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## A CLEAN WATER ACT, IF YOU CAN KEEP IT

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# A CLEAN WATER ACT, IF YOU CAN KEEP IT

SEAN G. HERMAN<sup>1</sup>

## I. INTRODUCTION

The Clean Water Act has traveled a successful but tortuous path. From combustible beginnings on the Cuyahoga River; through the Lake St. Clair wetlands; to reservoirs near the Miccosukee; and eventually discharged (or “functionally” discharged) off the Maui coast.<sup>2</sup> With each bend, the nearly fifty-year-old Act has proven to be not just resilient, but among our most successful environmental laws.<sup>3</sup> Much of that success stems from an effective enforcement structure that focuses more on treating pollutant sources rather than just impaired waters.<sup>4</sup> The text creating that structure has largely remained untouched by Congress for decades. Though static, the text’s success in reducing pollution may reflect its ingenuity. But even if true, its ingenuity would not entirely explain the Act’s success.

Much of the success also arises from the Act’s evolution with technology. Tracer dye studies,<sup>5</sup> LiDAR mapping,<sup>6</sup> and reporting databases,<sup>7</sup>

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<sup>2</sup> *Rapanos v. United States*, 547 U.S. 715 (2006); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020).

<sup>3</sup> See Oliver A. Houck, *TMDLs IV: The Final Frontier*, 29 ENV’T. L. REP. 10,469 (Aug. 1999) (“The federal Clean Water Act (CWA) could lay claim to being the most successful environmental program in America. . . Yet, we do not have clean water.”).

<sup>4</sup> See *Env’t Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976) (discussing intent of that Clean Water Act as including “direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated.”).

<sup>5</sup> See *Hawai’i Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 984 (D. Haw. 2014) (discussing tracer dye study).

<sup>6</sup> See The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250, 22,327 (April 21, 2020) [hereinafter Navigable Waters Protection Rule] (discussing LiDAR as tool for assessing wetlands).

among other tools, have lowered to unprecedented levels the barrier to water quality enforcement. As technology takes off, regulations have tried to keep pace.<sup>8</sup> So if technology has been the engine driving the Act's evolution, regulations have been the gear shift governing the speed with which it is implemented.

But unlike the statutory text, regulations under the Clean Water Act change often. In this last decade alone, we saw one administration craft a regulation called the Clean Water Rule, which the next tore down through suspension and repeal.<sup>9</sup> Then, it installed a replacement regulation called the Navigable Waters Protection Rule.<sup>10</sup> And now, a new administration of differing political views may tear that regulation down just like its predecessor.<sup>11</sup> Perhaps this third mutation may prove the process—promulgate, suspend, repeal, replace—to be some Hegelian dialectic that satisfies all in the end.<sup>12</sup> That is an unlikely outcome, however, since the problem lies not in the ingenuity (or lack thereof) of the regulatory language, but in the immutable text of its origin statute.

When it enacted the original statute in 1972, Congress chose the following phrase to describe what the Clean Water Act protects: “the waters of the United States.”<sup>13</sup> The phrase lacked any commonly understood meaning in 1972, just as it does today. It cannot mean all waters within the United States, as this would risk overstepping the Commerce Clause.<sup>14</sup> But it also must mean more than just the navigable waters

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<sup>7</sup> See, e.g., California State Water Resources Control Board's Stormwater Multiple Application and Report Tracking System, available at <https://smarts.waterboards.ca.gov/smarts/faces/Sw-SmartsLogin.xhtml>.

<sup>8</sup> For instance, the Clean Water Rule discussed how science “has advanced considerably in recent years” and how that development “play[s] a critical role in informing the agencies’ interpretation of the [Act’s] scope.” Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,057 (June 29, 2015) [hereinafter Clean Water Rule].

<sup>9</sup> *Id.*; Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018); Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).

<sup>10</sup> Navigable Waters Protection Rule, 85 Fed. Reg. 22,250.

<sup>11</sup> See Press Release, The White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/> [hereinafter White House Fact Sheet].

