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Textualism's Limits on the Administrative State: Of Isolated Waters, Barking Dogs, and *Chevron*

by Michael P. Healy

In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,[1] the U.S. Supreme Court recently held that the U.S. Army Corps of Engineers (the Corps) does not have authority under the Clean Water Act (the Act or the CWA)[2] to regulate the filling of "other waters."[3] This decision demonstrates a major shift in the Court's approach to statutory interpretation, particularly in the context of reviewing an agency's understanding of a statute. The significance of the case is best gauged by contrasting it with *United States v. Riverside Bayview Homes, Inc.*[4] There, the Court, acting just one year after it had famously established its deferential regime for the review of agency legal interpretations in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[5] held unanimously that the Corps had discretion to interpret the CWA contrary to the apparent meaning of the statutory text.[6] In returning to the issue of the jurisdictional scope of the CWA 15 years later, the Court's bare conservative majority has now interpreted the Act to have a clear textual meaning and to foreclose an agency interpretation accepted and enforced by several administrations.[7]

This Article will summarize briefly the factual background to the Court's decisions in *SWANCC* and *Riverside Bayview Homes*, and then compare the Court's interpretive approach to resolving the statutory issue in the two cases. This comparison will focus on the Court's shift to a textualist interpretive method and the Court's deviation from the principle of statutory *stare decisis*.[8] The Article will then discuss how the Court's textualist approach in *SWANCC* yields an interpretation that has no contextual legitimacy and undermines the federal regime of water pollution control.[9] The final section of the Article examines the Court's activist use of a clear statement rule in rejecting the Corps' request for deference under *Chevron*.[10] This rule has the effect of ignoring the strong evidence—the metaphorical, insistent barking of dogs[11]—that Congress intended the broadest scope to the exercise of federal authority over the nation's waters when it enacted and amended the CWA.

A Comparison of the Court's Decisions in *SWANCC* and *Riverside Bayview Homes*: Whither *Stare Decisis*

The regulatory structure established by the CWA is quite simple. The Act prohibits the discharge of any pollutant by any person unless the discharge is authorized by a permit.[12] Section 404(a) of the Act provides that "[t]he Secretary may issue permits after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[13] The term, "navigable waters," is defined by the Act as "the waters of the United States, including the territorial seas."[14]

The Corps has promulgated regulations that "define[ ] the term 'waters of the United States' as it applies to the jurisdictional limits of the [Corps] under the [CWA]."[15] Those regulations, first adopted in 1977,[16] provide that the Corps has regulatory jurisdiction over "other waters," defined in the regulations as "waters . . . , the use, degradation or destruction of which could affect interstate . . . commerce . . . ."[17] In 1986, the Corps explained that the effect on interstate commerce that results in the application of CWA jurisdiction arises when these other waters "are or would be

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1. 121 S. Ct. 675, 31 ELR 20382 (2001).
2. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
3. The regulatory definition of "other waters" is set out in *infra* note 17.
4. 474 U.S. 121, 16 ELR 20086 (1985).
5. 467 U.S. 837, 14 ELR 20507 (1984).
6. *See* 474 U.S. at 132, 16 ELR at 20090 ("On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'").
7. In 1986, the Court first asserted jurisdiction over "other waters," based upon the use of those waters by migratory birds and waterfowl. *See infra* note 18 and accompanying text.
8. *See infra* section, A Comparison of the Court's Decisions in *SWANCC* and *Riverside Bayview Homes*: Whither *Stare Decisis*.
9. *See infra* section, Textualism's "Pernicious Oversimplification" of the CWA's Contextual Meaning.
10. *See infra* section, *SWANCC* and the Judicial Activism of Clear Statement Rules.
11. *See infra* notes 122-23 and accompanying text (discussing the barking dog canon of construction).
12. *See* 33 U.S.C. §1311(a), ELR STAT. FWPCA §301(a).
13. *Id.* §1344(a), ELR STAT. FWPCA §404(a).
14. *Id.* §1362(7), ELR STAT. FWPCA §502(7).
15. 33 C.F.R. §328.1.
16. *See* 42 Fed. Reg. 37122 (July 19, 1977).
17. 33 C.F.R. §328.3(a)(3) defines "waters of the United States" to include:

> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
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> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
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> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
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> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce; . . . .

Id.

used as habitat by birds protected by the Migratory Bird Treaties" or "are or would be used as habitat by other migratory birds which cross state lines."[18]

In *SWANCC*, a group of localities was formed to develop a site for the disposal of municipal waste.[19] The group learned about:

> the availability of a 533-acre parcel, bestriding the Illinois counties Cook and Kane, which had been the site of a sand and gravel pit mining operation for three decades up until about 1960. Long since abandoned, the old mining site eventually gave way to a successional stage forest, with its remnant excavation trenches evolving into a scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet).[20]

The group decided that it wished to purchase and develop this site and sought any permits that were necessary for the project. Although the Corps first decided that a §404 permit was not necessary for the project,[21] the Corps later concluded that a permit was necessary because the aquatic areas on the site that had to be filled as part of the development project were habitat to many species of migratory birds and were accordingly "other waters" as defined by regulations.[22] When the Corps later declined to issue a §404 permit,[23] the Solid Waste Agency of Northern Cook County (SWANCC) brought an action in federal court, claiming both that the Corps' permit decision was unlawful and that the Corps lacked jurisdiction to require a permit for the filling of the "other waters."[24]

In *Riverside Bayview Homes*,[25] the property owner sought to develop "80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan," and "began to place fill materials on its property as part of its preparations for construction of a housing development."[26] The Corps determined that the area being filled was a wetland adjacent to navigable waters[27] and was accordingly within the regulatory definition of "waters of the United States."[28] The Corps brought an action in federal court to enjoin the unpermitted filling.[29]

These two cases raised issues about the extent of the Corps' jurisdiction under §404 and turned on whether the isolated aquatic sites in *SWANCC* and the wetlands adjacent to navigable waters in *Riverside Bayview Homes* could reasonably be defined as "waters of the United States" under the CWA. The Court employed different interpretive methods to resolve the jurisdictional question in the two cases and, as a consequence, reached different conclusions about the lawfulness of the agency's regulations. In *SWANCC*, the Court decided that the Corps lacked authority under the CWA to regulate aquatic sites that are not physically connected to traditional navigable waters of the United States.[30] In *Riverside Bayview Homes,* the Court decided that the Corps had acted reasonably in exercising its discretion under the CWA when the Corps adopted regulations that asserted jurisdiction over wetlands adjacent to waters of the United States.[31] We will now turn to consider the Court's interpretive approach in *SWANCC* and how that approach compares to *Riverside Bayview Homes*.

The Textualist Method in SWANCC

The *SWANCC* majority's interpretation of the jurisdictional reach of the CWA is based wholly on the "clear" meaning of the statutory text.[32] In the Court's view, notwithstanding the apparent breadth of the statutory definition, Congress' use of the term "navigable waters" in the CWA indicated that the statute applies only when the waters at issue are physically connected to waters that meet the traditional test of navigability.[33] The Court bolstered its conclusion that this was the

18. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986). This interpretation of the Act was not the result of notice-and-comment rulemaking. *See* Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 121 S. Ct. 675, 678, 31 ELR 20382 (2001).
19. *See SWANCC*, at 678, 31 ELR at 20382.
20. *Id.*
21. *See id.* ("The Corps initially concluded that it had no jurisdiction over the site because it contained no 'wetlands,' or areas which support 'vegetation typically adapted for life in saturated soil conditions,' 33 CFR §328.3(b) (1999).").
22. *See id.*

    > [A]fter the Illinois Nature Preserves Commission informed the Corps that a number of migratory bird species had been observed at the site, the Corps reconsidered and ultimately asserted jurisdiction over the balefill site pursuant to subpart (b) of the "Migratory Bird Rule." The Corps found that approximately 121 bird species had been observed at the site, including several known to depend upon aquatic environments for a significant portion of their life requirements.

    Id.
23. The Corps concluded that:

    > SWANCC had not established that its proposal was the "least environmentally damaging, most practicable alternative" for disposal of nonhazardous solid waste; that SWANCC's failure to set aside sufficient funds to remediate leaks posed an "unacceptable risk to the public's drinking water supply"; and that the impact of the project upon area-sensitive species was "unmitigatable since a landfill surface cannot be redeveloped into a forested habitat."

