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From Asahi to WOTUS: Why "Significant Nexus" Falls Short

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From *Asahi* to WOTUS: Why "Significant Nexus" Falls Short

Thomas J. Philbrick[*]

In 2012, California farmer John Duarte was fined $1 million by the federal government for plowing his own field. The government claimed that seasonal water gatherings on certain parts of his land made it a regulatable water even though the land had been Duarte's farmland for over two decades. This series of events was only possible because of the Clean Water Act's (CWA) definition of what constitutes a regulatable water.

The CWA prohibits the discharge of pollutants from any point source into navigable waters of the United States (WOTUS) without a permit. On June 29, 2015, the Obama administration determined that a body of water is a WOTUS subject to CWA regulation if it has a "significant nexus" to a navigable water. The Trump administration recently replaced the 2015 rule with a revised rule that limits the government's jurisdictional reach.

The WOTUS definition has always been controversial. Multiple Supreme Court cases have revolved around it, and legislators and scholars continually debate the proper scope of the term. While a significant amount of scholarship has focused on the relationship between the WOTUS rule and the Commerce Clause, far less ink has been spilt on the relationship between the WOTUS rule and the United States' personal jurisdiction jurisprudence. However, these personal jurisdiction cases offer a helpful framework through which to analyze the WOTUS rule. They suggest that the EPA's current "significant nexus" test falls short of the "clear connection" test from Justice Antonin Scalia's opinion in Rapanos v. United States. This is because of the susceptibility of the "significant nexus" standard to agency abuse and its lack of a legitimate statutory or precedential basis.

In an effort to calm the murky waters of the WOTUS rule, this Note provides a timely and in-depth analysis of the flaws in the "significant nexus" test and additional support for the Trump administration's adoption of the "clear connection" test that will help courts and agencies make better decisions and avoid burdening landowners.

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INTRODUCTION

When California farmer John Duarte plowed his fields to prepare for planting in the spring of 2012, he did not expect to run into problems with

the federal government.[1] However, after several years of litigation, Duarte had to pay a $1 million fine for plowing his own fields.[2] The government claimed that seasonal water gatherings on certain parts of his land made it regulatable water even though the land had been used as farmland for over two decades.[3] This series of events was only possible because of the Clean Water Act's (CWA) definition of what constitutes a regulatable water.[4]

The CWA prohibits the discharge of pollutants from any point source into navigable waters of the United States (WOTUS) without a permit.[5] The Environmental Protection Agency (EPA) enforces the CWA in consultation with the United States Fish and Wildlife Service (USFWS) and the Army Corps of Engineers (Corps).[6] The Obama administration redefined WOTUS on June 29, 2015, so that all wetlands adjacent to any WOTUS became subject to the CWA permitting requirements.[7] Whether

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1. *See* Damon Arthur, *He Plowed His Field; Now He Faces a $2.8 Million Fine*, USA TODAY (May 24, 2017, 7:07 AM), https://www.usatoday.com/story/news/nation-now/2017/05/24/farmer-plowing-fine/339756001/ [https://perma.cc/E43S-NTFD].

2. *See The Clean Water Act's 404(f) Exemptions*, THE FEDERALIST SOCIETY (May 2, 2018), https://fedsoc.org/events/the-clean-water-act-s-404-f-exemptions [https://perma.cc/V82U-32QV] (statement of Tyler G. Welti, Venable, LLP).

3. *See* Chris Bennett, *When a Farmer Punches Back at the Feds*, AGWEB (May 1, 2017, 1:02 PM), https://www.agweb.com/article/when-a-farmer-punches-back-at-the-feds-naa-chris-bennett/ [https://perma.cc/TC8G-2ZPV] ("Twenty years of wheat production followed by 15 years of livestock production wasn't a continuous farming operation, according to DOJ.").

4. *See* 33 U.S.C. § 1251(a) (2018); *see also* Mark Latham, Rapanos v. United States*: Significant Nexus or Significant Confusion? The Failure of the Supreme Court to Clearly Define the Scope of Federal Wetland Jurisdiction*, *in* THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS 5, 15 (L. Kinvin Wroth ed., 2007), http://vjel.vermontlaw.edu/files/2013/05/The-Supreme-Court-and-the-Clean-Water-Act-5-Essays.pdf [https://perma.cc/9Z32-SNWF] ("[T]he significant nexus test is fraught with uncertainty, both in terms of application and guidance, for those mired in the current muck of wetland jurisdictional determinations after the Court's inability in *Rapanos* to fashion a clearly articulated majority view. That is, just what constitutes the necessary significant nexus sufficient for either the Corps or EPA to assert jurisdiction over property owners' wetlands?").

5. *See* 33 U.S.C. § 1251(a).

6. *Id.*

7. *See* Sarah Everhart, *The WOTUS Rule Applies in Maryland*, MD. RISK MGMT. EDUC. BLOG (Sept 18, 2018), https://www.agrisk.umd.edu/post/the-wotus-rule-applies-in-maryland [https://perma.cc/3WAD-6AVN]; *see also* Lawrence A. Kogan, *US Food Security and Farmers' Livelihoods at Stake in "Waters of the US" Rule Rewrite*, THE WLF LEGAL PULSE (Apr 20, 2017),

a body of water is a WOTUS subject to CWA regulation is determined by whether the water has a "significant nexus" to a navigable water.[8] The Trump administration recently replaced the 2015 rule with a revised rule that significantly limits the reach of the government in regulating waterways.[9]

The WOTUS definition has always been controversial.[10] Multiple Supreme Court cases have revolved around it, and legislators and scholars continually debate the proper scope of the term.[11] While a significant

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https://www.wlf.org/2017/04/20/wlf-legal-pulse/us-food-security-and-farmers-livelihoods-at-stake-in-waters-of-the-us-rule-rewrite/ [https://perma.cc/QL2C-UDLW].

8. *See* Rapanos v. United States, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring in judgment) (defining a significant nexus as a place where the wetland or the surrounding land "significantly affect the chemical, physical, and biological integrity" of a navigable water); *see also* Brandon C. Smith, Note, *Jurisdictional Donnybrook: Deciphering Wetlands Jurisdiction After* Rapanos, 73 BROOK. L. REV. 337, 340 (2007) (arguing that the significant nexus standard leads to "disparate outcomes and uncertainty" for private property owners); *see also* Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 713 (1989) ("The issues of which waters and which activities are subject to 404 regulation have been at the heart of most of the controversy surrounding the program. Geographic jurisdiction concerns the scope of the Clean Water Act's intent to assert regulatory control over all waters . . . .").

9. *See* Katy Stech Perek, *EPA Rolls Back Obama-Era Regulations on Clean Water*, WALL ST. J., (Sept. 12, 2019, 9:01 PM), https://www.wsj.com/articles/epa-to-roll-back-obama-era-regulations-on-clean-water-11568300216 [https://perma.cc/XR8G-RWCC]; *see also* The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22,250, 22,257 (April 21, 2020) (to be codified at 33 C.F.R. § 328.3) [hereinafter New Rule] (laying out four categories of waters that are considered "waters of the United States": "(1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; (2) tributaries; (3) Lakes and ponds, and impoundments of jurisdictional waters; and (4) Adjacent wetlands.").

10. *See* Laura Gatz, *Overview of the Army Corps and EPA Rule to Define "Waters of the United States" (WOTUS) and Recent Developments*, CONG. RES. SERV. (Oct. 22, 2018), https://fas.org/sgp/crs/misc/IF10125.pdf [https://perma.cc/FE7W-JNPQ].

11. *See* William T. Gorton III, *Continued Turbulence in "Waters of the United States,"* 10 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 237, 242 (2018) (noting that significant litigation has followed the definition of WOTUS for most

amount of scholarship has focused on the relationship between the WOTUS rule and the Commerce Clause, far less ink has been spilled on the relationship between the WOTUS rule and the United States' personal jurisdiction jurisprudence.[12] However, these personal jurisdiction cases offer a helpful framework through which to analyze the WOTUS rule. They suggest that the recently revised WOTUS rule is correct in replacing the former "significant nexus" test with the "clear connection" test from Justice Antonin Scalia's opinion in *Rapanos v. United States*.[13]

In Part I, this Article describes the historical development of the WOTUS definition and the litigation that has arisen around it.[14] Part II contains a discussion of the foundational cases that comprise the United States' personal jurisdiction jurisprudence and an in-depth look at the key concepts that have stemmed from them.[15] Part III uses both the personal jurisdiction and WOTUS precedent to argue that the WOTUS definition must be defined narrowly in order to avoid several significant problems.[16]

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of its existence); Travis L. Schilling, *Redefining the Waters of the United States: Did Government Overreach Just Get Trumped?,* 23 DRAKE J. AGRIC. L. 131, 133 (2018) (noting the contentious nature of the rule's development); Nathan E. Vassar, *Within the Flood Plain? An Analysis of the New "Waters of the United States" Rule in the Context of History and Existing Regulations*, 46 TEX. ENVTL. L. J. 1, 17 (2016) (cautiously promoting the significant nexus test); Thomas P. Redick & Christopher Brooks, *WOTUS Wars and Endangered Species: Where Will Farmers Find Their Legal High Ground?*, 31 NAT. RESOURCES & ENV'T, Fall 2016, at 20, 23 (2016) (arguing that the significant nexus test will cause unfair and unrealistic results for farmers); Samuel Worth, *Water, Water, Everywhere, and Plenty of Drops to Regulate: Why the Newly Published WOTUS Rule Does Not Violate the Commerce Clause*, 43 B.C. ENVTL. AFF. L. REV. 605 (2016).

12. Worth, *supra* note 11.

13. *See* Rapanos v. United States, 547 U.S. 715, 717 (2006) (noting that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" are "adjacent" to other regulated waters and therefore covered by the CWA).

14. *See generally Rapanos*, 547 U.S. 715.

15. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); Hanson v. Denckla, 357 U.S. 235 (1958); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 (1987).

16. *See infra* Part III; *see also* Jacob Arechiga, *Redefining "Waters of the United States" in the Trump Era*, 48 TEX. ENVTL. L. J. 178, 179 (2018) (noting that the regulatory framework has quietly but steadily "expanded over time" to include more and more bodies of water).