<sup>12</sup> Hegel's dialectic assumes a rational political structure and begins with a political thesis (e.g., a ruler's authority is absolute). An antithesis then contradicts the thesis (e.g., resistance to ruler's absolute authority). As the populace's resistance and ruler's suppression intensify, they move toward a synthesis (e.g., the ruler brings the populace back under control by providing the populace with more control through charters, rights, or laws). Charles Edward Andrew Lincoln IV, *Hegelian Dialectical Analysis of U.S. Voting Laws*, 42 U. DAYTON L. REV. 87, 91-92 (2017); Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 15 BERKELEY J. INT'L L. 159, 181 (1997) [hereinafter *Hegelian Reflections*].

<sup>13</sup> See 33 U.S.C. § 1362(7) (defining “navigable waters”).

<sup>14</sup> See *The Daniel Ball*, 77 U.S. 557, 563-64 (1870) (holding that navigable waters form a continued highway for interstate commerce that is subject to Commerce Clause jurisdiction).

traditionally regulated since the United States' inception, like waters used for interstate commerce and waters susceptible for use with reasonable improvement.<sup>15</sup> If not, then what purpose would the definition serve?<sup>16</sup> Had Congress intended to reach only those waters historically known as “navigable waters,” it begs the question of why Congress would bother defining “navigable waters” as anything besides its traditional meaning. And its chosen definition—“waters of the United States”—does not fit within that traditional meaning.

Where then in the wide spectrum of “waters of the United States” does the subject matter of this statute fall? Without definition or criteria from Congress to guide their way, the agencies' answers from the last ten presidential administrations have shown that the question is a Rorschach Test. To one administrator, a prairie pothole could be a jurisdictional water.<sup>17</sup> To another, it's not.<sup>18</sup>

The framers warned of such mutability in policymaking. “It poisons the blessing of liberty itself,” wrote Publius, and it would be of little benefit if laws are “repealed and revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.”<sup>19</sup> Without knowing what the law will be, what merchant, farmer, or manufacturer would invest their fortunes in a future when they “can have no assurance that [their] preparatory labors and advances will not render [them] a victim to an inconstant government?”<sup>20</sup> The “continual change even of good measures is inconsistent with every rule of prudence and every prospect of success.”<sup>21</sup>

The safeguard against the political instability that Publius feared was a separation of powers and a system of checks and balances. Splitting legislative powers between the House of Representatives and Senate encourages stability as the Senate acts as a “salutary check” on the House.<sup>22</sup> But since Congress passed the Clean Water Act, we have not seen mutable policymaking arising in the legislative branch. We have

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<sup>15</sup> *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404-10 (1940).

<sup>16</sup> *See Rapanos v. United States*, 547 U.S. 715, 731 (2006) (“This provision shows that the Act’s term ‘navigable waters’ includes something more than traditional navigable waters.”).

<sup>17</sup> Clean Water Rule, 80 Fed. Reg. at 37,059.

<sup>18</sup> Navigable Waters Protection Rule, 85 Fed. Reg. at 22,314.

<sup>19</sup> THE FEDERALIST NO. 62 (Alexander Hamilton or James Madison).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

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seen the opposite: a period of stasis.<sup>23</sup> Congressional stasis has forced the executive branch to assume a larger role in policymaking.

Rather than address policy to keep pace with technology and litigation by passing legislation, Congress has relied on vague directives it gave the agencies decades ago. One such vague directive is the Act's subject matter: "waters of the United States."<sup>24</sup> Rather than assume its laboring oar and resolve the difficult task of determining what waters the federal government regulates, Congress has left the task to the agencies. Through its inaction, this article contends, Congress's delegation of policymaking authority to the agencies violates the separation of powers in two ways.

*First*, the phrase "waters of the United States" fails to provide agencies and courts with an intelligible principle that can measure whether the agencies have followed Congress's guidance. A missing intelligible principle violates the nondelegation doctrine. And this missing intelligible principle is all the more apparent as textualism and its demand for clarity gains general acceptance as an interpretative methodology among courts.

*Second*, because the phrase "waters of the United States" is standardless, it fails to apprise the public of what conduct the law requires. Not even a majority of the Supreme Court can decide what the phrase means.<sup>25</sup> When ambiguity becomes this uncertain, it violates the void-for-vagueness doctrine.