    Id. at 679, 31 ELR at 20383.
24. *See id.*
25. 474 U.S. at 121, 16 ELR at 20086.
26. *Id.* at 124, 16 ELR at 20087.
27. Lake St. Clair lies along a portion of the border between Michigan and Canada. There was no dispute that the lake itself was a navigable water of the United States.
28. 33 C.F.R. §328.3(a)(7).
29. *See* 474 U.S. at 124, 16 ELR at 20087.
30. *See infra* section, *The Textualist Method in* SWANCC.
31. *See infra* section, Riverside Bayview Homes' *Contextual Approach to Interpretation.*
32. *See SWANCC*, 121 S. Ct. at 683, 31 ELR 20384 ("We find §404(a) to be clear"); ("In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.") *Id.* at 680, 31 ELR at 20383 (emphasis in original); *see also* ("Because 'subsequent history is less illuminating than the contemporaneous evidence,' respondents face a difficult task in overcoming the plain text and import of §404(a)."). *Id.* at 682, 31 ELR at 20384 (internal quotations and citation omitted).
33. The Court's view was that:

    > We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited effect" and went on to hold that §404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in

meaning of the statute by relying on the fact that the Corps had given the statute this limited effect in 1974 when it first promulgated regulations for the §404 program.[34]

This was not the end of the Court's textual analysis, however. The Corps had sought to support the legality of its regulation by its contention that the statute was ambiguous in defining its jurisdictional reach and the Court, therefore, had to defer to the Corps' regulation under *Chevron*.[35] Indeed, the Court itself had found the definition of "navigable waters" to be ambiguous in *Riverside Bayview Homes* and had deferred to the Corps' exercise of regulatory jurisdiction over wetlands adjacent to navigable waters.[36] In response to the Corps' call for deference here, the Court held that the meaning of the statute's text was plainly contrary to the Corps' position, and that even an ambiguous text would not have resulted in deference on this question.[37] The Court held that the Corps had to show clear statutory authority for its exercise of jurisdiction, rather than rely upon an inferential delegation of discretionary power to the agency:

> These are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended §404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. *See, e.g., Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"). Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. §1251(b). We thus *read the statute as written* to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.[38]

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fact or which could reasonably be so made. *See, e.g., United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940).

121 S. Ct. at 682-83, 31 ELR at 20384.

34. The Court first relied on the Corps' initial, limited view of §404 jurisdiction in defending a narrow meaning of the terms of the CWA. The Court stated that:

> Indeed, the Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined §404(a)'s "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 CFR §209.120(d)(1). The Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." §209.260(e)(1). Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974.

Id. at 680, 31 ELR at 20383 (emphasis in original; footnote omitted). The Court returned to rely on that original Corps understanding when it rejected the Corps' attempt to rely on post-enactment congressional acquiescence. *See id.* at 681 n.5, 31 ELR at 20384 n.5: ("[W]e are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." (citation omitted)).

In a forthcoming article, I contend that a common understanding of a statute that is reflected in common practice, or *communis opinio* in the terminology of the ancient canon, provides very strong evidence of the statute's meaning. *See* Michael P. Healy, Communis Opinio *and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. (forthcoming 2001). The Corps' 1974 interpretation of the statute, however, can hardly be said to reflect the *common* understanding of the CWA's meaning: it was, rather, the Corps' own idiosyncratic understanding. The U.S. Environmental Protection Agency (EPA) rejected the Corps' limited view of §404 jurisdiction from the outset. *See* 121 S. Ct. at 689 & n.10, 31 ELR at 20386 & n.10. Moreover, the Corps' view was very quickly rejected in court. *See id.* at 689 & n.9, 31 ELR at 20386 & n.9 (citing Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 686, 5 ELR 20285 (D.D.C. 1975) and United States v. Holland, 373 F. Supp. 665, 673, 4 ELR 20710, 20715 (M.D. Fla. 1974)). When Congress amended the CWA in 1977, it too rejected an amendment that would have tied CWA jurisdiction to the concept of navigability. *See* 121 S. Ct. at 690, 31 ELR at 20386. Finally, the jurisdictional limit accepted by the Court in *Riverside Bayview Homes* was outside the limit initially identified by the Corps in 1974. In short, the Court is grasping for straws, or make weights, to claim that the Corps' initial view of the extent of CWA jurisdiction has probative value in discerning the CWA's meaning.

35. *See* 121 S. Ct. at 683, 31 ELR at 20384. In *Chevron*, the Court established the following two-step analysis of the legality of an agency's legal interpretation:

> 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; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if 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.

467 U.S. at 842-44, 14 ELR at 20508-09 (footnotes omitted).

36. *See infra* notes 48-50 and accompanying text.

37. The Court accordingly assumed the applicability of *Chevron* and then explained why, in its view, *Chevron* deference was unwarranted. Because the "Migratory Bird Rule" was an interpretation of the statute that had not been adopted following notice-and-comment rulemaking, *see supra* note 18, the Court might have applied the reasoning of Christensen v. Harris County, 120 S. Ct. 1655 (2000) and held that *Chevron* deference was inapplicable. In *Christensen*, the Court declined to extend *Chevron* deference to an Opinion Letter from the Department of Labor, Wage and Hour Division. The Court concluded that:

> [W]e confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the "power to persuade."

120 S. Ct. at 1662-63 (citations omitted). Because, in the *SWANCC* Court's view, the Corps' interpretation was not lawful under *Chevron*'s more deferential standard, it is plain that the interpretation would have failed also if the Court had employed *Skidmore* deference.

38. 121 S. Ct. at 683-84, 31 ELR at 20384-85 (emphasis added and footnote omitted).

For the majority, therefore, unlike in *Riverside Bayview Homes*, ambiguity was an insufficient basis for the Corps' assertion of regulatory authority. The majority's use of a clear statement rule to interpret the CWA is quite important because it responds to the Corps' call for *Chevron* deference by shifting the burden to the Corps to come forward with an express delegation of authority from Congress to support its jurisdiction, rather than mere statutory ambiguity. Although the Court does not explain why this clear statement requirement should not also have foreclosed the Corps' interpretation of jurisdiction in *Riverside Bayview Homes*, the reason would have to be that there the Corps had asserted jurisdiction over wetlands adjacent to waters that were unarguably "navigable waters."[39] The fact that the wetlands were physically adjacent to those waters meant that there was no constitutional uncertainty about Congress' constitutional power to regulate.[40]

In defining this clear statement rule, the Court is quite coy in explaining whether its requirement may be met only by clear text or whether a showing of clear congressional intent external to the statutory text is sufficient. The Court's assertion of its conclusion that there was no clear statement provides strong support for the view that a textual clear statement is necessary: "We thus *read the statute as written* to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference."[41] A focus on the meaning of the written statute is often a coded way for textualists to describe the essence of their interpretive methodology.[42] Also, the fact that the *SWANCC* Court insistently focused on the statutory words, "navigable waters," lends weight to a conclusion that the Court would require a clear textual delegation to the Corps.

In other important ways, however, the Court's decision suggests that clear and expressly affirmative legislative history would be sufficient. Most importantly, the Court used the following language to explain the clear statement requirement:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, *we expect a clear indication that Congress intended that result.* This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, *the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.*"[43]

By referring to congressional intent, the Court would apparently permit consideration of legislative history, which is the most common evidence of legislative intent. Moreover, although the Court did not include any discussion of the CWA's legislative history when it concluded that there was no clear statement, the Court had earlier stated its view that the legislative history was ambiguous with respect to the Corps' exercise of jurisdiction over isolated waters.[44] The fact that the Court appears to be of two minds regarding the nature of the required clear statement suggests that one or more Justices among the five in the majority were unwilling to consider legislative history when deciding whether a clear statement was present.[45] Even assuming that the

39. *See supra* note 27.

40. The direct connection related to the wetlands' physical location adjacent to Lake St. Clair. The source of the water that gave rise to the wetland conditions was groundwater, rather than the adjacent, navigable surface waters of Lake St. Clair. *See infra* note 61 and accompanying text.

41. 121 S. Ct. at 684, 31 ELR at 20385 (emphasis added and footnote omitted).