I. THE WOTUS STORY

The Clean Water Act was originally enacted in 1948 as the Federal Water Pollution Control Act.[17] The Act was amended in 1972 to become the Clean Water Act (CWA), which prohibited pollutant discharges into "navigable" waters without a permit.[18] The CWA defined navigable waters as "waters of the United States, including the territorial seas."[19] The CWA delegated to the EPA and the Corps the authority to determine what constituted "waters of the United States."[20] The Corps has interpreted the phrase to include traditional navigable waters, tributaries of those waters, and wetlands "adjacent" to such waters and tributaries.[21] Adjacent wetlands are those that are "bordering, contiguous [with], or neighboring" a water of the United States.[22]

A. A Tale of Two Pluralities

Waves of litigation followed the 1972 CWA amendments as interest groups called for changes to the statute and clarity on what bodies of water constituted "waters of the United States."[23] One example is the 1985 case of *United States v. Riverside Bayview Homes, Inc.*, in which the government sued a Michigan landowner for filling a wetland without a permit.[24] The United States Supreme Court held that the definition of "waters of the United States" included only those waters that "actually

17. Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948).

18. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1388 (2018)).

19. *See* 33 U.S.C. § 1362(7) (2018); *see also* Gatz, *supra* note 10 (noting that "[w]aters need not be truly navigable to be subject to CWA jurisdiction").

20. Gatz, *supra* note 10.

21. *See* 33 C.F.R. § 328.3(a)(1), (a)(5), (a)(7) (2020).

22. *Id.* § 328.3(c).

23. *See, e.g.*, Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (holding that the CWA did not extend to the waters in question because they were isolated, individual bodies of water that were not directly connected to a navigable water); U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Rapanos v. United States, 547 U.S. 715 (2006) (holding that the definition of "waters of the United States" include only those waters that "actually abut[ted]" a traditionally navigable water); Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1152, 1157 (9th Cir. 2005).

24. *See Riverside Bayview*, 474 U.S. at 124.

abut[ted]" a traditionally navigable water.[25] Another seminal case regarding the WOTUS definition is the 2001 case of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, in which a group of municipal services in Chicago tried to build a landfill on a series of lakes and wetlands.[26] They were denied a CWA permit by the Corps.[27] The waste agency argued that the waters in question were not navigable waters and that the term should be defined more narrowly.[28] The Supreme Court held that the CWA did not extend to the waters in question because they were isolated, individual bodies of water that were not directly connected to a navigable water.[29]

However, the most important case regarding the WOTUS definition is the 2006 case of *Rapanos v. United States*, which dealt with developer John Rapanos' unpermitted filling of a fifty-four acre wetland in order to build a shopping mall.[30] After the EPA fined him thousands of dollars, Rapanos challenged the agency's interpretation of navigable waters in court.[31] The United States Supreme Court vacated and remanded the ruling against Rapanos but split evenly on the rationale for doing so.[32]

The plurality opinion, written by Justice Antonin Scalia, stated that the CWA applied only to wetlands that have a continuous surface connection to bodies of water that are relatively permanent, such as streams, lakes, or rivers.[33] Scalia wrote that the definition of WOTUS included only those waters that were "relatively permanent, standing, or continuously flowing bodies of water."[34] He advanced four primary reasons for his conclusion.[35] First, Scalia looked at the natural and original definition of the term "waters" and argued the Corps had extended the definition of WOTUS beyond the plain language of the statute.[36] Second, Scalia reasoned that Supreme Court precedent established that isolated, non-navigable waters

25. *Id.* at 135.

26. *See Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 162–63 (describing the planned waste disposal site).

27. *Id.* at 165.

28. *Id.* at 168.

29. *Id.* at 171–72.

30. *See* Rapanos v. United States, 547 U.S. 715, 715 (2006).

31. *Id.* at 720.

32. *Id.* at 757.

33. *Id.* at 717 (noting that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" are "adjacent" to other regulated waters and therefore covered by the CWA).

34. *Id.* at 731.

35. *Id.* at 732.

36. *Id.* at 734 ("The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction.").

were clearly not included in the definition of WOTUS.[37] Third, Scalia drew parallels from other areas of the CWA to support his conclusion.[38] For instance, he noted that the CWA defined intermittent and infrequent flows of water under an entirely separate portion of the statute—not the "navigable waters" portion.[39] In addition, he noted that the phrase "navigable waters," which was adopted from previous versions of the CWA, has traditionally been understood to only include discrete bodies of water.[40] Fourth, Scalia utilized a federalism rationale to argue that the Corps' WOTUS definition was far too expansive.[41] He maintained that the Corps' excessively broad WOTUS definition would infringe upon the power of the states to control their land and water usage.[42] In this case, there was no "clear and manifest" statement from Congress that would authorize such an infringement of state authority.[43] In short, Scalia felt that the phrase "waters of the United States" included only those waters that were relatively permanent and not those waters that contained merely intermittent water flows.[44]

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37. *Id.* at 726; Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 171–72 (2001) (holding that the CWA did not extend to the waters in question because they were isolated, individual bodies of water that were not directly connected to a navigable water).

38. *See Rapanos*, 547 U.S. at 731 (plurality opinion). Justice Scalia seems to have used a pseudo-Whole Act approach in this analysis. *Id.* Under this approach, courts will interpret one part of a statute based on other parts of the same statute based on a presumption of statutory consistency.

39. *Id.* at 735 (the CWA itself includes intermittent flows of water under the definition of point sources).

40. *Id.* at 734 ("In addition, the Act's use of the traditional phrase 'navigable waters' (the defined term) further confirms that it confers jurisdiction only over relatively permanent bodies of water. The Act adopted that traditional term from its predecessor statutes. On the traditional understanding, 'navigable waters' included only discrete bodies of water.") (internal citations omitted).

41. *Id.* at 731; *see also* THE FEDERALIST NO. 62 (James Madison) ("It will be of little avail to the people . . . if the laws be . . . so incoherent that they cannot be understood . . . . Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?").

42. *Id.* at 737–38 (quoting *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 174).

43. *Id.* ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority.").

44. *Id.* at 739 ("[T]he phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water . . . [and] not . . . channels through which water flows intermittently or ephemerally . . . .").

Justice Kennedy's solo concurring opinion, however, was more expansive. Kennedy proposed a WOTUS definition that included any non-navigable body of water—such as a wetland—that had a "significant nexus" to a traditionally navigable water.[45] This nexus existed, in Justice Kennedy's view, if the body of water "significantly affect[ed] the chemical, physical, and biological integrity" of a navigable water.[46] On the other hand, if the water in question had only a minimal or "speculative" impact on a navigable water, it was not a WOTUS and was not subject to CWA regulation.[47]

B. Response and Redefinition

Rapanos and its companions added to the uncertainty that existed concerning the types of waters protected by the CWA.[48] In response to these cases, the EPA and the Corps redefined WOTUS by issuing a rule on June 29, 2015.[49] The rule began by stating that the CWA had jurisdiction over traditional navigable waters, tributaries of traditional navigable waters, and wetlands directly abutting traditional navigable waters.[50] Second, the rule determined that waters "adjacent" to traditional navigable waters were within the WOTUS definition and were, therefore, subject to CWA jurisdiction.[51] A water was "adjacent" if it bordered or neighbored a WOTUS and was separated from it by some sort of barrier.[52] Third, for any other body of water, the agencies had to conduct a case-specific analysis in order to determine whether or not the body of water had Justice Kennedy's "significant nexus" to a traditionally navigable

45. *Id.* at 759 (Kennedy, J., concurring in judgment).
46. *Id.* at 780.
47. *Id.* at 784.
48. Gatz, *supra* note 10.
49. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328); *see also* Kogan, *supra* note 7.
50. *See* Clean Water Rule: Definition of 'Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328); *see also* Tim Stanis, *Drain the Swamps: A Brief History of "Waters of the United States" and the Trump Administration's Attempt at Defining the Term*, GEO. ENV. L.R. (March 2, 2017), https://gielr.wordpress.com/2017/03/02/drain-the-swamps-a-brief-history-of-waters-of-the-united-states-and-the-trump-administrations-attempt-at-defining-the-term/ [https://perma.cc/TET4-CRJT].
51. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328).
52. *Id.*

water.[53] A "significant nexus" existed where the body of water in question significantly affected a body of water listed in the first or second category.[54] If a significant nexus existed, the water in question was a WOTUS that fell under CWA jurisdiction.

Immediately after the rule was published, dozens of interest groups filed lawsuits in federal courts around the country.[55] Environmental interest groups asked for more stringent protections of rivers and streams, and agricultural interest groups worried that the significant nexus standard would make it possible for the government to control even the smallest farm drain.[56] On August 27, 2015, the United States District Court of North Dakota blocked the implementation of the new WOTUS rule in the thirteen states who had initially challenged the 2015 rule.[57] Two months later, the Sixth Circuit Court of Appeals issued a nationwide stay of the WOTUS rule.[58]

On February 28, 2017, President Donald Trump issued an executive order withdrawing the 2015 WOTUS rule and revising it in accordance

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53. *Id.* (stating that a significant nexus existed where the body of water in question significantly affected a traditionally navigable water); *see also Short Summary of the WOTUS Rule*, WATERS ADVOCACY COALITION 1–2 (2014), https://www.nssga.org/wp-content/uploads/2014/01/WAC-Rule-Summary-4-2014.pdf [https://perma.cc/W3P6-Z2GS]; *see also* Gatz, *supra* note 10.

54. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328).

55. *See Clean Water Act, WOTUS*, FB.ORG, https://www.fb.org/issues/regulatory-reform/clean-water-act/ [https://perma.cc/TM88-9TSP] (last visited Oct. 6, 2020).