With these two violations in mind, this article begins by posing a thesis: The Clean Water Act regulates all "waters of the United States." It then suggests a two-part antithesis: Congress violated the nondelegation and void-for-vagueness doctrines by defining the Clean Water Act only as reaching "waters of the United States." And it resolves the conflict with a synthesis: a call for Congress to amend the Clean Water Act by providing the statute with a more stable and intelligible jurisdictional reach. Federal oversight in water quality regulation is a necessity. But to what degree is a policy decision that Congress has yet to make.

## II. THESIS: A HISTORY OF CLEAN WATER IN FOUR CASES

Begin with the statute. Enacted in 1972, the Clean Water Act amended the Federal Water Pollution Control Act and remade how the

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<sup>23</sup> Congress has not significantly amended the Clean Water Act since it enacted the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 76 (1987).

<sup>24</sup> 33 U.S.C. § 1362(7).

<sup>25</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).

United States regulated water quality at a federal level.<sup>26</sup> The Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>27</sup> And one of its primary goals was to eliminate the discharge of pollutants to "navigable waters" by 1985.<sup>28</sup> Though it did not reach this goal, its enforcement mechanism proved effective.

The Act's core prohibition is the unpermitted "discharge of any pollutant,"<sup>29</sup> a phrase which means "any addition of any pollutant to navigable waters from any point source."<sup>30</sup> The regulated conduct thus is the "discharge" or "addition" of pollutants, and the "navigable waters" are what the Act protects. But for all of the Act's definition and structure, it never determines what are the "navigable waters" it protects. It simply defines these as "the waters of the United States, including the territorial seas."<sup>31</sup>

Indeterminacy surrounds this definition of the Act's keystone, "navigable waters." When Congress enacted the Act in 1972, "navigable waters" enjoyed a commonly understood, historical meaning. The term meant waters that are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."<sup>32</sup> Congress could regulate the "navigable waters" within each State so long as it tied those waters to the interstate commerce clause with navigability.<sup>33</sup>

But Congress did not draw only on this historical meaning when defining what waters its Act protected. Instead, Congress defined "navigable waters" as "the waters of the United States, including the territorial seas."<sup>34</sup> Unlike "navigable waters," the phrase "waters of the United States" had no commonly understood meaning. Nor does the Act define "waters of the United States."<sup>35</sup> Without a definition, courts have described the phrase as "notoriously unclear,"<sup>36</sup> "elusive and unpredictable,"<sup>37</sup> and defining it "a contentious and difficult task."<sup>38</sup> This lack of

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<sup>26</sup> An Act to amend the Federal Water Pollution Control Act, Pub. Law No. 92-500, 86 Stat. 816 (1972).

<sup>27</sup> 33 U.S.C. § 1251(a).

<sup>28</sup> 33 U.S.C. § 1251(a)(1).

<sup>29</sup> 33 U.S.C. § 1311(a).

<sup>30</sup> 33 U.S.C. § 1362(12).

<sup>31</sup> 33 U.S.C. § 1362(7).

<sup>32</sup> *The Daniel Ball*, 77 U.S. 557, 563 (1870).

<sup>33</sup> *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824).

<sup>34</sup> 33 U.S.C. § 1362(7).

<sup>35</sup> 33 U.S.C. § 1362.

<sup>36</sup> *Sackett v. Env't Prot. Agency*, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

<sup>37</sup> *State v. U.S. Env't Prot. Agency*, 989 F.3d 874, 879 (10th Cir. 2021).

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definition is the focus of constitutional concern, which has been litigated at length in the half-century since its enactment.

Four cases underscore this constitutional concern. First is *Natural Resources Defense Council, Inc. v. Callaway*.<sup>39</sup> After the Act's enactment in 1972, one of the two agencies charged with enforcing it—the Army Corps of Engineers (the other being Environmental Protection Agency)—promulgated regulations defining “waters of the United States” in accordance with its historical meaning.<sup>40</sup> But without much of any analysis or discussion of the Act's text, the U.S. District Court for the District of Columbia held that the Army Corps lacked authority to adopt this definition because Congress “asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause.” So the Act's phrase, “navigable waters,” “is not limited to the traditional tests of navigability.”<sup>41</sup>