42. In his decision in In re Sinclair, 870 F.2d 1340 (7th Cir. 1989), Judge Easterbrook, a prominent textualist, has briefly summarized the approach of textualism in the following terms:

> Statutes are law, not evidence of law. References to "intent" in judicial opinions do not imply that legislators' motives and beliefs, as opposed to their public acts, establish the norms to which all others must conform. "Original meaning" rather than "intent" frequently captures the interpretive task more precisely, reminding us that it is the work of the political branches (the "meaning") rather than of the courts that matters, and that their work acquires its meaning when enacted ("originally"). Revisionist history may be revelatory; revisionist judging is simply unfaithful to the enterprise. Justice Holmes made the point when denouncing a claim that judges should give weight to the intent of a document's authors:
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> > [A statute] does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used . . . . But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law . . . . We do not inquire what the legislature meant; we ask only what the statute means. . . .
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> *Id.* at 1343 (citations omitted).

43. 121 S. Ct. at 683, 31 ELR at 20384 (emphasis added; citations and one internal quotation omitted).

44. *See id.* at 680 n.3, 31 ELR at 20383 n.3 (quoted *infra* in note 67).

45. A reasonable inference from a prior decision raising analogous issues is that Justices Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas likely supported a requirement that the text include the clear statement. In Landgraf v. USI Film Prods., 511 U.S. 244 (1994), Justice John P. Stevens wrote a majority opinion that was joined by Chief Justice William H. Rehnquist and Justice Sandra Day O'Connor, the other two members of the majority in *SWANCC*. There, the Court held that there must be "clear evidence of congressional intent" before a statue may be applied retroactively. *Id.* at 286. In deciding that there was no such clear intent in that case, the Court reviewed statutory text as well as legislative history. *See id.* at 255-63. Justice Scalia concurred in the judgment in an opinion joined by Justices Kennedy and Thomas. He accepted the need for a clear statement, but strongly objected to the willingness of the majority to look beyond the text to discern whether a clear statement was present:

> The Court . . . is willing to let th[e] clear statement be supplied, not by the text of the law in question, but by individual legislators who participated in the enactment of the law, and even legislators in an earlier Congress which tried and failed to enact a similar law. . . .
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> This effectively converts the "clear statement" rule into a "discernible legislative intent" rule . . . . If it is a "clear statement" we are seeking, surely it is not enough to insist that the statement can "plausibly be read as reflecting general agreement"; the statement must clearly reflect general agreement. No legislative history can do that, of course, but only the text of the statute itself. . . .
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> *Id.* at 287 (Scalia, J., concurring).

SWANCC Court did grudgingly consider legislative history, its failure to discern any clear intent, despite Justice John P. Stevens' strong intentionalist argument,[46] gives an important indication of the nature of the clear statement that the Court is demanding: Congress must be clear and specific in its delegation of the constitutionally questionable power. A very broadly intended jurisdictional grant of the sort found in the CWA and its legislative history is insufficient to give the agency regulatory discretion.[47]

In sum, the Court bolstered its reading of the text of the CWA with a clear statement rule that barred deference to the agency based on the regulatory power being exercised. Given that the Court employed the clear statement rule to ensure an adequate legislative grant of regulatory authority, the Court should have been more specific about the nature of its requirement, so that Congress would have meaningful guidance. The Court's lack of clarity means that if Congress wishes to be sure that the Court will allow the exercise of administrative discretion, Congress will have to employ lengthy and express delegations in statutory text.

Riverside Bayview Homes' *Contextual Approach to Interpretation*

The Court's interpretive approach in *SWANCC* contrasts starkly with the approach in *Riverside Bayview Homes*. The contrast is apparent from the outset of the Court's analysis in the earlier decision, which described *Chevron* deference and looked toward a range of legal sources to resolve the interpretive issue:

> An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. Accordingly, our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as "waters."[48]

In addition to the Court's acceptance of the interpretive significance of the Act's "policies, and legislative history," its interpretive approach contrasts with *SWANCC* because the Court so readily and promptly dispensed with giving the statute's text a determinate and narrow meaning:

> On a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters." Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under §404(a) nor to the realities of the problem of water pollution that the [CWA] was intended to combat.[49]

The Court's approach to interpretation in *Riverside Bayview Homes* also differs markedly from the approach in *SWANCC*, because in the former case the Court was deferential toward the exercise of agency expertise in addressing problems as to which Congress had intended a comprehensive regulatory approach:

> Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within the meaning of §404(a). Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems is [are] maintained." Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."[50]

The Court in *Riverside Bayview Homes* relied, moreover, on the breadth of this concern with water pollution control to understand Congress' broad definition of waters subject to regulation under the Act:

> In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.[51]

The Court also based its acceptance of the Corps' broad assertion of jurisdiction under the CWA on the actions of Congress when it amended the statute in 1977.[52] During its consideration of proposed amendments to the Act, Congress considered whether the Corps' regulations had extended CWA jurisdiction too broadly.[53] Ultimately, however,

46. *See infra* section, Textualism's "Pernicious Oversimplification" of the CWA's Contextual Meaning.

47. In this respect, by requiring a clear statement from Congress, rather than relying on the statute's broad terms as well as the intent and purposes of that broad delegation, the Court effectively requires that Congress catalogue all constitutionally questionable applications of the delegated authority. If such a catalogue were to omit a certain questionable application, this textualist Court would likely infer that Congress' omission gives rise to a negative inference that Congress did not intend the omitted application. Needless to say, such an approach demands remarkable foresight and comprehensiveness from the legislative branch. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991) (White, J., concurring). In criticizing the Court's application of a textual clear statement rule, Justice Byron R. White decried the results:

> The vagueness of the majority's rule undoubtedly will lead States to assert that various federal statutes no longer apply to a wide variety of state activities if Congress has not expressly referred to those activities in the statute. Congress, in turn, will be forced to draft long and detailed lists of which particular state functions it meant to regulate.

Id. at 478.

48. 474 U.S. at 131, 16 ELR at 20088 (citations and footnote omitted).

49. *Id.* at 132, 16 ELR at 20088-89.

50. *Id.* at 132-33, 16 ELR at 20089 (citations omitted).

51. *Id.* at 133, 16 ELR at 20089 (citations omitted).

52. *See* Pub. L. No. 95-217.

53. *See* 474 U.S. at 136, 16 ELR at 20090 ("Proponents of a more limited §404 jurisdiction contended that the Corps' assertion of jurisdiction

Congress declined to rein in the scope of the Act: "[E]fforts to narrow the definition of 'waters' were abandoned; the legislation as ultimately passed, in the words of Senator Baker, 'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act.'"[54] The Court's conclusion was that "[i]n the end . . . Congress acquiesced in the administrative construction."[55]

SWANCC's *Inconsistency With* Stare Decisis

As we have seen, the Court in *Riverside Bayview Homes* concluded that the CWA's purpose and legislative history had created an ambiguity regarding the Act's regulatory scope and had impliedly delegated authority to the Corps to resolve the question of jurisdiction. In *SWANCC*, however, the Court relied on the Act's text and a clear statement rule to reject the existence of any ambiguity and implied delegation. The only way to reconcile the decisions is to decide that, although the statute was ambiguous with respect to the treatment of certain "waters," i.e., wetlands adjacent to navigable waters, the statute's meaning was clear in excluding other waters, i.e., so-called isolated waters. Under this view of the Corps' regulations, the Corps would be seen as having sought to exercise discretion along two different axes in the two cases.

The first axis was at issue in *Riverside Bayview Homes* and it demarcated the place at which land becomes water when there is a claimed physical connection between the locus in question and navigable waters. Under this view of the action at issue in *Riverside Bayview Homes*, the significance of navigability to the Corps' exercise of jurisdiction would be retained and the question impliedly delegated to the Corps would be the identification of the permissible physical connection between the site at issue and navigable waters. Indeed, this appears to be the *SWANCC* Court's view of the earlier decision.[56] *SWANCC* could then be conceptualized as considering a different, second axis that concerned the regulatory scope of the CWA regarding waters that had no such physical connection to navigable waters of the United States.[57] Conceptualized in this manner, a site may itself be unquestionably comprised of water, but nevertheless be outside CWA jurisdiction because it lacks the necessary physical connection to navigable waters of the United States.