56. Gatz, *supra* note 10; *see also* MAJORITY STAFF OF S. COMM. ON ENV'T & PUB. WORKS, 114TH CONG., REP. ON THE EXPANSION OF JURISDICTION CLAIMED BY THE ARMY CORPS OF ENGINEERS AND U.S. EPA UNDER THE CLEAN WATER ACT 1–2 (2016), https://www.epw.senate.gov/public/_cache/files/7b469fe4-62c3-4ea9-9ce2-bedbf5179372/wotus-committee-report-final1.pdf [https://perma.cc/ W2ZU-4UFH]; *see also* Laura Campbell, *Waters of the United States*, MICH. FARM BUREAU, https://www.michfb.com/mi/wotus/ [https://perma.cc/D9ZU-L5ZE] (last visited Oct. 6, 2020); *see also* Pam MacLean, *Sixteen States Sue EPA Over Clean Water Rule*, REUTERS (June 29, 2015), https://www.reuters.com/article/us-usa-environment-water-epa/sixteen-states-sue-epa-over-clean-water-rule-idUSKCN0P92QJ20150629 [https://perma.cc/D3QB-WDYW].

57. *See Clean Water Act, WOTUS*, *supra* note 55; *see also* Steve Kopperud, *Federal Judge Blocks WOTUS in 13 States; EPA Says it will Enforce for Rest of Country*, OHIO AGRIBUSINESS ASS'N, http://www.oaba.net/aws/OABA/pt/sd/news_article/110970/_PARENT/layout_details/false [https://perma.cc/RA6H-HBLK] (last visited Oct. 6, 2020).

58. *See In re* EPA, 803 F.3d 804, 806 (6th Cir. 2015).

with Justice Scalia's *Rapanos* opinion.[59] In *National Association of Manufacturers v. Department of Defense*, the United States Supreme Court lifted the nationwide stay on the implementation of the rule in January 2018, holding that district courts—not courts of appeals—were the proper venue for lawsuits challenging the 2015 rule.[60] On February 6, 2018, the EPA and the Corps delayed the implementation of the 2015 rule for two years to facilitate redrafting.[61] After a series of attempts to block the rule by multiple federal district courts, the EPA and Corps proposed a revised WOTUS definition on December 11, 2018.[62] The result of this complicated web of procedural developments was that the 2015 WOTUS rule was only in effect in twenty-two states.[63] Three different district court injunctions covered the other twenty-eight states.[64]

The Trump administration officially rolled back the 2015 WOTUS rule on September 12, 2019.[65] The administration implemented the revised rule on January 23, 2020, fulfilling the 2017 Executive Order[66] and limiting the government's jurisdictional reach in water regulation.[67]

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59. *See* Exec. Order No. 13,778, 3 C.F.R. § 13778 (2018) [hereinafter Executive Order].

60. *See* Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S.Ct. 617, 624 (2018) (holding that lawsuits challenging the definition of WOTUS must be filed in district courts).

61. Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018).

62. *See* Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (Feb. 14, 2019) [hereinafter Revised Definition]; *see also* ENVTL. PROT. AGENCY, FACT SHEET, PROPOSED REVISED DEFINITION OF "WATERS OF THE UNITED STATES", https://www.epa.gov/sites/production/files/2018-12/documents/factsheet_-_wotus_revision_overview_12.10_1.pdf [https://perma.cc/QK4V-VT3R] [hereinafter Fact Sheet] ("This proposal clearly limits 'waters of the United States' under the Clean Water Act to those that are physically and meaningfully connected to traditional navigable waters.").

63. Gatz, *supra* note 10; *see also* Ellen Essman, *WOTUS Lawsuits Continue to Trickle Through Federal Courts*, OHIO ST. U. FARM OFF. BLOG (June 6, 2019), https://farmoffice.osu.edu/blog/thu-06062019-1115am/ohio-ag-law-blog-wotus-lawsuits-continue-trickle-through-federal-courts [https://perma.cc/X4Z2-A6T3].

64. Gatz, *supra* note 10.

65. Perek, *supra* note 9.

66. Executive Order, *supra* note 59.

67. New Rule, *supra* note 9.

II. THE PERSONAL JURISDICTION FRAMEWORK

The development of the WOTUS rule contains several notable analytical parallels to the United States' personal jurisdiction precedent. In order to more fully understand the lessons that can be extracted from this jurisprudence, the foundational personal jurisdiction cases require a general presentation. These cases include *International Shoe Company v. Washington*, *World-Wide Volkswagen v. Woodson*, *Hanson v. Denckla*, *Asahi Metal Industry vs. Superior Court of California*, and others.[68]

A. Pennoyer*,* International Shoe*, and Minimum Contacts*

Personal jurisdiction is one of the foundational topics of American legal jurisprudence. The concept is historically rooted in *Pennoyer v. Neff*, which established in 1878 that personal jurisdiction exists where the court has power over the defendant's person.[69] In *Pennoyer*, defendant Neff was sued by his lawyer Mitchell in Oregon for unpaid legal fees.[70] Although he owned 300 acres of land in Oregon, Neff was not a resident of Oregon and was not served with process in Oregon.[71] After the court entered a default judgment against Neff, Mitchell took control of Neff's land in Oregon and sold it to Pennoyer in order to recover the fees that he sought.[72] Upon discovering what had happened, Neff sued Pennoyer to recover his land.[73] The issue before the Supreme Court on appeal was whether the default judgment against Neff was valid, given that he did not reside in Oregon and was not served with process therein.[74] The Court held that the default judgment was invalid because a state cannot exercise jurisdictional authority over persons or property that are not within its borders.[75] The *Pennoyer* decision focused on the territorial limits of jurisdiction.

In 1945, the United States Supreme Court developed this idea further in the case of *International Shoe Co. v. Washington*.[76] The Missouri-based International Shoe Company (International Shoe), incorporated in

68. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 (1987).
69. *See* Pennoyer v. Neff, 95 U.S. 714, 723 (1877).
70. *Id.* at 719.
71. *Id.* at 719–20.
72. *Id.*
73. *Id.*
74. *Id.* at 721–22.
75. *Id.* at 723.
76. *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

Delaware, employed salesmen to market its products in the state of Washington.[77] Washington sued International Shoe for failing to contribute to a mandatory state unemployment fund.[78] The state served both the salesmen personally in Washington and the Missouri headquarters via mail.[79] International Shoe argued that the state of Washington did not have personal jurisdiction over it.[80] The United States Supreme Court held that International Shoe was subject to personal jurisdiction in Washington because the company had minimum contacts with Washington "such that the maintenance of the suit [did] not offend 'traditional notions of fair play and substantial justice.'"[81] The Court noted that although isolated acts by a salesman would likely not have created jurisdiction, the extended nature of the salesmen's presence in Washington supported jurisdiction.[82] The majority stated that since International Shoe enjoyed the "benefits and protection" of doing business in Washington, it is reasonable that it should also be subject to certain obligations therein.[83]

The *International Shoe* majority introduced the idea that a party may be subject to personal jurisdiction in a state, despite not being physically headquartered in that state, as long as it has "minimum contacts" with the state.[84] The majority held that contacts that were "continuous and systematic" were especially likely to lead to personal jurisdiction.[85] The *International Shoe* dissent, however, took a narrower approach, arguing that the majority's expansive approach infringed on states' right to conduct their own proceedings.[86]

B. Hanson *and Purposeful Availment*

The Supreme Court had another opportunity to address personal jurisdiction in the 1958 case of *Hanson v. Denckla*, in which the Court had to decide whether the state of Florida had jurisdiction over a Delaware trust.[87] Hanson was the executor of her mother's trust, which had been

77. *Id.* at 311–12.
78. *Id.*
79. *Id.* at 312.
80. *Id.*
81. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
82. *Id.* at 319.
83. *Id.*
84. *Id.* at 316 (quoting *Milliken*, 311 U.S. at 463).
85. *Id.* at 320.
86. *Id.* at 325.
87. *See generally* Hanson v. Denckla, 357 U.S. 235 (1958).

established in Delaware before her mother moved to Florida.[88] After moving to Florida, Hanson's mother amended her will so that the majority of the trust assets went to Hanson, not Hanson's sisters Denckla and Stewart.[89] Following their mother's passing, Denckla and Stewart sued in Florida, requesting that Florida exercise jurisdiction over the Delaware trust and reinstate their previous shares of the trust.[90] Hanson instituted an action in Delaware, seeking validation of Delaware's jurisdiction over the trust.[91] The United States Supreme Court held that Florida did not have jurisdiction over the Delaware trust because Hanson did not have minimum contacts with Florida.[92] Justice Warren's majority opinion noted that Hanson had not "purposefully avail[ed] [herself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[93] Justice Black's dissent argued that the Florida court should have been able to adjudicate the controversy because of the Delaware trust's regular and extended communications with Hanson's mother during her residence in Florida.[94] He determined that these communications, as well as Florida's resultant interest in the proper administration of the trust, created minimum contacts between the trust and the state of Florida.[95]

C. World-Wide Volkswagen*,* Shaffer*, and Foreseeability*

The increasing prevalence of cross-border travel in the twentieth century was the impetus for the 1980 case of *World-Wide Volkswagen Corporation v. Woodson*.[96] In this case, the Robinson family purchased a car in their home state of New York. While driving through Oklahoma, they were involved in a serious car accident in which multiple family members were severely burned.[97] The Robinsons sued the New York retailer and the New York-based manufacturer World-Wide Volkswagen in Oklahoma.[98] World-Wide Volkswagen objected that it was not subject

88. *Id.* at 238–39.
89. *Id.*
90. *Id.* at 240.
91. *Id.* at 242.
92. *Id.* at 253.
93. *Id.*
94. *Id.* at 258–59.
95. *Id.*
96. *See generally* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
97. *Id.* at 288.
98. *Id.*

to jurisdiction in Oklahoma.[99] The United States Supreme Court held that there was no personal jurisdiction over World-Wide Volkswagen in Oklahoma.[100] Channeling *International Shoe*, the Court held that Oklahoma could only have personal jurisdiction over a nonresident defendant like World-Wide Volkswagen if the company had minimum contacts with the state of Oklahoma.[101] The Court explained that its decision was also based on an evaluation of several factors, including the burden on the defendant, the interest of the state in question, and the interest of the judicial system in an efficient resolution.[102]