The second case is *United States v. Riverside Bayview Homes, Inc.*<sup>42</sup> After *Callaway*, the Army Corps revisited its regulations and promulgated a definition that included within “navigable waters” non-navigable wetlands adjacent to navigable creeks.<sup>43</sup> The regulations sought to extend the definition of “waters of the United States” to the outer limits of Congress's commerce power.<sup>44</sup> In considering the Army Corps' regulation, the Supreme Court invoked *Chevron*<sup>45</sup>—which was just a year old at that point—and concluded with a double negative: The Court could not say that the Army Corps' interpretation of the Act was unreasonable.<sup>46</sup> The Court acknowledged that it was facially “unreasonable to classify ‘lands,’ wet or otherwise, as ‘waters.’”<sup>47</sup> But the transition from water to solid ground is not necessarily or typically an abrupt one, and the transition includes shallows, marshes, mudflats, swamps, and bogs that make determining a water's limit “far from obvious.”<sup>48</sup> So the Court turned to legislative history and the Act's purpose to support its deference to the Army Corps' assertion of jurisdiction over non-naviga-

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<sup>38</sup> Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 624 (2018).

<sup>39</sup> 392 F. Supp. 685, 686 (D.D.C. 1975).

<sup>40</sup> Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,119 (April 3, 1974).

<sup>41</sup> Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

<sup>42</sup> 474 U.S. 121 (1985).

<sup>43</sup> Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975); Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

<sup>44</sup> Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. at 37,144 n.2.

<sup>45</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>46</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985).

<sup>47</sup> *Id.* at 132.

<sup>48</sup> *Id.*

ble wetlands.<sup>49</sup> At bottom, the Court noted, “the term ‘waters’ as used in the Act does not necessarily exclude ‘wetlands.’”<sup>50</sup>

The third case is *Solid Waste Agency of Northern Cook County v. Army Corp of Engineers*.<sup>51</sup> The Army Corps’ 1986 regulations defined “navigable waters” to include all waters “used as habitat by [ ] migratory birds which cross state lines.”<sup>52</sup> The Supreme Court looked upon this regulation with some skepticism, noting that when “an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”<sup>53</sup> The Army Corps’ regulation—often called the Migratory Bird Rule—had asserted jurisdiction over an abandoned sand and gravel pit. But the Court could find no “clear statement from Congress” that would allow the Army Corps to regulate waters like the isolated pond at issue.<sup>54</sup> Federal regulation of isolated ponds “would result in a significant impingement of the States’ traditional and primary power over land and water use,” but no language within the Act could countenance such an outcome.<sup>55</sup> The Court then made two comments in dictum that casted doubt on the *Cal-laway* holding. First, the Court commented on how the Migratory Bird Rule strays from the Army Corps’ original interpretation of the Act as extending only to navigable-in-fact waters.<sup>56</sup> Second, the Court noted that Congress enjoys broad authority under the Commerce Clause, but that authority is not unlimited.<sup>57</sup>

The fourth case is *Rapanos v. United States*.<sup>58</sup> A fractured Supreme Court invalidated the tributary and adjacent wetlands provisions of the Army Corps’ 1986 regulations. Justice Scalia wrote the plurality, joined by three other justices; Justice Kennedy wrote his own concurrence; and Justice Stevens wrote a dissent joined by three others.<sup>59</sup> The issue was whether “navigable waters” includes wetlands that do not physically abut navigable-in-fact waters.<sup>60</sup> The plurality noted that the phrase “naviga-

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<sup>49</sup> *Id.* at 132-33.

<sup>50</sup> *Id.* at 139 n.11.

<sup>51</sup> 531 U.S. 159 (2001).

<sup>52</sup> Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) [hereinafter 1986 Regulations].

<sup>53</sup> *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

<sup>54</sup> *Id.* at 174.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 168.

<sup>57</sup> *Id.* at 173.

<sup>58</sup> 547 U.S. 715 (2006).

<sup>59</sup> Chief Justice Roberts and Justice Breyer also wrote a clarifying concurrence and dissent, respectively, but joined in the plurality and dissent, respectively.

<sup>60</sup> *Rapanos v. United States*, 547 U.S. 715, 729-30 (2006) (plurality).