This conceptualization of the 1985 decision fails utterly to hold water, as it were, when proper and fair account is given to the rationale of that decision. At the outset, it must be accepted that, in an important respect, some of the Court's language in *Riverside Bayview Homes* may be read as accepting the Corps' decision as lawful because it was taken along the first axis. This is because the question there about whether the wetlands were "waters of the United States" implicated a judgment about the physical boundaries of an area already accepted as "navigable waters." In the *Riverside Bayview Homes* Court's words:

> In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.[58]

Even at this most general level of analysis, however, the Court makes no reference to the navigability of the waters whose boundary is at issue.

As the Court's consideration of the Corps' exercise of jurisdiction in 1985 became more focused, however, the Court's analysis plainly clarified that it had not accepted the legality of the Corps' decision based on a conclusion that the Corps reasonably identified the limits of navigability, since the exercise of regulatory jurisdiction over the wetlands plainly exceeded those limits. Rather, the Court concluded that the exercise of jurisdiction was reasonable because the Corps had acted reasonably to protect the environmental quality of the nation's waters. The Court in no way sought to constrain the protection authorized by the Act by requiring that a physical nexus with navigability be proved:

> Of course, it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosys-

over wetlands and other nonnavigable 'waters' had far exceeded what Congress had intended in enacting §404.").

54. *Id.* (footnote omitted).

55. *Id.* at 135-36, 16 ELR at 20089-90.

> [T]he scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of "navigable waters." Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it.

Id. at 137, 16 ELR at 20090 (citation omitted).

56. *See* 121 S. Ct. at 680, 31 ELR at 20383 (citation omitted), where the *SWANCC* Court made the following claim about the decision in *Riverside Bayview Homes*:

> It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . ." In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water."

Id. (emphasis in original; citation omitted).

57. The Court might have considered a third axis along which the Corps' jurisdiction could be defined: the temporal duration of the aquatic sites at issue. Such an axis might have allowed the *SWANCC* Court to hold that there was no CWA jurisdiction over the portions of *SWANCC*'s property that were ponded only on a seasonal basis. *But cf.* Leslie Salt Co. v. United States, 896 F.2d 354, 360, 20 ELR 20477, 20481 (1990) (rejecting a limit on CWA jurisdiction based on the seasonal character of the aquatic site). Under the Court's decision in *SWANCC*, the Corps apparently has authority to regulate seasonal "waters of the United States," provided that they have a sufficient physical connection to navigable waters.

58. 474 U.S. at 132, 16 ELR at 20089.

tems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined. Following the lead of the Environmental Protection Agency, see 38 Fed. Reg. 10834 (1973), the Corps has determined that wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality:

> "The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.
>
> "For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system." 42 Fed. Reg. 37128 (1977).[59]

In the *Riverside Bayview Homes* Court's view, the exercise of jurisdiction was reasonable because it reflected, at bottom, "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands"[60] and not, as *SWANCC* would have it, a reasonable judgment about the furthest limits of the notion of navigability.

The conclusion that the *Riverside Bayview Homes* Court was concerned with and deferred to the Corps' ecologic judgment about the significance of wetlands to the aquatic system is confirmed by two other aspects of the Court's analysis. First, the wetlands at issue in *Riverside Bayview Homes*, though adjacent to Lake St. Croix, were saturated by groundwater, rather than the lake's surface water.[61] The Court addressed this fact not by reference to how it impacted upon the wetlands' connection to navigable waters, which would have been the decisive issue under *SWANCC*'s reading of *Riverside Bayview Homes*, but rather by its relevance to the wetlands' ecological significance.[62] Second, the Court indicated that the Corps' exercise of jurisdiction was based on the Corps' assessment of the broad ecological significance of wetlands and that more specific judgments about the ecological significance of particular sites could be made at the time the Corps reviewed the §404 permit application.[63] In sum, concerns about navigability are wholly foreign to the Court's understanding of the Corps' exercise of delegated regulatory authority and the reason for its legality.

If the *SWANCC* Court had actually applied the reasoning of the Court in *Riverside Bayview Homes*, the Court would have had to consider and reject the earlier case's acceptance of an ecological-connection rationale for the Corps' regulation of the "other waters" at issue in the case. The Court never engaged in such analysis, ignoring Justice Stevens' contention that the requisite ecological connection was present.[64] For the *SWANCC* Court to represent that the earlier decision depended on the relation of the wetlands at issue to navigability is at best incorrect. If the Court had been candid, rather than disingenuous, it would simply have acknowledged that it was rejecting the rationale of *Riverside Bayview Homes*.[65] This switch in the Court's rationale is es-

59. *Id.* at 133-34, 16 ELR at 20089.

60. *Id.* at 134, 16 ELR at 20089, where the Court stated that:

> We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the "waters" of the United States—based as it is on the Corps' and EPA's technical expertise—is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

Id.

61. *See id.* at 130-31, 16 ELR at 20088.

62. The Court stated that:

> [T]he Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. Again, we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act. Because respondent's property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case.

Id. at 135, 16 ELR at 20089 (footnote omitted).

63. *See id.* at 135 n.9, 16 ELR at 20089 n.9, where the Court stated that:

> Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit. *See* 33 CFR §320.4(b)(4) (1985).

Id.

64. *See* 121 S. Ct. at 685 n.2, 31 ELR at 20385 n.2.

> [A]lthough the majority and petitioner both refer to the waters on petitioner's site as "isolated," their role as habitat for migratory birds, birds that serve important functions in the ecosystems of other waters throughout North America, suggests that—ecologically speaking—the waters at issue in this case are anything but isolated.

Id. (citations omitted).

Under the reasoning of *Riverside Bayview Homes*, *see supra* note 63, the Corps' conclusion regarding ecological significance would be reviewed based on the ecological value of all so-called isolated waters, while the particularized judgment about the ecological value of a particular site would be relevant to the decision whether to grant a permit. The cumulative ecological value of other waters appears to be quite significant. *See* JON KUSLER, THE *SWANCC* DECISION AND STATE REGULATION OF WETLANDS 1 (2001) (The Court's decision in *SWANCC* "potentially removes much of the [CWA] protection for 30% to 60% of the Nation's wetlands.") (prepared for the Association of State Wetland Managers, Inc.) (on file with author).

65. *Cf.* United States v. Bryan, 339 U.S. 323, 345-46 (1950) (Jackson, J., concurring) ("the principle of *stare decisis* . . . is not well served by failing to make explicit an overruling which is implicit in a later decision").

To the extent that the *SWANCC* Court seeks to distinguish *Riverside Bayview Homes*, it recasts the earlier case as grounded on specific acquiescence by Congress:

pecially unfortunate because, if the Court had expressed *SWANCC*'s cramped view of CWA jurisdiction when it decided *Riverside Bayview Homes* in 1985, Congress may well have broadened the Act's grant of jurisdiction when it amended the Act in 1987.[66] The Court's contextually responsive, sympathetic approach in 1985 gave Congress no notice of the need for an amendment.

Even apart from *SWANCC*'s deviation from the Court's construction of CWA jurisdiction in *Riverside Bayview Homes*, *SWANCC*'s reasoning is doubtful on its own terms. The majority's interpretive method in *SWANCC* has two important consequences for defining the jurisdictional scope of the CWA, both of which will be discussed in detail. First, the Court's reliance on statutory text allowed the Court to ignore almost entirely the context of the 1972 enactment[67] and the 1977 amendment of the statute. Second, the Court's use of a clear statement rule gave the Court license both to ignore strong evidence of legislative intent and purpose supporting the exercise of jurisdiction over "other waters" and to trump the Corps' long-standing interpretation of the CWA.

> [O]ur holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States."

121 S. Ct. at 680, 31 ELR at 20383 (citations omitted).

Justice Stevens viewed *Riverside Bayview Homes* as accepting that Congress had acquiesced more broadly in the Corps' regulations:

> Our broad finding in *Riverside Bayview* that the 1977 Congress had acquiesced in the Corps' understanding of its jurisdiction applies equally to the 410-acre parcel at issue here. Moreover, once Congress crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes, there is no principled reason for limiting the statute's protection to those waters or wetlands that happen to lie near a navigable stream.

Id. at 685, 31 ELR at 20385 (Stevens, J., dissenting).