The Court utilized the concept of foreseeability to further develop its point.[103] World-Wide Volkswagen was not subject to jurisdiction because it could not reasonably have foreseen or anticipated being called into court in Oklahoma.[104] Justice White, speaking for the majority, argued that subjecting World-Wide Volkswagen to jurisdiction in Oklahoma would create an unprecedented and unforeseeable level of liability for retailers because their liability would travel with the items they sold.[105]

Justice Marshall's dissent, however, echoed the *International Shoe* majority's use of the "traditional notions of fair play" and argued that World-Wide Volkswagen was subject to jurisdiction in Oklahoma.[106] He viewed the majority's decision as too narrow and dismissed its use of the foreseeability concept.[107] Justice Marshall felt that while World-Wide Volkswagen may not have specifically predicted that its cars would end up in Oklahoma, its participation in a regional and national economic network implied that it should have expected such an occurrence in a distant state.[108]

Only a few years earlier, the Supreme Court decided in *Shaffer v. Heitner* that a nonresident shareholders' stock in an Arizona company did not create the minimum contacts necessary for jurisdiction.[109] In *Shaffer*, a nonresident shareholder sued the other nonresident shareholders, all of whom owned stock in an Arizona company that was incorporated in

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99. *Id.*
100. *Id.* at 299.
101. *Id.* (stating that World-Wide Volkswagen did not have sufficient contacts with the state of Oklahoma).
102. *Id.* at 292.
103. *Id.* at 295–97.
104. *Id.* at 287.
105. *Id.* at 296.
106. *Id.* at 313 (Marshall, J., dissenting).
107. *Id.* at 315 (Marshall, J., dissenting).
108. *Id.* at 314 (Marshall, J., dissenting).
109. *See* Shaffer v. Heitner, 433 U.S. 186, 215–16 (1977).

Delaware.[110] The issue was whether Delaware had jurisdiction over the group of nonresident shareholders being sued.[111] The Supreme Court held in a majority opinion written by Justice Marshall that the shareholders were not subject to jurisdiction in Delaware—despite the fact that the company was incorporated in Delaware—because their shares in the company were not sufficient to create minimum contacts.[112] This was because the existence of the stocks did not lead to the inference that the shareholders could be subject to a lawsuit in either Arizona or Delaware.[113] The majority reasoned that the nonresident shareholders had not purposefully availed themselves of the privilege of conducting activities in Delaware.[114] The dissent, written by Justice Brennan, would have held that the shareholders were subject to jurisdiction in Delaware because of the state's powerful interest in ensuring the availability of a convenient forum.[115]

D. Asahi*,* McIntyre*, and Intentional Targeting*

The Supreme Court had several other opportunities to examine the kinds of jurisdictional questions that were presented in *World-Wide Volkswagen*. Once such opportunity came in the 1987 case of *Asahi Metal Industry vs. Superior Court of California*, in which the Court had to decide whether or not Asia-based manufacturer Asahi Metal Industry, which sold materials to a California retailer, was subject to personal jurisdiction in California for an automobile accident that had occurred there.[116] The Supreme Court held unanimously that Asahi was not subject to jurisdiction in California because it had not purposefully or intentionally directed its actions toward California.[117] However, the Court split evenly on the rationale.[118] Justice O'Connor wrote for the plurality that simply putting a product into the stream of commerce is not enough to establish purposeful

110. *Id.* at 189–90.
111. *Id.* at 189.
112. *Id.* at 215–16.
113. *Id.* at 216.
114. *Id.* (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
115. *Id.* at 222 (Brennan, J., dissenting in part and concurring in part).
116. *See* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 108 (1987).
117. *Id.* at 112. "The 'substantial connection' . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*." *Id.* (emphasis in original) (citations omitted).
118. *Id.* at 102.

action toward the state at issue.[119] There must be some sort of purposeful physical action in the state for jurisdiction to be proper.[120] O'Connor noted that if Asahi had, for instance, designed the product for use in California or advertised in California, minimum contacts might have been established.[121] O'Connor concluded by examining the factors laid out in *World-Wide Volkswagen*, which made it clear that asserting jurisdiction over Asahi in California would be unreasonable.[122]

Justice Brennan's opinion argued that Asahi's extensive sales presence in California was enough to create minimum contacts with that state.[123] As long as Asahi was aware that its product was being marketed in California, "the possibility of a lawsuit there cannot come as a surprise."[124] If Asahi placed its goods in the stream of commerce with the knowledge that they could eventually end up in California, minimum contacts existed and jurisdiction was proper.[125] In the vein of *International Shoe*, Brennan argued that a company who benefits economically from the state in question should be subject to jurisdiction there since those benefits accrue regardless of whether or not the company intentionally targeted that state.[126] His approach focused on the ability of the state to regulate individuals or entities who cause harm in that state, regardless of whether or not they physically do anything in the state.

Likewise, in *J. McIntyre Machinery v. Nicastro*, the United States Supreme Court held that a British company was not subject to jurisdiction in New Jersey for a work accident that occurred in New Jersey because it had not targeted the state of New Jersey.[127] Justice Kennedy's majority opinion noted that McIntyre had no offices in New Jersey, it did not pay taxes in New Jersey, and it did not advertise in New Jersey.[128] Therefore, McIntyre did not purposefully avail itself of the privilege of doing business in New Jersey and should not be subject to jurisdiction there.[129] Kennedy

119. *Id.* at 112.
120. *Id.*
121. *Id.* at 112-14.
122. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); *see also Asahi*, 480 U.S. at 114.
123. *See Asahi*, 480 U.S. at 121 (arguing that "Asahi's regular and extensive sales of component parts" in California was sufficient to subject it to jurisdiction there) (Brennan, J., concurring).
124. *Id.* at 117 (Brennan, J., concurring).
125. *Id.*
126. *Id.*
127. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 886 (2011).
128. *Id.*
129. *Id.* at 877.

also reaffirmed the view of the *Asahi* plurality that the mere possibility that one's goods might end up in the forum state is not enough to establish jurisdiction.[130] Justice Breyer's concurrence agreed that a determination of jurisdiction in New Jersey would subject far too many entities to jurisdiction.[131] However, Justice Ginsburg's dissent argued that McIntyre was subject to the jurisdiction of New Jersey because it targeted the broader market of the United States as a whole.[132]

The cases described above provide a useful analytical device for thinking about the "waters of the United States" definition. A closer look at the ideological themes in the foregoing opinions is necessary in order to understand the parallels that can inform a discussion of the WOTUS rule.

III. CLEAR CONNECTION, NOT SIGNIFICANT NEXUS

The United States' personal jurisdiction precedent offers a helpful framework through which to analyze the WOTUS rule. From the foregoing cases can be drawn two distinct jurisprudential themes. One is a broad, expansive view of jurisdiction that looks at the possibility of a product making its way to the forum state.[133] The other is a narrower view that looks at whether the party purposefully targeted the forum state.[134]

A. Extracting Themes From the Personal Jurisdiction Precedent and Comparing Them to the Rapanos *Opinions*

A careful analysis of the personal jurisdiction precedent discussed above displays a clearly delineated set of themes. The first of these themes is a broad, expansive approach that focuses on the possibility that the good in question might eventually cause harm in the forum state. If such a possibility exists, then jurisdiction is acceptable. This approach focuses on a state's ability to hold a nonresident liable for harm that they cause in the forum state, regardless of whether they physically acted in the state. It is not concerned with the physicality or traceability of the connection. Instead, it maintains that even an indirect connection between the defendant and the forum state can be sufficient for establishing jurisdiction.

For instance, the *International Shoe* majority's holding that International Shoe was subject to jurisdiction in Washington was based on

130. *Id.* at 882.
131. *Id.* at 891 (Breyer, J., concurring).
132. *Id.* at 905 (Ginsburg, J., dissenting).
133. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).
134. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

an expansive interpretation of "minimum contacts."[135] The majority focused on International Shoe's implied investment in the Washington economy because it had enjoyed the benefit of doing business there.[136] This viewpoint emerged again in the *World-Wide Volkswagen* dissent.[137] Justice Marshall argued that the majority's decision was too narrow and that World-Wide Volkswagen's participation in a regional and national economic network implied that it should have expected to be sued in a distant state.[138] Likewise, Justice Black adopted an expansive conception of minimum contacts in *Hanson* when he argued that the Delaware trust's regular communications with Hanson's mother during her residence in Florida were enough to establish minimum contacts.[139] Justice Brennan's dissent in *Asahi* also echoed this approach.[140] He argued that all Asahi would need to do to be subject to jurisdiction in California was to simply put its products in the broader stream of commerce.[141] This approach basically focused on whether or not Asahi made its products available and had the knowledge that they *might eventually end up* in California.[142] Justice Ginsburg's dissent in *McIntyre* likewise argued that McIntyre would be subject to jurisdiction in New Jersey if it simply put its products in the stream of commerce with the knowledge that they *might eventually end up* in New Jersey.[143]

The other approach is a narrower one that focuses on whether or not the entity in question intentionally targeted the forum state. This approach is all about *physicality*, *intentionality,* and *purpose*. Without a clear and purposeful targeting of the forum state, jurisdiction is not appropriate. This viewpoint requires a direct connection between the defendant and the forum state in order for jurisdiction to exist. By focusing on the tangible and traceable nature of the connection, the narrow viewpoint concerns itself with individuals' ability to control whether they are subject to

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135. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

136. *Id.* at 319.

137. *World-Wide Volkswagen*, 444 U.S. at 314 (Marshall, J., dissenting).

138. *Id.*

139. *Id.* at 318–19 (Blackmun, J., dissenting).

140. Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 121 (1987) (Brennan, J. concurring).

141. *Id.* at 117 (Brennan, J. concurring) (arguing that as Asahi was aware that its product was being marketed in California, "the possibility of a lawsuit there cannot come as a surprise").