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ble waters” means something more than traditional navigable waters, but the qualifier “navigable” is not without significance.<sup>61</sup> Regulating non-navigable waters and lands abutting navigable-in-fact waters impinges upon the States’ traditional and primary power over land and water use.<sup>62</sup> Without a “clear and manifest” statement that Congress intended to intrude upon this traditional state authority, the plurality would not interpret “waters of the United States” as allowing it.<sup>63</sup> So the plurality defined “navigable waters” in accordance with its commonsense understanding of the term: “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”<sup>64</sup>

Only four justices signed onto the plurality. Justice Kennedy joined the plurality in judgment and wrote a concurrence that defined “navigable waters” by a “significant nexus” test.<sup>65</sup> Through the “significant nexus” test, the EPA and Army Corps could determine what “navigable waters” they may regulate by finding whether non-abutting wetland significantly affects the physical, chemical, and biological integrity of a navigable-in-fact water.<sup>66</sup> Faced with a plurality and concurrence, it has been unclear whether either opinion controls district courts and circuit courts’ interpretations of the Clean Water Act.<sup>67</sup>

Chief Justice Roberts foresaw this obvious consequence when he bemoaned how the Court could not issue an opinion commanding a majority for how to read the Clean Water Act’s reach.<sup>68</sup> He then called on the EPA and Army Corps to develop regulations within “the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed” to define “waters of the United States.”<sup>69</sup>

The EPA and Army Corps accepted that invitation, but ultimately without success. Under the Obama Administration, the agencies promul-

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<sup>61</sup> *Id.* at 731.

<sup>62</sup> *Id.* at 738.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 739 (cleaned up).

<sup>65</sup> *Id.* at 759 (Kennedy, J., concurring).

<sup>66</sup> *Id.* at 779.

<sup>67</sup> For instance, the First, Third, and Eighth Circuits have concluded that the Clean Water Act may reach either the plurality’s or Justice Kennedy’s standard. *United States v. Johnson*, 467 F.3d 56, 64-66 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174, 176, 182 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). The Fourth Circuit follows Justice Kennedy’s test, without having decided whether the plurality’s test may also apply. *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng’rs*, 633 F.3d 278, 288 (4th Cir. 2011). The Seventh, Ninth, and Eleventh Circuits have held that Justice Kennedy’s test controls. *Orchard Hill Bldg. Co. v. U. S. Army Corps of Eng’rs*, 893 F.3d 1017, 1021 (7th Cir. 2018); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007).

<sup>68</sup> *Id.* at 758 (Roberts, C.J., concurring).

<sup>69</sup> *Id.*

gated the Clean Water Rule, which followed Justice Kennedy’s “significant nexus” test.<sup>70</sup> This regulation extended the Act’s jurisdiction to include intermittent and ephemeral streams that are hydrologically connected to navigable waters by either being within a specified distance of a navigable water’s ordinary high water mark, or as determined case-by-case.<sup>71</sup>

The Clean Water Rule became mired in litigation and ultimately subject to repeal efforts under the Trump Administration.<sup>72</sup> For its part, the Trump Administration promulgated the Navigable Waters Protection Rule, which aimed to align the agencies’ definition with the *Rapanos* plurality.<sup>73</sup> Among its changes was the categorical exclusion from “navigable waters” of those ephemeral waters that flow only in response to precipitation.<sup>74</sup> These seasonal or temporary bodies of water are prevalent in the arid and semi-arid west and include vernal pools, arroyos, and dry washes that fill with water only after seasonal rains or snowmelt.<sup>75</sup> The 2020 regulation also limited the Act’s jurisdiction over wetlands to include only “adjacent wetlands” that either abut or have a direct hydrological surface connection with traditionally navigable waters.<sup>76</sup>

At the time of this article, the Biden Administration is now reconsidering the 2020 regulation.<sup>77</sup> And it has several options before it. It could leave the 2020 regulation in place; or repeal it and reinstate the 1986 regulation.<sup>78</sup> Or it could repeal and re-promulgate the 2015 regulation. It could also repeal and replace the regulation with something entirely new. Or it could promulgate a new regulation that builds off the 2020 regulation.

Of these options, leaving the 2020 regulation as-is appears to be the least tenable. Political pressures make that outcome unlikely, which highlights the game of regulatory volleyball taking place.<sup>79</sup> In eight

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<sup>70</sup> Clean Water Rule, 80 Fed. Reg. 37,054.

<sup>71</sup> *Id.* at 37,058.

<sup>72</sup> Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. at 5,201; Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. at 56,626.