Moreover, Justice Stevens claimed that the Court's acceptance of the acquiescence argument in the earlier case bound the *SWANCC* Court based on *stare decisis*:

> Even if the majority were correct that Congress did not extend the Corps' jurisdiction in the 1972 CWA to reach beyond navigable waters and their nonnavigable tributaries, Congress' rejection of the House's efforts in 1977 to cut back on the Corps' 1975 assertion of jurisdiction clearly indicates congressional acquiescence in that assertion. Indeed, our broad determination in *Riverside Bayview* that the 1977 Congress acquiesced in the very regulations at issue in this case should foreclose petitioner's present urgings to the contrary. The majority's refusal in today's decision to acknowledge the scope of our prior decision is troubling. Having already concluded that Congress acquiesced in the Corps' regulatory definition of its jurisdiction, the Court is wrong to reverse course today.

Id. at 690-91, 31 ELR at 20387 (citations and footnotes omitted).

66. Pub. L. No. 100-4.

67. The majority does include the following limited discussion of the legislative history of the 1972 Act in a footnote:

> Although the Conference Report includes the statement that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation. Indeed, respondents admit that the legislative history is somewhat ambiguous.

121 S. Ct. at 680 n.3, 31 ELR at 20383 n.3 (citations omitted).

Textualism's "Pernicious Oversimplification" of the CWA's Contextual Meaning

As Justice Felix Frankfurter argued:

> The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. . . . A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning. . . .[68]

By relying on text alone, the Court's decision in *SWANCC* "pernicious[ly] oversimplifi[es]" the meaning of the CWA. In his dissent, Justice Stevens identified several reasons why the Court's reading of the statute is flawed. First, Justice Stevens described how Congress redefined its rationale for regulating the nation's waters in the CWA of 1972. His historically rich, contextual approach "illuminate[s]" the CWA "by a reference to the history of federal water regulation, a history that the majority largely ignores."[69] Justice Stevens concluded this survey by stating that:

> The shift in the focus of federal water regulation from protecting navigability toward environmental protection reached a dramatic climax in 1972, with the passage of the CWA. The Act, which was passed as an amendment to the existing FWPCA, was universally described by its supporters as the first truly comprehensive federal water pollution legislation. The "major purpose" of the CWA was "to establish a *comprehensive* long-range policy for the elimination of water pollution."[70]

Justice Stevens' analysis is quite reminiscent of then-Justice William H. Rehnquist's analysis for a unanimous Court in *Leo Sheep Co. v. United States*.[71] There, the Court had to decide "[w]hether the Government has an implied easement to

68. United States v. Monia, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting).

69. 121 S. Ct. at 685, 31 ELR at 20385. The history summarized by Justice Stevens related to the Rivers and Harbors Act of 1899 and judicial interpretation of §13 of that statute, as well as the 1948 Federal Water Pollution Control Act and the 1972 Amendments to that statute, which yielded the modern CWA. *See id.*

70. *Id.* at 686, 31 ELR at 20385-86 (quoting S. Rep. No. 92-414, at 95 (1971) (emphasis in original)). The CWA defines "pollutant" to include "dredged spoil" as well as "solid waste, . . . rock, [and] sand" that are discharged into waters. 33 U.S.C. §1362(6). In his dissent, Justice Stevens also stated that "[i]t is fair to characterize the [CWA] as 'watershed' legislation. The statute endorsed fundamental changes in both the purpose and the scope of federal regulation of the Nation's waters." 121 S. Ct. at 685, 31 ELR at 20385; *see also id.* at 687, 31 ELR at 20386 ("This Court was therefore undoubtedly correct when it described the 1972 amendments as establishing 'a comprehensive program for controlling and abating water pollution.'" (quoting Train v. City of New York, 420 U.S. 35, 37, 5 ELR 20162 (1975)).

71. 440 U.S. 668 (1979). Justice White did not participate in the Court's decision. *Id.* at 688.

build a road across land that was originally granted to the Union Pacific Railroad under the Union Pacific Act of 1862—a grant that was part of a governmental scheme to subsidize the construction of the transcontinental railroad."[72] The government claimed that the statutory text was ambiguous and relied on "the familiar canon of construction that, when grants to federal lands are at issue, any doubts are resolved for the Government not against it."[73] The Court concluded that the application of the canon was trumped by clear congressional intent,[74] apparent in the history of the Union Pacific land grants, that showed an intent to grant land broadly in order to ensure construction of the railroad.[75] In *SWANCC*, the dissent's historically rich contextual analysis of the CWA demonstrates that the majority's insistence that the CWA mandates a navigability nexus is anachronistic and otherwise wrong headed.[76]

Justice Stevens bolstered his elaboration of the CWA's historical context by summarizing the legislative history related to the Act's broad definition of "navigable waters." The history of that legislative process showed that "the 1972 conferees arrived at the final formulation by specifically deleting the word 'navigable' from the definition that had originally appeared in the House version of the Act. The majority today undoes that deletion."[77] Moreover, the Conference Committee Report showed that this deletion was intended to extend the Act's jurisdiction to the limits of Congress' constitutional power.[78]

Finally, Justice Stevens highlighted the cramped and contrived nature of the majority's adherence to the navigability nexus by considering the purpose of the CWA and contrasting it with the purpose of the Rivers and Harbors Act (RHA) of 1899.[79] Employing the legal process method for identifying a statute's purpose,[80] Justice Stevens contrasted §13 of the RHA with §404 of the CWA and concluded that the former statute had the purpose of eliminating obstructions to navigation with no independent concern for pollution prevention, while the sole purpose of the latter Act was to prevent pollution and degradation of the nation's waters.[81] The dissent then related that purpose of the 1972 Act to Congress' treatment of the jurisdictional scope of the Act:

> Because of the [CWA's] ambitious and comprehensive goals, it was, of course, necessary to expand its jurisdictional scope. Thus, although Congress opted to carry over the traditional jurisdictional term "navigable waters" from the RHA and prior versions of the FWPCA, it broadened the *definition* of that term to encompass all "waters of the United States."[82]

72. *Id.* at 669.
73. *Id.* at 682 (internal quotations and citation omitted).
74. *See id.* at 682-83.
75. *See id.*
76. The Court's textualist method led to a similarly anachronistic and wrong-headed interpretation of the Federal Arbitration Act in another recent decision. *See* Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001). The alignment of the Justices there was the same alignment as in *SWANCC* and Bush v. Gore, 121 S. Ct. 525 (2000).
77. 121 S. Ct. at 687, 31 ELR at 20386 (footnote omitted).
78. *See id.* at 687-88, 31 ELR at 20386 (citations omitted), where Justice Stevens argued that:

> The Conference Report explained that the definition in §502(7) was intended to "be given the broadest possible constitutional interpretation." The Court dismisses this clear assertion of legislative intent with the back of its hand. The statement, it claims, "signifies that Congress intended to exert [nothing] more than its commerce power over navigation."
>
> The majority's reading drains all meaning from the conference amendment. By 1972, Congress' Commerce Clause power over "navigation" had long since been established. Why should Congress intend that its assertion of federal jurisdiction be given the "broadest possible constitutional interpretation" if it did not intend to reach beyond the very heartland of its commerce power? The activities regulated by the CWA have nothing to do with Congress' "commerce power over navigation." Indeed, the goals of the 1972 statute have nothing to do with *navigation* at all.

Id. (emphasis in original; citations omitted). *See also id.* at 688, 31 ELR at 20386 ("Viewed in light of the history of federal water regulation, the broad §502(7) definition, and Congress' unambiguous instructions in the Conference Report, it is clear that the term 'navigable waters' operates in the statute as a shorthand for 'waters over which federal authority may properly be asserted.'").

79. 30 Stat. 1152.
80. This method is described in HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge Jr. & Philip P. Frickey eds., 1994). These authors describe the method as follows:

> The gist of this [purposivist] approach is to infer purpose by comparing the new law with the old. Why would reasonable men, confronted with the law as it was, have enacted this new law to replace it? . . .
>
> The most reliable guides to an answer will be found in the instances of unquestioned application of the statute. . . .
>
> Once these points of reference are established, they throw a double light. The purposes necessarily implied in them illuminate facets of the general purpose. At the same time they provide a basis for reasoning by analogy to the disputed application in hand. . . .

Id. at 1378.