142. *Id.*

143. J. McIntyre Mach., Ltd. v. Nicastro, 546 U.S. 873, 905 (2011) (Ginsburg, J., dissenting).

jurisdiction. Personal jurisdiction, from this perspective, is about how to appropriately limit state power. This viewpoint emerged initially in *Pennoyer v. Neff*, which focused on the territorial limits of jurisdictional power and held that a state cannot exercise jurisdiction over a person who does not reside in that state and who was not properly served with process in that state.[144] The narrow approach was reiterated in *International Shoe*, where the dissenting opinion highlighted the dangers of an expansive approach in relation to federalism and state autonomy.[145] The *Hanson* Court held that jurisdiction exists only when the party in question "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[146] The *World-Wide Volkswagen* majority also utilized this approach when it held that World-Wide Volkswagen was not subject to jurisdiction in Oklahoma.[147] After considering a variety of factors, the Court decided that World-Wide Volkswagen was not subject to jurisdiction because it could not reasonably have foreseen or anticipated being called into court in Oklahoma.[148] Likewise, the Court held in *Shaffer* that nonresident shareholders' stock in an Arizona company did not create the minimum contacts necessary for jurisdiction in Delaware (the state of incorporation) because those shares did not lead to the inference that the shareholders could be subject to a lawsuit in either Arizona or Delaware.[149] In addition, the Court noted that the shareholders had not purposefully availed themselves of the privilege of conducting activities in Delaware.[150] The narrow viewpoint resurfaced in the *Asahi* majority opinion, where Justice O'Connor stated that Asahi would have had to specifically target the state of California with its products in order to be subject to jurisdiction in California.[151] The *McIntyre* majority also utilized this approach when it held that McIntyre Machinery was not subject to jurisdiction in New Jersey because it had not intentionally targeted that state.[152]

In sum, the personal jurisdiction precedent contains two distinct viewpoints: one that bases jurisdiction on a *direct, obvious, and purposeful targeting* of the state and another that bases jurisdiction on *utilizing the*

144. Pennoyer v. Neff, 95 U.S. 714, 723 (1878).
145. Int'l Shoe Co. v. Washington, 326 U.S. 310, 325 (1945).
146. Hanson v. Denckla, 357 U.S. 235, 253 (1958).
147. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980).
148. *Id.* at 297.
149. Shaffer v. Heitner, 433 U.S. 186, 215–16 (1977).
150. *Id.* (quoting *Hanson*, 357 U.S. at 253).
151. Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 112 (1987).
152. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 886 (2011).

stream of commerce and the *possibility* that the good in question *might eventually* cause harm in the forum state.

These two approaches find intriguing parallels in the *Rapanos* opinion that informs much of the current law regarding the WOTUS definition. Scalia's plurality opinion in *Rapanos* focuses on whether there is a clear, continuous, and traceable connection between the body of water in question and a traditionally navigable (and therefore clearly regulatable) water.[153] In other words, his opinion focuses on whether there is a clear, targeted, and obvious connection. By focusing on the physicality of the connection and requiring a direct connection between the defendant and the forum state, it provides individuals with the additional freedom to control whether or not they are subject to jurisdiction. This viewpoint focuses on limiting governmental power and promoting fairness to individuals.

On the other hand, Justice Kennedy's *Rapanos* opinion focuses broadly on whether there is a "significant nexus" between the body of water in question and a traditionally navigable (and therefore clearly regulatable) water.[154] His opinion focuses on whether there is at least some chance that the water in question could eventually affect the larger breadth of regulatable waters. Just like Justice Marshall's dissent in *World-Wide Volkswagen*,[155] even an indirect connection between the defendant and the forum state can be enough to establish jurisdiction. Kennedy's viewpoint is concerned with a state's ability to hold individuals accountable for the harm they cause to a state's waters, regardless of where they physically are when they cause that harm. Rather than focus on individuals' ability to determine where they are subject to liability, Justice Kennedy's approach focuses on the government's ability to pursue remedies for harm done to a body of water. In a sense, the two viewpoints in *Rapanos* embody the principles and ideologies that undergird the jurisdictional battles of the past century.

B. Implications From These Parallels

Justice Scalia opined in *Rapanos* that the ambiguity and vagueness of the "significant nexus" test has effectively authorized a "'Land is Waters'

153. Rapanos v. United States, 547 U.S. 715, 717 (2006) (plurality opinion) (noting that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" are "adjacent" to other regulated waters and therefore covered by the CWA).

154. *Id.* at 759 (Kennedy, J., concurring in judgment).

155. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 314 (1980).

approach to federal jurisdiction."[156] In saying this, Scalia expressed the debate over the WOTUS rule in terms of federal jurisdiction, perhaps drawing on the intrastate considerations inherent in water use regulation. This idea—that the varying standards for the WOTUS definition can be conceptualized through the lens of jurisdiction—is the basis for the arguments that follow.

1. The Inherent Ambiguity of the Significant Nexus Test Makes It Susceptible to Agency Overreach

The personal jurisdiction precedent described above suggests that the narrower, more restrained approach is the proper way to interpret the phrase "waters of the United States" because it avoids subjecting far too many bodies of water to CWA jurisdiction. This is particularly relevant because of Congress' failure to delineate the WOTUS parameters, leaving the definition process up to the Corps and the EPA.[157]

The "significant nexus" test is based on whether the body of water "significantly affect[s] the chemical, physical, and biological integrity" of a navigable water.[158] However, if the body of water has only a minimal or "speculative" impact on a navigable water, it is not a WOTUS.[159] The ambiguity of this approach is ripe with the possibility of misuse by agencies.[160] For instance, what is the standard of chemical, physical, or biological integrity that this should be measured against? [161] Under this

156. *Rapanos*, 547 U.S. at 733–34 (plurality opinion) (noting that the agencies have "stretched the term 'waters of the United States' beyond parody").

157. *See* Schilling, *supra* note 11, at 134 ("Whether intentional or not, Congress's failure to elaborate and amend the definition and has left the task to government experts like the Army Corps and the EPA.").

158. *Rapanos*, 547 U.S. at 780 (2006) (Kennedy, J., concurring in judgment).

159. *Id.*

160. *Id.* at 722 (plurality opinion) ("Any plot of land containing such a channel may potentially be regulated as a 'water of the United States.'"); *see also id.* at 738 ("The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a de facto regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase 'the waters of the United States' hardly qualifies.") (internal citations omitted).

161. *Id.* at 756, n.15 (plurality opinion) (internal citations omitted) ("Justice Kennedy's 'significant nexus' standard is perfectly opaque. When, exactly, does a wetland 'significantly affect' covered waters . . . ? As the dissent hopefully

standard, one could argue that nearly any body of water—even a mere puddle—affects the chemical, physical, or biological integrity of a navigable water. Are any one of those three categories more important than the others? How much of an effect constitutes a "significant" effect?[162] These are just a few of the questions that arise when considering the lack of clarity associated with the "significant nexus" test.[163] Chief Justice John Roberts observed in the wake of *Rapanos* that the ambiguity and uncertainty created by the case would lead to widespread confusion.[164] His prediction has unfortunately been borne out in both the agencies and the courts, which have consistently struggled to find clarity in the "significant nexus" test.[165]

Justice Marshall argued in *World-Wide Volkswagen* that all that was necessary for jurisdiction was World-Wide Volkswagen's placing of its goods in the general stream of commerce.[166] In other words, jurisdiction was based on whether one's product *might eventually* cause harm in the forum state. However, his colleagues were quick to expose the practical weaknesses of his argument by noting the impossibility of predicting

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observes, such an unverifiable standard is not likely to constrain an agency whose disregard for the statutory language has been so long manifested.").

162. *See* Latham, *supra* note 4, at 15 ("[T]he significant nexus test is fraught with uncertainty, both in terms of application and guidance, for those mired in the current muck of wetland jurisdictional determinations after the Court's inability in *Rapanos* to fashion a clearly articulated majority view. That is, just what constitutes the necessary significant nexus sufficient for either the Corps or EPA to assert jurisdiction over property owners' wetlands?").

163. *Rapanos*, 547 U.S. at 728 (plurality opinion) (noting that even the most insubstantial hydrologic connection may be held to constitute a "significant nexus"); *see also* Latham, *supra* note 4, at 14 ("Justice Kennedy's approach in essence provides a map with no indication of where North, South, East or West is located.").

164. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) ("It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities now have to feel their way on a case-by-case basis.").

165. U.S. v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006). The judge stated that Justice Kennedy's significant nexus test provided "no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is 'nexus' determined?" *Id. See also* Donald J. Kochan, *Strategic Institutional Positioning: How We Have Come to Generate Environmental Law Without Congress*, 6 TEX. A&M L. REV. 323, 338 (2019) (pointing out that "the EPA and Corps happily exploited the judicial uncertainty of meaning by adopting a dramatically broad, new administrative definition of WOTUS").

166. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 314 (1980).

whether the product might do so. For instance, Justice White devoted several paragraphs to depicting the kinds of situations that could arise if the expansive approach was utilized, noting that retailers would be under excessive and unrealistic pressure to predict every potential mishap.[167] Justice O'Connor's *Asahi* opinion discussed how only an obvious or intentional action truly created jurisdiction because it aligned with the interest of the state and the judiciary in minimizing burdens on the parties and resolving disputes efficiently.[168] Justice White argued for the majority in *World-Wide Volkswagen* that subjecting World-Wide Volkswagen to jurisdiction would subject retailers to an unprecedented level of liability.[169] Justice Breyer likewise argued in *McIntyre* that a determination of jurisdiction in New Jersey would subject far too many entities to jurisdiction.[170] Justice Scalia's *Rapanos* opinion echoed these concerns when he argued that the "significant nexus" test would enable the government to characterize even the smallest trickle as a "water of the United States."[171] He argued that such an expansive standard would effectively authorize the federal government to regulate "immense stretches of intrastate land," a task that typically belongs to the states in the American federalist system.[172]

These opinions display the serious practical risks associated with the expansive viewpoint. The resurgence of this outlook in Justice Kennedy's *Rapanos* test should therefore be cause for concern. The "significant nexus" approach extends the proper scope of governmental authority too far. In the process, it tramples on the proper limits of state power, as established and evidenced in the personal jurisdiction cases described

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167. *Id.* at 296.

168. Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 114 (1987); *see also World-Wide Volkswagen*, 444 U.S. at 292.

169. *World-Wide Volkswagen*, 444 U.S. 286, 296 (1980).

170. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 891 (2011) (Breyer, J., concurring).