<sup>73</sup> Navigable Waters Protection Rule, 85 Fed. Reg. 22,250.

<sup>74</sup> *Id.* at 22,251.

<sup>75</sup> *Id.* at 22,288.

<sup>76</sup> *Id.* at 22,251.

<sup>77</sup> White House Fact Sheet, *supra* note 11.

<sup>78</sup> Until the Clean Water Rule in 2015, the text of the agencies’ regulations has been consistent since 1986 (Army Corps) and 1988 (EPA). *See* 1986 Regulations, 51 Fed. Reg. 41,206; Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764 (June 6, 1988).

<sup>79</sup> *See, e.g.,* Beth Burger, *Climate Collision: Trump’s EPA Rewrote the Rules on Air, Water Energy*, USA TODAY (Oct. 29, 2020), <https://www.usatoday.com/in-depth/news/investigations/2020/10/29/climate-change-escalates-voters-face-choice-deregulate-re-regulate/3668667001/> (quoting

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years, we have seen the agencies impose four different jurisdictional reaches for the Clean Water Act: the 1986 Army Corps Rule, the 2015 Clean Water Rule, return of the 1986 Army Corps Rule, and the 2020 Navigable Waters Protection Rule. With the Biden Administration, we may soon see our fifth.

### III. ANTITHESIS 1: NONDELEGATION DOCTRINE AND THE RISE OF TEXTUALISM

When agencies play a game of regulatory volleyball, they risk violating the separation of powers doctrine. Under this foundational doctrine, American democracy diffuses its governing powers across the three branches. Congress legislates (Article I), the President executes (Article II), and the courts interpret (Article III).<sup>80</sup> This separation of powers was a remedy born from tyranny. When both “legislative and executive powers are united in the same person,” “there can be no liberty.”<sup>81</sup> So the “separate and distinct exercise of the different powers of government” is “essential to the preservation of liberty.”<sup>82</sup> The gradual encroachment on and accumulation of all powers of one branch by another is the “tyrannical concentration of all the powers of government in the same hands.”<sup>83</sup> A government breaches its duty to the People to preserve liberty when “Congress gives up its legislative power and transfers it to the President, or to the judicial branch.”<sup>84</sup> Put otherwise, the Constitution puts it beyond Congress’s power to delegate all of its legislative power to another branch.<sup>85</sup> This bar against certain delegations of constitutional authority is otherwise known as the nondelegation doctrine.

#### A. THE NONDELEGATION DOCTRINE

The nondelegation doctrine arises not from the Constitution’s text but from its underlying principle. Nondelegation is “a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”<sup>86</sup> That “system of govern-

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then-California Attorney General Xavier Becerra as believing there was no “environmental policy stance the Trump administration had taken that a hypothetical Biden administration would likely defend,” including the Navigable Waters Protection Rule).

<sup>80</sup> U.S. CONST. art. I-III.

<sup>81</sup> THE FEDERALIST NO. 47 (James Madison) (cleaned up).

<sup>82</sup> THE FEDERALIST NO. 51 (James Madison).

<sup>83</sup> THE FEDERALIST NO. 48 (James Madison).

<sup>84</sup> J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

<sup>85</sup> *Id.* at 407.

<sup>86</sup> Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).

ment” is the separation of powers outlined in the Constitution’s first three articles.

Of course, a separation of powers does not prohibit a sharing of powers. Practicality requires a government “in which the legislative, executive, and judiciary departments have not been kept totally separate and distinct.”<sup>87</sup> A separation of powers thus does not seek purity in preventing powers from bleeding among the three branches. It instead protects against the accumulation of the whole power of one branch in the hands of another.<sup>88</sup> Powers may mix among the branches, with the separation of powers violated when there is “too great a mixture, and even an actual consolidation, of the different powers.”<sup>89</sup> Nondelegation thus allows one branch to seek assistance from another branch, but “the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.”<sup>90</sup> Neither separation of powers nor the nondelegation doctrine prohibit Congress from obtaining another branch’s help.<sup>91</sup> And today, “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>92</sup> The “complex economic and social problems” that demand broad delegations are as much a reality today as they were seventy-five years ago when the Supreme Court first acknowledged this reality.<sup>93</sup>

The point at which a general directive from Congress violates the nondelegation doctrine, however, is at best unclear; at worst, it is perhaps perfunctory. All the nondelegation doctrine demands is that Congress accompany its delegation of power with an “intelligible principle.”<sup>94</sup> The “intelligible principle” requires only that “Congress clearly delineate[ ] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”<sup>95</sup> So, on one hand, Congress “must provide substantial guidance” to agencies in how to regulate matters affecting “the entire national economy.”<sup>96</sup> But on the other hand, Congress need not legislate with precision by, say, providing a “determi-

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<sup>87</sup> THE FEDERALIST NO. 47 (James Madison).