Justice Stevens pursued exactly this analysis:

> Section 404 of the CWA resembles §13 of the RHA, but, unlike the earlier statute, the primary purpose of which is the maintenance of navigability, §404 was principally intended as a pollution control measure. A comparison of the contents of the RHA and the 1972 Act vividly illustrates the fundamental difference between the purposes of the two provisions. The earlier statute contains pages of detailed appropriations for improvements in specific navigation facilities, 30 Stat. 1121-1149, for studies concerning the feasibility of a canal across the Isthmus of Panama, *id.*, at 1150, and for surveys of the advisability of harbor improvements at numerous other locations, *id.*, at 1155-1161. Tellingly, §13, which broadly prohibits the discharge of refuse into navigable waters, contains an exception for refuse "flowing from streets and sewers . . . in a liquid state." *Id.*, at 1152.
>
> The 1972 Act, in contrast, appropriated large sums of money for research and related programs for water pollution control, 86 Stat. 816-833, and for the construction of water treatment works, *id.*, at 833-844. Strikingly absent from its declaration of "goals and policy" is *any* reference to avoiding or removing obstructions to navigation. Instead, the principal objective of the Act, as stated by Congress in §101, was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251. Congress therefore directed federal agencies in §102 to "develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters." 33 U.S.C. §1252. The CWA commands federal agencies to give "due regard," not to the interest of unobstructed navigation, but rather to "improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife [and] recreational purposes."

121 S. Ct. at 687, 31 ELR at 20386 (emphasis in original).

81. *Id.*
82. *Id.* (quoting 33 U.S.C. §1362(7)) (footnote omitted).

The majority's textualist method also resulted in the Court's failure to account for the contextual insights into CWA jurisdiction that may be gained from considering the 1977 Amendments. In his dissent, Justice Stevens reviewed how Congress considered in 1977 the broad assertion of CWA jurisdiction by the Corps.[83] As part of that consideration, Congress rejected an amendment that would have reimposed a navigability limit on the Corps' jurisdiction,[84] leading Justice Stevens to conclude that "[t]he net result of that extensive debate was a congressional endorsement of the position that the Corps maintains today."[85]

Justice Stevens relied, moreover, on several provisions enacted by Congress in 1977 to gain a contextual understanding of the scope of CWA jurisdiction. First, Justice Stevens described how the enactment of §404(g) in 1977 confirmed that Congress viewed CWA jurisdiction far more broadly than the *SWANCC* majority accepted. In §404(g)(1), Congress allowed states to develop programs for the issuance of §404 permits when the affected waters are "navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . .)."[86] Justice Stevens reasoned that:

> Section 404(g)(1)'s reference to navigable waters "other than those waters which are presently used, or are susceptible to use" for transporting commerce and their adjacent wetlands appears to suggest that Congress viewed (and accepted) the Act's regulations as covering more than navigable waters in the traditional sense. The majority correctly points out that §404(g)(1) is itself ambiguous because it does not indicate precisely how far Congress considered federal jurisdiction to extend. But the Court ignores the provision's legislative history, which makes clear that Congress understood §404(g)(1)—and therefore federal jurisdiction—to extend, not only to navigable waters and nonnavigable tributaries, but also to "isolated" waters, such as those at issue in this case.[87]

Justice Stevens also relied on two exceptions from the permit requirement included in §404(f) by the 1977 Amendments to show that Congress recognized that the Act applied to "other waters."[88] The *SWANCC* majority, however, declined to give these statutory provisions any weight in interpreting the meaning of the textual definition of "navigable waters."[89] The contextual importance of the 1977 Amendments was markedly different for Justice Stevens: "The legislative history of the 1977 amendments therefore plainly establishes that, when it enacted §404(g), Congress believed—and desired—the Corps' jurisdiction to extend beyond just navigable waters, their tributaries, and the wetlands adjacent to each."[90]

In sum, the Court's textualist method in *SWANCC* yields an interpretation of the CWA that is nonresponsive to the novelty and breadth of the statutory scheme. As the following section shows, the Court also used a clear statement rule to foreclose the Corps' reliance on *Chevron* deference to an agency's interpretation of an ambiguous statute.

SWANCC and the Judicial Activism of Clear Statement Rules

Not content to rest wholly on its view of the "clear meaning" of the CWA text, the majority employed a clear statement rule as well to reject definitively the Corps' reliance on *Chevron* deference.[91] The Court's use of the clear statement rule in *SWANCC* is important in two respects: it exemplifies how the Court's textualists have continued to adapt doctrines of statutory construction to ensure sufficient judicial power to dictate particular interpretive results, and it continues the conservative Court's efforts to apply the *Chevron* doctrine in ways that constrain broad grants of discretion to agencies. Each of these important aspects of *SWANCC* will be considered in turn.

SWANCC *and the Application of a Clear Statement Requirement*

The Court in *SWANCC* was reviewing the Corps' assertion of regulatory jurisdiction over aquatic sites that had no physical connection with waters traditionally accepted as

83. *See id.* at 689-90, 31 ELR at 20387.

84. *See id.*

85. *Id.* at 690, 31 ELR at 20387.

86. 33 U.S.C. §1344(g)(1), ELR STAT. FWPCA §404(g)(1).

87. 121 S. Ct. at 691-92, 31 ELR at 20388.

88. Justice Stevens wrote that:

> [T]he 1977 amendments expressly exclude from the Corps' regulatory power the discharge of fill material "for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches," and "for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters." [33 U.S.C. §1344(f)(1), ELR STAT. FWPCA §404(f)(1).] The specific exemption of these waters from the Corps' jurisdiction indicates that the 1977 Congress recognized that similarly "isolated" waters *not* covered by the exceptions would fall within the statute's outer limits.

Id. at 691, 31 ELR at 20387 (emphasis in original).

89. Regarding the relevance of §404(f), enacted as part of the 1977 Amendments, the Court concluded that "[a]s §404(a) only regulates dredged or fill material that is discharged 'into navigable waters,' Congress' decision to exempt certain types of these discharges does not affect, much less address, the definition of 'navigable waters.'" *Id.* at 682 n.7, 31 ELR at 20384 n.7. The Court rejected the relevance of §404(g), added by the 1977 Amendments, for similar reasons:

> But §404(g) gives no intimation of what those waters might be; it simply refers to them as "other . . . waters." Respondents conjecture that "other . . . waters" must incorporate the Corps' 1977 regulations, but it is also plausible, as petitioner contends, that Congress simply wanted to include all waters adjacent to "navigable waters," such as nonnavigable tributaries and streams. The exact meaning of §404(g) is not before us and we express no opinion on it, but for present purposes it is sufficient to say, as we did in *Riverside Bayview Homes*, that "§404(g)(1) does not conclusively determine the construction to be placed on the use of the term 'waters' elsewhere in the Act (particularly in §502(7), which contains the relevant definition of 'navigable waters') . . . ."

Id. at 682, 31 ELR at 20384 (citation and footnote omitted). The *Riverside Bayview Homes* Court did, however, state regarding the sections of the CWA enacted in 1977 that "in light of the fact that the various provisions of the Act should be read *in pari materia*, it does at least suggest strongly that the term 'waters' as used in the Act does not necessarily exclude 'wetlands.'" 474 U.S. at 138 n.11, 16 ELR at 20090 n.11.

90. 121 S. Ct. at 692, 31 ELR at 20388.

91. *See id.* at 683, 31 ELR at 20384 ("We find §404(a) to be clear, but even were we to agree with respondents, we would not extend *Chevron* deference here.").

navigable. If permitted by the U.S. Constitution, Congress would have to have delegated authority to regulate these waters based on an exercise of its powers under the U.S. Commerce Clause.[92] The *SWANCC* majority, accordingly, would arguably have applied a well-accepted rule of construction if it had interpreted the CWA to have a meaning that did not raise the question of constitutional infirmity, provided that the interpretation was "fairly possible."[93] Justice Stevens would no doubt have rejected this conventional use of the canon, however, based on his view that Congress plainly intended to exercise all of its Commerce Clause power when it enacted the CWA.[94]

During the last quarter century, however, the Supreme Court has changed the effect to be given to the avoidance of constitutional questions canon. The beginning of this change can be observed in *National Labor Relations Board v. Catholic Bishop of Chicago*.[95] There, then-Chief Justice Warren E. Burger gave the canon a stronger legal effect, so that the canon, when applicable, required that there be a "clear expression of an affirmative intention of Congress"[96] before the Court would construe a statute "in a manner that could in turn call upon the Court to resolve difficult and sensitive" constitutional questions.[97] The *Catholic Bishop* Court indicated by its inquiry into the text as well as legislative history that Congress need not express the necessary clear intent in the statute's text.[98]