171. Rapanos v. United States, 547 U.S. 715, 722 (2006) (plurality opinion) ("Any plot of land containing such a channel may potentially be regulated as a 'water of the United States.'"). Justice Scalia argued that such an expansive standard would effectively authorize the federal government to regulate "immense stretches of intrastate land," a task that typically belongs to the states. "We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase 'the waters of the United States' hardly qualifies." *Id.* at 738 (internal citations omitted). *See also J. McIntyre*, 564 U.S. at 880.

172. *Rapanos*, 547 U.S. at 738 (plurality opinion).

above, and the governing principles of the American legal system.[173] Just as the *McIntyre* majority was right to criticize *International Shoe* and its progeny for their use of vague and unworkable "freeform notions of fairness," so was Justice Scalia correct to criticize Justice Kennedy's creation and use of a vague, unworkable, and ambiguous regulatory standard.[174]

Justice Kennedy in fact admits the flawed nature of his proposed test in his *Rapanos* opinion, noting that the significant nexus standard "may not align perfectly with the traditional extent of federal authority."[175] He nonetheless forges ahead, even going so far as to state that when a significant nexus is established, it would be acceptable "as a matter of administrative convenience" to "presume" that any other relatively similar bodies of water in that general region also have a significant nexus.[176] This is perhaps the most alarming assertion of them all. Justice Kennedy apparently feels that the EPA and Corps can *assume* the existence of a significant nexus if it is too *inconvenient* for them to actually examine the body of water in question.

As if intending to prove the danger of such ambiguity, the courts have continued to uphold the sweeping jurisdiction of the EPA and Corps under this expansive approach.[177] For example, the Third Circuit Court of Appeals held in *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Engineers* that a wetland that was separated from a traditionally navigable body of water by a seventy-foot-high berm and a maintenance road nonetheless had a significant nexus to the regulated water.[178] It is hard to imagine how almost anything could stop the courts or agencies from finding a "significant nexus" if a seventy-foot-high berm is not enough. Likewise, in *U.S. Army Corps of Engineers v. Hawkes Co.*, the Corps

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173. THE FEDERALIST NO. 62 (James Madison) ("It will be of little avail to the people . . . if the laws be . . . so incoherent that they cannot be understood . . . . Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?").

174. *J. McIntyre*, 564 U.S. at 880 ("Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.").

175. *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring in judgment).

176. *Id.* ("Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.").

177. *Id.* at 726 (plurality opinion) ("[T]he lower courts have continued to uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries.'").

178. Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1152, 1157 (9th Cir. 2005).

argued that a wetland had a significant nexus to a regulated water that was over 120 miles away.[179] Although the Supreme Court did not decide whether there was a significant nexus due to the procedural nature of the case, the fact that the Corps felt able to make such a claim in the first place is concerning.

These judicial actions have only emboldened the agencies, who have been quite pleased to utilize the full breadth of their authority under the "significant nexus" interpretation.[180] This has been particularly unfortunate for Americans who own or use large amounts of land, such as farmers. For instance, Springfield, Illinois, farmer Kurt Wilke was sued three times by the EPA and other agencies for allegedly filling in a wetland on a farm that had been farmed for more than 100 years.[181] The government never visited the site, but they nonetheless claimed that the supposed wetland was a WOTUS.[182] Similarly, the Corps sued California farmer John Duarte for plowing his own field.[183] The government claimed that seasonal water gatherings on certain parts of the land made it a

179. U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807 (2016).

180. Arechiga, *supra* note 16, at 179 (noting that the regulatory framework has quietly but steadily "expanded over time" to include more and more bodies of water); Gorton, *supra* note 11, at 237 (noting that the process of "describing the nation's water resources has since caused problems and, consequently, resulted in the expansion of federal environmental regulatory jurisdiction across the country. It has also been a long-time source of considerable tension across the nation as surprised citizens, industries, and organizations find that activities on their properties are subject to federal regulation").

181. Deana Stroich, *Illinoisans Ask for Swampbuster Reform*, FARMWEEKNOW.COM (July 16, 2018, updated Oct. 23, 2019), https://www.farmweeknow.com/policy/national/illinoisans-ask-for-swampbuster-reform/article_bd89f78a-d3d6-11e9-9de4-1f287ed64e20.html [https://perma.cc/S53Q-9R72] (statement of Adam Nielsen, Ill. Farm Bureau) ("Everyone we met with quickly recognized that if [Kurt Wilke] weren't a lawyer and a farmer, NRCS and the appeals process would have buried him and wrongfully denied his family's right to farm land that should never have been in question.").

182. *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring in judgment) ("Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.").

183. Robin Abcarian, *A Land-Use Case That's Enough to Furrow a Farmer's Brow*, L.A. TIMES, (Jan. 15, 2016, 2:00 AM), http://www.latimes.com/local/abcarian/la-me-0115-abcarian-farmer-wetlands-20160115-column.html [https://perma.cc/YH67-C3QB].

regulatable water.[184] This determination was only possible because of the ambiguous and amorphous nature of the definition of WOTUS, which effectively allows agency officials to characterize almost anything as a WOTUS.[185] In addition, the EPA and Corps have spent over thirty years pursuing legal action against Pennsylvania farmer Robert Brace for repairing drainage systems in his own fields, alleging that his actions were causing discharges into a water of the United States even though the water in question was a previously non-existent wetland that only formed because of uncontrollable beaver activity.[186] Likewise, the Corps sued wheat farmer Jack LaPant for planting his own fields, claiming that they were navigable waters under the definition of WOTUS.[187] His wheat fields constituted navigable waters because, according to the Corps, they contained several small depressions in which seasonal rainfall sometimes gathered.[188] These sobering stories are only a few examples of the regulatory overreach that has resulted from an ambiguous and unduly broad interpretation of the phrase "waters of the United States."

2. The Significant Nexus Test Has No Basis in Either the CWA or Precedent

The "significant nexus" test has no basis in precedent, nor is it supported by the text of the CWA. First, Justice Kennedy's "significant nexus" test, which has since become the basis for the EPA and Corps' enforcement of the WOTUS definition, was not actually a CWA

184. Bennett, *supra* note 3 ("Twenty years of wheat production followed by 15 years of livestock production wasn't a continuous farming operation, according to DOJ.").

185. *Rapanos*, 547 U.S. at 722 (plurality opinion).

186. *See generally* United States v. Brace, 41 F.3d 117 (3d Cir. 1994); *see also* ECOSTRATEGIES CIVIL ENG'G, WETLAND EVALUATION REPORT 3 (2015), http://nebula.wsimg.com/658771222d0cf5edb63033181395d3a6?AccessKeyId=7F494AADE6AF42D36823&disposition=0&alloworigin=1 [https://perma.cc/VQ8Q-FE2S] (noting that agency interference was actually one of the primary causes of the creation of wetland conditions because they did not allow Brace to maintain the ditches).

187. *See* Tony Francois, *Trump's New "Navigable Waters" Rule is an Improvement, But Still Murky*, DAILY SIGNAL (June 4, 2020), https://www.dailysignal.com/2020/06/04/trumps-new-navigable-waters-rule-is-an-improvement-but-still-murky/ [https://perma.cc/6QLW-77AH].

188. *Id.*

requirement.[189] In fact, that language does not even appear in the Act.[190] Justice Scalia rightly called Justice Kennedy out for attempting to rewrite the statute on his own by picking and choosing from among the CWA's stated purposes and creating something that Congress did not.[191]

Second, the Supreme Court precedent regarding the WOTUS definition does not support the application of the expansive "significant nexus" test.[192] As discussed above, the Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* that the CWA did not extend to a group of wetlands that the agency was trying to build on because they were isolated, individual bodies of water that were not directly connected to a navigable water.[193] Likewise, the Supreme Court decided in *United States v. Riverside Bayview Homes, Inc.* that the definition of "waters of the United States" included only those waters that "actually abut[ted]" a traditionally navigable water.[194] Both of these cases directly counter the "significant nexus" test.

Third, a glance at the personal jurisdiction precedent shows that an even broader swath of Supreme Court jurisprudence does not support the "significant nexus" formulation.[195] *Hanson* established that jurisdiction

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189. *Rapanos*, 547 U.S. at 754–55 (plurality opinion).

190. *Id.* ("In fact, however, that phrase appears nowhere in the Act, but is taken from *SWANCC*'s cryptic characterization of the holding of *Riverside Bayview*."). Scalia later criticized Kennedy for substituting his own view of the CWA for Congress' view of the CWA using a "Dog Didn't Bark" argument. In other words, Congress could have inserted a "significant nexus" requirement, but it didn't.

191. *Id.* at 756 ("More fundamentally, however, the test simply rewrites the statute, using for that purpose the gimmick of 'significant nexus.' It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that 'significantly affect the chemical, physical, and biological integrity of' waters of the United States. It did not do that, but instead explicitly limited jurisdiction to 'waters of the United States.'"); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (1998) ("[J]udges have no authority . . . to write . . . new laws").

192. *See* Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 171–72 (2001) (holding that the CWA did not extend to the waters in question because they were isolated, individual bodies of water that were not directly connected to a navigable water).

193. *Id.*

194. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985).

195. *Id.*; *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 171–72; Shaffer v. Heitner, 433 U.S. 186, 215–16 (1977); Hanson v. Denckla, 357 U.S. 235, 253 (1958); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 112 (1987); J.

exists only where the party in question "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[196] *World-Wide Volkswagen* was not subject to jurisdiction in Oklahoma because it could not reasonably have foreseen or anticipated being called into court in Oklahoma. [197] The Supreme Court held in *Shaffer* that nonresident shareholders' stock in an Arizona company did not create the minimum contacts necessary for jurisdiction in Delaware (the state of incorporation) because those shares did not lead to the inference that the shareholders could be subject to a lawsuit in either Arizona or Delaware.[198] Justice O'Connor held that Asahi Metal Industry would have had to specifically target the state of California with its products in order to be subject to jurisdiction in California.[199] McIntyre Machinery was not subject to jurisdiction in New Jersey because it had not intentionally targeted that state.[200] All of these descriptors—intentionality, obvious and purposeful action, clear targeting of the forum state, etc.—are saying the same thing: a clear, direct, and obvious connection is required in order to avoid subjecting too many parties to jurisdiction. When paralleled with the WOTUS context, the correctness of Scalia's standard is reinforced. Requiring a clear, direct, and obvious connection is necessary in order to avoid subjecting too many waters (and therefore too many American landowners) to excessive regulation.

