Health and Human Services guidelines for the protection of human subjects.<sup>15</sup>

### People/ positions to interview

The relevant departments within the OECA are:

Office of Remediation and Enforcement; Office of Civil Enforcement (brings civil cases); Office of Compliance; Office of Criminal Enforcement, Forensics and Training; Office Compliance (data, planning and results). The contact information for the directors of each of these offices is available online.<sup>16</sup> Certainly, there has been some personnel turn-over since these cases were decided by the Supreme Court but these contacts are the best place to start and I am confident that these are the most relevant departments.

Below I have listed some of the most important questions. The actual proceeding of the interviews will probably not follow a linear, prescribed set of questions. I believe that this pre-made survey approach would be inappropriate for this study. Surveys are best for quantitative projects and, as Weiss states, “Interviews that sacrifice uniformity of questioning to achieve fuller development of information are properly called *qualitative* interviews.”<sup>17</sup> The questions below point to the most important pieces of information for testing my hypothesis. The goal of the interviews would be to elicit responses to these questions and gain further information I cannot anticipate.

1. Overall, how have Supreme Court rulings in *SWANCC* and *Rapanos* affected your perspective on the EPA’s jurisdiction of the Clean Water Act?
2. At what point did your office begin to scale back enforcement of the CWA?
3. Did this only affect enforcement on the wetlands permits?
4. What lower court rulings (if any) did your office consider to be important for your enforcement capacity?

### **Conclusion:**

The capacity of the Supreme Court to affect the enforcement of environmental law through its recent Commerce Clause decisions is not fully understood or even addressed by most

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<sup>15</sup> Department of Health and Human Services <http://www.hhs.gov/ohrp/humansubjects/guidance/45cfr46.htm>

<sup>16</sup> Personnel contact information for the relevant EPA officials is available at:

<http://www.epa.gov/compliance/contact/index.html>

<sup>17</sup> Robert S. Weiss. 1994. *Learning from Strangers: The Art and Method of Qualitative Interview Studies*” The Free Press: p. 3

literature. The reversal of precedent (or resurrection of a dead line of precedent) causes instability in the law. Most prominent legal scholars admit that environmental law is inherently unstable under the Commerce Clause<sup>18</sup> but they are hesitant to follow the effects of legal decisions to the world of bureaucratic legal enforcement. This study aims to bridge the gap in the literature and better explain when and why enforcement is thwarted most severely. *SWANCC* was the first case to challenge the EPA's jurisdiction based on the Commerce Clause jurisprudence in *Lopez*. This study aims to make the Court, the regulators involved, and the public better informed about how the Supreme Court influences outcomes in the real world.

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<sup>18</sup> Lazarus 2004.