During the past 15 years, the Rehnquist Court has pursued the textualist approach to interpretation with greater frequency.[99] At the same time, the Rehnquist Court has further modified the effect of the canon favoring avoidance of constitutional questions. In *Gregory v. Ashcroft*,[100] the Court held that, before it will construe a statute in a way that raises a question of whether it violates constitutional requirements of federalism, "it must be plain to anyone reading the Act" that the statute has the constitutionally questionable meaning.[101] This change in the canon's effect means that the clear statement must now be in the text, rather than in the legislative history. This new requirement, of course, goes well beyond the rationale of *Catholic Bishop*, which sought to ensure congressional deliberation on the question of constitutional import, and runs a serious risk of disingenuous interpretive results.[102] Indeed, a cynical view of the use of clear statement rules by the Rehnquist Court would be that the Court's textualists have found that they need to have rules of construction available to them that will trump the plain, though not explicit, meaning, of broadly written statutory text when they view the interpretive result directed by the text as objectionable.[103]

In *SWANCC*, the Court concluded that the application of a clear statement rule was triggered by the Corps' assertion of regulatory jurisdiction that was constitutionally questionable because the exercise of Commerce Clause power was uncertain[104] and because asserting federal regulatory power was doubtful based on federalism principles.[105] As has al-

92. *See* U.S. CONST. art. I, §7. Justice Stevens concluded that Congress' delegation of regulatory jurisdiction was constitutional: "The Corps' exercise of its §404 permitting power over 'isolated' waters that serve as habitat for migratory birds falls well within the boundaries set by this Court's Commerce Clause jurisprudence." 121 S. Ct. at 694, 31 ELR at 20388.

93. *See, e.g.*, Machinists v. Street, 367 U.S. 740, 749-50 (1961); Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804).

94. *See* 121 S. Ct. at 688, 31 ELR at 20386.

95. 440 U.S. 490 (1979).

96. *Id.* at 504.

97. *Id.* at 507.

98. *See id.* at 504-07 (examining statutory text and legislative history for evidence of any affirmative intention of Congress).

99. *See, e.g.*, William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, SUP. CT. REV. 429, 444-47 (1994).

100. 501 U.S. 452 (1991).

101. *Id.* at 467.

102. *See* Frank E. Horack Jr., *The Disintegration of Statutory Construction*, 24 IND. L.J. 335 (1949).

> Rules of interpretation in the nature of presumption are the hardest with which to deal. They are fictional rules of interpretation and frequently lead to results exactly opposite those which legislatures intend. At best they are judicial standards requiring a particular form of legislative expression. As such, they are within limits defensible. Every system of government depends upon the ability of society to require of its people certain formalities as prerequisite to legal consequence. It is not too much to require this of the agencies of government as well. Formalities, however, become intolerable when they no longer reflect the normal expectations of the society for which they were constructed. To test thus the rules of presumed intention discloses that they are altogether unsatisfactory.
>
> *Id.* at 342.

In the early twentieth century, Dean Pound voiced the concern that courts might engage in an activist construction of statutes to avoid the effects of legislative enactments:

> There are two ways in which the courts impede or thwart social legislation demanded by the industrial conditions of today. The first is narrow and illiberal construction of constitutional provisions, state and federal. . . . The second is a narrow and illiberal attitude toward legislation conceded to be constitutional, regarding it as out of place in the legal system, as an alien element to be held down to the strictest limits and not to be applied beyond the requirements of its express language. The second is by no means so conspicuous as the first, but is not on that account the less unfortunate or the less dangerous. . . .
>
> Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908).

103. *See* WILLIAM N. ESKRIDGE JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (2d ed. 1995)

> Critics could suggest that cases like *Gregory* demonstrate that textualism fails to live up to its promise of providing objective interpretive methods in the face of outcomes judges cannot tolerate. . . . For conservative textualists who care about federalism, the safety valve when textualism gets them boxed in . . . is the creation of a super-strong clear statement rule that trumps the result suggested by plain meaning.
>
> *Id.*

104. *See* 121 S. Ct. at 683. 31 ELR at 20384.

105. *See id.* at 683-84, 31 ELR at 20384-85. Justice Stevens found the Court's federalism concerns "ironic":

> It is particularly ironic for the Court to raise the specter of federalism while construing a statute that makes explicit efforts to foster local control over water regulation. Faced with calls to cut back on federal jurisdiction over water pollution, Congress rejected attempts to narrow the scope of that jurisdiction and, by incorporating §404(g), opted instead for a scheme that encouraged States to supplant federal control with their own regulatory programs.
>
> *Id.* at 693, 31 ELR at 20388 (citation omitted). For a discussion of how the Court's new federalism doctrines may apply to federal environmental law, see Stephen R. McAllister & Robert L. Glicksman, *Federal Environmental Law in the "New" Federalism Era*, 30 ELR 11122 (Dec. 2000).

ready been discussed,[106] the *SWANCC* Court was evasive in explaining whether the clear statement must be in the form of clear statutory text or clear intent. *SWANCC*'s rule thus appears like the rules in both *Catholic Bishop* and *Gregory*. In any event, given the clear statement requirement, Congress' deletion of the word "navigable" when defining the CWA's jurisdictional scope was insufficient to grant the Corps' regulatory jurisdiction over isolated waters. In the Court's view, such jurisdiction could be exercised only if Congress made specific provision for it in the statute and the exercise of jurisdiction were found to be constitutional.

In sum, *SWANCC* continues the Rehnquist Court's judicially active application of clear statement requirements. Given that Congress had no reason to expect either in 1972 or 1977 that the exercise of regulatory jurisdiction over "other waters" would be constitutionally suspect under the Commerce Clause and federalism principles, the Court's imposition of the requirement in 2001, based on constitutional doctrine established in the last decade,[107] makes the Court appear to be engaging in "bait-and-switch" tactics with Congress.[108] The next section will discuss how the Court's use of the clear statement rule was especially activist since it wholly foreclosed *Chevron* deference.

SWANCC *and the Court's New Limits on the Administrative State*

We have already seen that the *SWANCC* Court failed to adhere to the principle of *stare decisis* when it rejected the *Riverside Bayview Homes* Court's understanding of the discretion accorded to the Corps by the CWA.[109] Although the Court broke with CWA statutory precedent, its decision in *SWANCC* was faithful to the Rehnquist Court's recent use of the textualist method supplemented by clear statement rules to constrain broad exercises of agency regulatory authority.[110] This line of Rehnquist Court precedent began with the decision in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*[111] There, Justice Antonin Scalia relied heavily on the etymology and (related) dictionary meaning of the word "modify," in the Communications Act of 1934.[112] Concluding that the word granted the Federal Communications Commission (FCC) authority to make only incremental changes,[113] the Court struck down an FCC regulation that made a "fundamental change in the Act's tariff-filing requirement."[114] The Court stated that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[115] Although the theory of *Chevron* was that our governmental structure allocated policymaking decisions to administrative agencies rather than to the courts, by its textualist method in *MCI*, the Court held that Congress had imposed a significant limit on the breadth of its delegation of regulatory discretion by its use of the word "modify" in the statute's text.

Just last term, the Court, in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*,[116] considered whether the Food and Drug Administration (FDA) had authority to regulate tobacco under the Food, Drug, and Cosmetic Act (FDCA).[117] Justice Sandra Day O'Connor, writing for the same conservative majority that decided *SWANCC*, viewed the *MCI* case as reflecting a strong concern that settled law be unsettled by an agency only when the statutory text clearly grants an agency power to change the settled law.[118] In reviewing the terms of the FDCA, the Court felt "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[119] In the Court's view, the FDA's decision to regulate tobacco failed under the first step of *Chevron*: there can have been no implicit delegation of such broad regulatory authority. In both these

106. *See supra* notes 41-47 and accompanying text.

107. *See* United States v. Lopez, 514 U.S. 549 (1995); Gregory v. Ashcroft, 501 U.S. 452 (1991).

108. Professors Eskridge and Frickey have criticized the Court's use of clear statement rules in some recent cases as evidencing a "bait-and-switch" approach to statutory interpretation:

> [Two recent] decisions surely came as a surprise to Congress. Indeed, there is a "bait and switch" feature to [these] cases . . .: when Congress enacted the statutes in question, the constitutionality of the state-infringing provisions was clear and Congress could not have anticipated the *Gregory* rule; nor could a reasonable observer have predicted the expansion of *Gregory* in [the second case]. When the Court's practice induces Congress to behave in a certain way and the Court then switches the rules, Congress justifiably feels taken.