The reasoning above makes it clear that Justice Kennedy's "significant nexus" standard, which is the basis for the CWA's WOTUS definition, is vague, dangerously ambiguous, and ripe for regulatory overreach. The past few decades have witnessed the EPA and Corps' incremental expansion of their control over landowners (particularly farmers) through the use of the WOTUS rule.[201] Therefore, the Trump administration was

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McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 886 (2011); Int'l Shoe Co. v. Washington, 326 U.S. 316 (1945).

196. *Hanson*, 357 U.S. at 253.

197. *World-Wide*, 444 U.S. at 297.

198. *Shaffer*, 433 U.S. at 215–16.

199. *Asahi*, 480 U.S. at 112.

200. *McIntyre*, 564 U.S. at 886.

201. United States v. Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993) (referring to "the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act," which the court characterized as a "regulatory hydra"); United States v. Brace, 41 F.3d 117 (3d Cir. 1994); Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1152, 1157 (9th Cir. 2005); Abcarian, *supra* note 183; Stroich, *supra* note 181 (statement of Adam Nielsen, Ill. Farm Bureau); Kogan, *supra* note 7.

correct to discard the "significant nexus" test and utilize Justice Scalia's "clear connection" test.[202] This test focuses on whether there is a direct, continuous, and traceable connection between the body of water in question and a traditionally navigable water.[203] It is preferable because it avoids the ambiguity associated with the current standard, minimizes the opportunity for abuse by agency officials, and provides clarity to farmers and other landowners.[204]

C. Responding to Anticipated Objections

In anticipation of possible objections to these conclusions, this Section provides both a summary of three potential counterarguments and reasoned responses for each.

1. Objection #1: A Faulty Parallel

Some may object that the parallels drawn between the personal jurisdiction precedent and the two WOTUS viewpoints are inadequate. This is a fair point. Like any cross-disciplinary comparison, this set of parallels does not provide a direct analogy in every single respect. The primary difference is that the personal jurisdiction precedent is concerned with the ability of *courts* to exercise power over an individual, whereas the WOTUS definition and the CWA in general are about the ability of the *federal government* to exercise power over an individual. In other words, interpreting the WOTUS definition depends in part on a discussion of Congressional intent and the drafters' understanding of the CWA, but the personal jurisdiction cases depend on courts' interpretations of the limits of Due Process. While these differences are no doubt important to recognize, the parallels drawn herein are nonetheless valid. The judicial conceptualization of personal jurisdiction is easily adaptable to the governmental context of the CWA.[205] Both are concerned with the proper

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202. New Rule, *supra* note 9.

203. Rapanos v. United States, 547 U.S. 715, 717 (plurality opinion).

204. Latham, *supra* note 4, at 13–14 (noting that Justice Scalia's "jurisdictional requirement of the presence of water does have the appeal of clarity").

205. This kind of parallel legal application has been done many times before. For instance, the Supreme Court has regularly applied the "presumption of regularity" associated with claims of governmental failure to comply with required procedures to the executive branch and its agencies, among others. *See* United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926) (describing the presumption); Parke v. Raley, 506 U.S. 20, 29 (1992); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989); Rogers v. Hill, 289 U.S. 582, 591 (1933).

limits of the statute and the proper implementation of due process. Both are inquiring about the ability of the individual to avoid institutional power. Both are asking essentially the same question: When is an individual subject to legal authority?

In addition, even if one were to disregard the personal jurisdiction parallels and approach this discussion solely from the perspective of Congressional intent, the "clear connection" test would still emerge as the best option. This is because the Congressional intent question would transform this article's inquiry into a question of statutory interpretation to which the canons of statutory construction must be applied, and those canons favor the "clear connection" test. In particular, the Avoidance Canon and the Whole Act Approach both support the adoption of the "clear connection" test.

First, the Avoidance Canon states that, when possible, courts will interpret statutes so as to avoid serious constitutional difficulties.[206] The threshold question for purposes of this discussion is whether the "significant nexus" test would lead to serious Constitutional difficulties.[207] The answer is a resounding "yes": There are multiple constitutional difficulties associated with the "significant nexus" test. For instance, the inherent ambiguity of the "significant nexus" test leads to widespread Due Process concerns because agency officials have been very willing to interpret almost anything as a "significant nexus."[208] The cases described above, in which multiple farmers were rendered helpless in the face of

206. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON STATUTORY INTERPRETATION 859 (2012) ("Avoidance Canon: avoid interpretations that would render a statute unconstitutional *or* that would raise serious constitutional difficulties."). While some see the Avoidance Canon as a mere presumption that should be invoked only "when fairly possible to do so," Crowell v. Benson, 285 U.S. 22, 62 (1932), the United States Supreme Court has, on multiple occasions, utilized this canon to resolve important issues. *See, e.g.*, United States v. Witkovich, 353 U.S. 194, 199 (1957) (holding that interpreting the statute to allow very broad questioning of detainees would lead to constitutional difficulties); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979) (holding that church-school teachers are not required to comply with National Labor Relations Act because doing so would raise serious Constitutional difficulties).

207. *NLRB*, 440 U.S. at 501 (noting the importance of avoiding "serious constitutional questions").

208. United States v. Brace, 41 F.3d 117 (3d Cir. 1994); Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1152, 1157 (9th Cir. 2005).

regulatory action, are a prime example of these Due Process concerns.[209] The *Brace* case is a particularly pointed example, as he was sued based on factors that were both (1) completely out of his control and (2) created by the agencies' own actions.[210]

The "significant nexus" test would also lead to constitutional difficulties because it endangers the federalist principles that undergird the American republic. Justice Scalia's *Rapanos* opinion lists this very concern as one of the four primary reasons that the "clear connection" test should be adopted.[211] He maintained that the Corps' excessively broad WOTUS definition would infringe upon the power of the states to control their land and water usage.[212] In this case, there was no "clear and manifest" statement from Congress that would authorize such an infringement of state authority.[213] As the Supreme Court stated in *Gregory v. Ashcroft*,[214] there is a presumption against federal preemption of states' ability to regulate their own affairs.[215] The "significant nexus" test would allow agencies (and, to a lesser degree, courts) to override this presumption and violate the foundational principles of federalism.

Secondly, the Whole Act Approach suggests that the "clear connection" test is the preferable approach to the WOTUS definition. Under this approach, courts will interpret one part of a statute based on other parts of the same statute based on a presumption of statutory consistency.[216] Scalia's *Rapanos* opinion addressed this argument when he

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209. *Brace*, 41 F.3d 117; *Baccarat Fremont Developers*, 425 F.3d at 1152, 1157; Abcarian, *supra* note 183; Bennett, *supra* note 3; Stroich, *supra* note 181.

210. ECOSTRATEGIES CIVIL ENG'G, *supra* note 186, at 3.

211. Rapanos v. United States, 547 U.S. 715, 731 (2006) (plurality opinion).

212. *Id.* at 737–38 (quoting Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001)).

213. *Id.* ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority.").

214. *See* Gregory v. Ashcroft, 501 U.S. 452, 463 (1991) (holding that judge age requirements are to be set by each state, even though the federal government has a statute that limits the age of judges, because it is vitally important to preserve the rights guaranteed to the states and removed from the control of the federal government).

215. It is also worth noting that the *Ashcroft* presumption directly supports this Article's use of the personal jurisdiction precedent in support of the "clear connection" test. Jurisdictional questions revolve around inter-state activity, which implicates the very state-sovereignty questions that concerned the *Ashcroft* court.

216. *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is

stated that other areas of the CWA provide additional support for the "clear connection" test.[217] As noted above, the CWA defines intermittent and infrequent flows of water under the "point sources" portion of the statute, not the "navigable waters" portion.[218] In addition, the phrase "navigable waters," which was adopted from previous versions of the CWA and is the umbrella section under which the WOTUS definition sits, has traditionally been understood to only include discrete bodies of water.[219] If an overarching term refers only to a limited set of discrete bodies of water, it is quite strange to simultaneously argue that its sub-term refers to a broad and undefined array of non-discrete bodies of water.[220] Therefore, both the overall placement of the WOTUS definition in the statute's structure and the broader term within which it resides support a narrow reading.[221] In addition to the strong support for the "clear connection" test in the CWA, there is also a notable lack of support for Justice Kennedy's broad "significant nexus" reading. In fact, the "significant nexus" has never been

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often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."). The Supreme Court has utilized this approach regularly. For instance, both the majority and the dissenting opinions in *Babbitt v. Sweet Home* used the Whole Act Approach to make distinct arguments. *See generally* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995). In holding that habitat modifications such as logging constituted an illegal taking of an endangered species under the Endangered Species Act (ESA), the majority argued that a 1982 Amendment to the ESA showed that the act as a whole was meant to broadly protect species. *See id.* at 702–03. The dissent, however, argued that other uses of the word "take" in the statute suggested that the act as a whole did not provide such protections. *See id.* at 717 (Scalia, J., dissenting).

217. *Rapanos*, 547 U.S. at 731 (plurality opinion).

218. *Id.* at 735.

219. *Id.* at 734 ("In addition, the Act's use of the traditional phrase 'navigable waters' (the defined term) further confirms that it confers jurisdiction only over relatively permanent bodies of water. The Act adopted that traditional term from its predecessor statutes. On the traditional understanding, 'navigable waters' included only discrete bodies of water.") (internal citations omitted).

220. United States v. Pacheco, 225 F.3d 148, 154 (2d Cir. 2000) (quoting Richards v. United States, 369 U.S. 1, 11 (1962)) ("The 'whole act' rule of statutory construction exhorts us to read a section of a statute not 'in isolation from the context of the whole Act' but to 'look to the provisions of the whole law, and to its object and policy.'").