William N. Eskridge Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 85 (1994) (footnote omitted). These authors also made the following telling criticism of the Court's recent use of clear statement rules:

> When candidly set forth and applied, clear statement rules are among the many ways the Court can signal to Congress its concerns about the constitutionality of government actions. But when the Court transparently manipulates the canons to fit its own substantive agenda, the Court places its credibility and legitimacy at risk. Like the Court's erratic textualist performance in statutory cases, its application of quasi-constitutional clear statement rules has been tactically clever in the short-term but institutionally risky in the longer-term. The Court's adventurism has been most apparent, and most normatively questionable, in the super-strong clear statement rules protecting states' rights at the expense of individual rights and national policies.

Id. at 81-82 (footnote omitted).

109. *See supra* section, SWANCC's *Inconsistency With* Stare Decisis.

110. For an elaborate analysis of the relation between the textualist method and *Chevron* deference, see Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 352 (1994). *See also* Gregory E. Maggs, *Reconciling Textualism and the* Chevron *Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393 (1996).

111. 512 U.S. 218 (1994).

112. 48 Stat. 1064, as amended.

113. *See* 512 U.S. at 225-28.

114. *Id.* at 229. *Cf.*

115. *Id.* at 231. Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121, 140 (2000) ("To us it seems that Justice Scalia has attempted to bring to statutory interpretation another 'new' canon of interpretation, namely, that ambiguous statutes should be read narrowly.").

116. 120 S. Ct. 1291 (2000).

117. 21 U.S.C. §301 et seq.

118. *See* 120 S. Ct. at 1315.

119. *Id.*

cases, the Court employed the textualist method to hold that the challenged agency actions effected a fundamental change in the law and were unlawful in the absence of express permission in the statute.

Although the *SWANCC* Court cited neither *MCI* nor *Brown & Williamson*, the Court employed a similar clear statement rule requiring the expressly affirmative grant of regulatory authority to foreclose the Corps' exercise of nontraditional regulatory jurisdiction. The Court's use of this clear statement rule allowed the Court to disregard strong evidence of legislative intent and purpose supporting the exercise of jurisdiction over "other waters" and to nullify the Corps' long-standing interpretation of the CWA.

Through its use of the clear statement rule in *SWANCC*, the Court barred Congress from impliedly delegating an important regulatory issue to the Corps. When this clear statement rule applies, the delegation must instead be made expressly and affirmatively by the statute. At least in *Brown & Williamson*, and arguably in *MCI*, the Court employed its clear statement rule to foreclose an agency's novel interpretation of the regulatory authority delegated by the statute.[120] In *SWANCC*, however, the agency interpretation foreclosed by the Court had been in place for 15 years, had been accepted and implemented by 3 administrations, and had been reviewed by Congress. Such an activist use of a clear statement rule is contrary to the spirit of *Chevron*, which recognized that administrative agencies were better placed than courts to make political decisions arising in the implementation of statutes. The Court should not be devising rules of construction that enable courts to declare particularized implementation decisions unlawful because they were not authorized in sufficiently clear terms. Such rules effectively limit the scope of *Chevron* deference.

The Court's use of the clear statement rule in *SWANCC* has the effect, moreover, of ignoring evidence of clear congressional intent in the legislative history, structure, and purpose of the CWA.[121] The Court, often in opinions written by Justice Stevens, has employed the use of a canon providing that a statute should not be interpreted to effect a significant change in law when there is no indication that Congress intended such a change.[122] This canon—colorfully described as the dog that didn't bark rule of construction[123]—is sometimes rejected by the Court.[124] Justice Scalia, in particular, has advocated that the Court must not require Congress to identify an intent to change the law in legislative history when the statute's text means that the law has changed.[125] By employing its clear statement rule in *SWANCC*, the Court has turned a deaf ear to the dogs barking insistently in the legislative history of the CWA to signal Congress' plain intent to shift from a regime of water regulation based on protecting navigation to one based on protecting water quality and the ecosystems dependent on that quality.[126] Re-

120. *Cf. supra* note 34 (discussing how an agency's long-standing understanding of a statute may provide strong evidence of its meaning).

121. This clear intent with regard to both the 1972 Act and 1977 Amendments is discussed *supra* in section, Textualism's "Pernicious Oversimplification" of the CWA's Contextual Meaning.

122. *See* Chisom v. Roemer, 501 U.S. 380, 396 (1991) (Stevens, J.):

> We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment.

(footnote omitted); American Hosp. Ass'n v. National Labor Relations Bd., 499 U.S. 606, 613-14 (1991) (Stevens, J.) ("If this amendment had been intended to place the important limitation on the scope of the Board's rulemaking powers that petitioner suggests, we would expect to find some expression of that intent in the legislative history." (citation omitted)); Williams v. United States, 458 U.S. 279 (1982):

> [I]f Congress really set out to enact a national bad check law in §1014, it did so with a peculiar choice of language and in an unusually backhanded manner. . . . Absent support in the legislative history for the proposition that §1014 was "designed to have general application to the passing of worthless checks," we are not prepared to hold petitioner's conduct proscribed by that particular statute.

Id. at 287 (citation and footnote omitted).

See also United States v. Bestfoods, 118 S. Ct. 1876, 1885, 28 ELR 21225, 21227 (1998) ("nothing in CERCLA purports to reject this bedrock principle [of corporations law], and against this venerable common-law backdrop, the congressional silence is audible.") *Cf.* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-267 (1979) ("silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely"); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521 (1989) (Stevens, J.) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.") (citation omitted); William D. Popkin, *A Common Law Lawyer on the Supreme Court*, 1989 DUKE L.J. 1087, 1152 ("Justice Stevens applies this [clear-statement] doctrine when he rejects the apparent meaning of the statutory language because it produces results that he 'cannot believe' the legislature intended without clear statement to that effect, especially if Congress seems unaware of what it is doing.").

This clear-statement approach has distinguished scholarly support. *See* Harry H. Wellington & Lee A. Albert, *Statutory Interpretation and the Political Process: A Comment on* Sinclair v. Atkinson, 72 YALE L.J. 1547 (1963):

> [T]he invocation of the clear statement rule would seem appropriate . . . where one interpretation of a statute would work vast and far-reaching changes in an established body of jurisprudence, either statutory or common law. Such changes in a body of existing doctrine is not a factor Congress is likely to have considered in passing a statute, and the disruption worked by such a statute is a consideration worthy of legislative attention.

Id. at 1563 n.50.

123. This label reflects an allusion to Sherlock Holmes's use of the evidence of the dog that didn't bark. *See* Harrison v. PPG Indus., Inc., 446 U.S. 578, 602, 10 ELR 20353, 20359 (1980) (Rehnquist, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night."); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 588-89 & n.20 (1982) (Stevens, J., dissenting) (citing A. CONAN DOYLE, *Silver Blaze*, *in* THE COMPLETE SHERLOCK HOLMES 383 (1938)).

124. *See PPG Indus.*, where the Court stated:

> [I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

Id. 446 U.S. at 592, 10 ELR at 20357 (footnote omitted)).

125. *See Chisom*, 501 U.S. at 406 (Scalia, J., dissenting) ("we have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past. We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie." (citations omitted)).

126. *See supra* section, Textualism's "Pernicious Oversimplification" of the CWA's Contextual Meaning.

jecting an agency interpretation implementing that new federal regulatory regime without showing that the regulation is an unreasonable approach to water quality protection or that it is unconstitutional significantly erodes the number of cases in which the Court will find an implicit or explicit delegation of regulatory authority to an agency and thereby greatly restricts the range of *Chevron* deference. In the place of deference, this activist, textualist Court has assumed the power to force Congress to delegate regulatory authority with specificity.

Conclusion

In sum, by its rejection of the Corps' assertion of regulatory jurisdiction over isolated waters, the *SWANCC* Court has improperly abandoned statutory *stare decisis* and has ignored clear congressional intent to provide comprehensive protection of the nation's waters. The analytic approach taken by the Court means not only that many wetland areas will no longer be protected by federal law, but also that agencies have less ability to regulate in ways that the Court finds to be excessive.