221. *Id.*; *Rapanos*, 547 U.S. at 734 (plurality opinion).

a CWA requirement and does not appear anywhere in the Act, which suggests that Justice Kennedy simply made it up.[222]

Some may argue in return that the oft-invoked "Dog Didn't Bark" interpretive canon suggests that Congress' failure to define WOTUS suggests that its intent was to let the agencies define the term however they liked.[223] In other words, since no one in Congress brought up how to define the term, Congress must have intended not to define it and—by implication—must have intended to let the agencies define it. However, Congressional abdication of its legislative responsibility does not lead *ipso facto* to the conclusion that any agency viewpoint is correct.[224] To do so would be to inflict yet another grievous blow to the federalism principles that the "significant nexus" test has already sorely wounded.[225] While it is unfortunate that Congress did not provide guidance on how to define the WOTUS term, it is certainly clear that any proposed definition of the WOTUS term should align as closely as possible with the materials that Congress *did* provide.[226] This brings the issue right back to Scalia's *Rapanos* argument and the Whole Act analysis above.[227] Since the "significant nexus" test cannot be found anywhere else in the CWA and

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222. *Rapanos*, 547 U.S. at 755 (plurality opinion) ("In fact, however, that phrase appears nowhere in the Act, but is taken from *SWANCC*'s cryptic characterization of the holding of *Riverside Bayview*."). Scalia later criticized Kennedy for substituting his own view of the CWA for Congress' view.

223. ESKRIDGE ET AL., *supra* note 206, at 859. ("The 'dog didn't bark' canon: presumption that prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule.").

224. Kochan, *supra* note 165, at 329–30 (referring to the Congressional tendency to "abdicat[e] lawmaking authority [and] supplant[] the Framers' anticipated ambition to erect strong fences around their claim on *exclusive* legislative authority").

225. *Id.*; *Rapanos*, 547 U.S. at 731 (plurality opinion) (arguing that the Corps' excessively broad WOTUS definition would infringe upon the power of the states to control their land and water usage); Gregory v. Ashcroft, 501 U.S. 452, 463 (1991).

226. *See* Oklahoma v. New Mexico, 501 U.S. 221, 236 n.5 (1991) (noting that it is common practice to resort to "other . . . material[s] when required to interpret a statute which is ambiguous . . . ."); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (stating that these other materials can "shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms").

227. *Rapanos*, 547 U.S. at 734 (plurality opinion); *see also* United States v. Pacheco, 225 F.3d 148, 154 (2d Cir. 2000) (quoting Richards v. United States, 369 U.S. 1, 11 (1962)) ("The 'whole act' rule of statutory construction exhorts us to read a section of a statute not 'in isolation from the context of the whole Act' but to 'look to the provisions of the whole law, and to its object and policy.'").

the "clear connection" test is supported by both the historical interpretation of the WOTUS rule and the overall structure of the act, the goal of interpreting the WOTUS definition based on what Congress *did* provide is easily accomplished by adopting the "clear connection" test.

2. Objection #2: "Clear Connection" Is No Less Subjective Than "Significant Nexus"

Some may object that this factor test leads to just as much subjectivity as the "significant nexus" standard. However, there are three reasons that this objection is inaccurate. First, the "clear connection" approach would, as noted above, maximize judicial efficiency. It would limit the number of lawsuits that happen in the first place, thereby giving judges adequate time to devote themselves to a thorough examination of the cases. Second, this approach provides an *actual definition*, not a vague concept whose ambiguity and case-by-case (or perhaps judge-by-judge) variability make it open to an almost endless number of interpretations.[228] This definition utilizes the Supreme Court's personal jurisdiction precedent to create the first step toward a more workable and just definition of the "waters of the United States."[229] Third, the agencies would actually benefit from this framework because it would provide them with clarity.[230] This is particularly relevant in light of Congress' failure to delineate the WOTUS

228. *Rapanos*, 547 U.S. at 756, n.15 (plurality opinion) (internal citations omitted) ("Justice Kennedy's 'significant nexus' standard is perfectly opaque. When exactly does a wetland 'significantly affect' covered waters . . . ?"); Latham, *supra* note 4 ("[T]he significant nexus test is fraught with uncertainty, both in terms of application and guidance, for those mired in the current muck of wetland jurisdictional determinations after the Court's inability in *Rapanos* to fashion a clearly articulated majority view. That is, just what constitutes the necessary significant nexus sufficient for either the Corps or EPA to assert jurisdiction over property owners' wetlands?").

229. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985); Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 171–72 (2001); Shaffer v. Heitner, 433 U.S. 186, 215–16 (1977); Hanson v. Denckla, 357 U.S. 235, 253 (1958); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 112 (1987); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 886 (2011); Int'l Shoe Co. v. Washington, 326 U.S. 316 (1945).

230. *See* Scott Angstreich, *Shoring up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 114–15 (2000) ("[A]s a regulation gets clearer, it is usually easier to enforce, thus reducing the costs of applying the rule and increasing the incentive of regulated entities to comply.").

parameters, leaving the definition process up to the agencies.[231] Providing this additional level of clarity would enable citizens to more clearly anticipate when they might be subject to regulation. It would also ensure that agencies face fewer complaints of overreach.

3. Objection #3: "Clear Connection" Would Create Inconsistency and Injustice

Others may object that the agencies' current approach is necessary in order to avoid inconsistency. This argument might maintain that since the agencies' position is based on scientific evidence about the integrated nature of the water supply, it is the most reasonable and most widely applicable framework. The existence of a few occasional problems should not mean that we ignore the agencies' efforts to implement a comprehensive regulatory regime. However, that is not the primary problem in the WOTUS context. The issues with the WOTUS definition stem from ambiguous, vaguely drafted statutes and the regulatory overreach that so naturally follows, not with the sincerity or good intentions of agency officials. The cases described above are perfect examples of the kinds of injustices that result from the inconsistency made possible by the "significant nexus" standard.[232]

Others may argue with Justice Kennedy that requiring a clear connection would be unfair in practice because it would subject a small yet constant trickle to jurisdiction while exempting an irregular torrent through an otherwise dry channel.[233] Kennedy focused particularly on man-made ditches and other industrial conduits as being prime examples of intermittent water flows that very well could be substantial.[234] However, while Scalia readily admits that many such conduits can hold water both permanently and intermittently, he points to the fact that the CWA defines "ditches" and "waters" in separate parts of the Act as indicative of Congress' intent to distinguish between continuous and intermittent flows

231. Schilling, *supra* note 11, at 134 ("Whether intentional or not, Congress's failure to elaborate and amend the definition and has left the task to government experts like the Army Corps and the EPA.").

232. *See* United States v. Brace, 41 F.3d 117 (3d Cir. 1994); Baccarat Fremont Developers, LLC v. Army Corps of Eng'rs, 425 F.3d 1150, 1152, 1157 (9th Cir. 2005); Abcarian, *supra* note 183; Bennett, *supra* note 3; Stroich, *supra* note 181.

233. *Rapanos*, 547 U.S. at 728 (plurality opinion) (noting that "even the most insubstantial hydrologic connection may be held to constitute a 'significant nexus.'").

234. *Id.* at 777 (Kennedy, J., concurring in judgment).

of water.[235] He also observes that Kennedy is straying from the Court's true goal in *Rapanos*, which was not to determine exactly when a particular streambed becomes dry enough to lose its WOTUS status but rather to provide a reliable and workable framework for states and agencies.[236] Therefore, concerns about the clear connection test's practical fairness do not cast doubt on its validity.

CONCLUSION

This Article comes at a particularly relevant time. On September 12, 2019, the Trump administration rolled back the Obama-era WOTUS rule and announced its plan to redefine the term.[237] On January 23, 2020, the administration replaced the 2015 rule with a revised rule that significantly reduced the government's reach in regulating the nation's waterways.[238]

This Article utilizes the Supreme Court's personal jurisdiction precedent to draw insightful parallels to the WOTUS context that strongly support Scalia's *Rapanos* interpretation and the Trump administration's revised WOTUS rule.[239] It identifies the susceptibility of the WOTUS definition to abuse and uncovers its lack of a legitimate statutory or

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235. *Id.* at 736 n.7 (plurality opinion) ("On its only natural reading, such a statute that treats 'waters' separately from 'ditch[es], channel[s], tunnel[s], and conduit[s],' thereby distinguishes between continuously flowing 'waters' and channels containing only an occasional or intermittent flow.").

236. *Id.* at 732 n.5 (plurality opinion) (internal citations omitted) ("By describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months . . . . Though scientifically precise distinctions between 'perennial' and 'intermittent' flows are no doubt available, we have no occasion in this litigation to decide exactly when the drying up of a streambed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States.' It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's 'intermittent' and 'ephemeral' streams . . . are not.").

237. Perek, *supra* note 9.

238. New Rule, *supra* note 9 (laying out four categories of waters that are considered waters of the United States: "(1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; (2) tributaries; (3) Lakes and ponds, and impoundments of jurisdictional waters; and (4) Adjacent wetlands.").

239. *See* discussion *supra* Part III.B.

precedential basis.[240] In light of the parallels drawn and problems identified, this Article argues that Justice Scalia's "clear connection" test is the better approach.[241] In short, this Article provides additional support for the new WOTUS definition at a highly relevant juncture.

The WOTUS definition has always been controversial.[242] Scholars, agencies, and courts continue to struggle with implementing its standards and balancing the interests of competing parties.[243] In an effort to calm the murky waters of the WOTUS rule,[244] this Article provides a timely and in-depth analysis of the flaws in the current "significant nexus" test and additional support for the adoption of the "clear connection" test in order to help courts and agencies make better decisions and avoid burdening landowners.

240. *See* discussion *supra* Parts III.B.1, III.B.2.

241. *See* discussion *supra* Part III.C.

242. Gatz, *supra* note 10; *see also* Kochan, *supra* note 165, at 340.

243. Gorton, *supra* note 11, at 242.

244. Revised Definition, *supra* note 62; Fact Sheet, *supra* note 62 ("The role of federal government under the Clean Water Act is ultimately derived from Congress' commerce power over navigation. As a result, this proposal clearly limits 'waters of the United States' under the Clean Water Act to those that are physically and meaningfully connected to traditional navigable waters."); Perek, *supra* note 9.