<sup>88</sup> *See id.* (interpreting Montesquieu as saying that when “the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted.”).

<sup>89</sup> *Id.*

<sup>90</sup> J.W. Hampton, 276 U.S. at 406.

<sup>91</sup> *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

<sup>92</sup> *Id.*

<sup>93</sup> *Am. Power & Light Co. v. Sec. & Exch. Comm’n*, 329 U.S. 90, 105 (1946).

<sup>94</sup> J.W. Hampton, 276 U.S. at 409.

<sup>95</sup> *Am. Power & Light*, 329 U.S. at 105.

<sup>96</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001).

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nate criterion” for when an agency is regulating too much.<sup>97</sup> Requiring an intelligible principle ensures that Congress—the branch that is most responsive to the electorate—makes the important policy choices.<sup>98</sup> And on balance, a law violates the nondelegation doctrine only absent standards that make it impossible for courts to determine whether an agency has obeyed the will of Congress.<sup>99</sup>

As the Supreme Court recently acknowledged, this test is “not demanding.”<sup>100</sup> That is an understatement. Only twice has the Court found that a statute violated the nondelegation doctrine.<sup>101</sup> And both times were in 1935. So, to paraphrase Cass Sunstein, the nondelegation doctrine has had one good year, and 232 bad ones (and counting).<sup>102</sup>

Given the trouble defining where to draw the line between prohibited and permitted delegations, nondelegation has been “a judicially underenforced norm, and properly so.”<sup>103</sup> Despite its vital aim at preserving the constitutional design of American democracy, history shows that courts place (and have always placed) the nondelegation doctrine threshold on the floor, near the dustbin.

## B. RISE OF TEXTUALISM

In theory, the rise of textualism would appear to strengthen the nondelegation doctrine. As Justice Elena Kagan has proclaimed, “We’re all textualists now.”<sup>104</sup> The proclamation reflects how courts interpret law today, which differs substantially from how they interpreted law in 1972 when Congress enacted the Clean Water Act. Textualism emphasizes the primacy of a statute’s text and requires that courts use all objective tools of statutory construction when interpreting law.<sup>105</sup> Not so much before the rise of textualism.

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<sup>97</sup> *Id.*; see also Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317 (2000) [hereinafter *Nondelegation Canons*] (“it is extremely difficult to defend the idea that courts should understand Article I, section 1 of the Constitution to require Congress to legislate with particularity.”).

<sup>98</sup> *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in judgment).

<sup>99</sup> *Mistretta v. United States*, 488 U.S. 361, 379 (1989) (quoting *Yakus v. United States*, 321 U.S. 414, 425-26 (1944)).

<sup>100</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019).

<sup>101</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>102</sup> *Nondelegation Canons*, *supra* note 97, at 322.

<sup>103</sup> *Id.* at 338.

<sup>104</sup> Justice Elena Kagan, “A Dialogue with Justice Elena Kagan on the Reading of Statutes” The Scalia Lecture, Harvard Law School (Nov. 17, 2015), available at <https://www.youtube.com/watch?v=DPEtzFTOTg>.

<sup>105</sup> *Textualism As Fair Notice*, 123 HARV. L. REV. 542 (2009).

Take the Supreme Court's 1971 holding in *Overton Park, Inc. v. Volpe*.<sup>106</sup> The Court noted in the opinion's twenty-ninth footnote that it would use the statute's text to divine legislative intent—but only after concluding that the legislative history itself was ambiguous.<sup>107</sup> Working alongside a judicial branch that approached cases like *Overton Park* with little concern for a statute's text, it follows that Congress in 1971 would have been less concerned about the text it negotiated and placed in the final statute. If it could expect that the words exchanged on the Senate floor would have equal if not greater force than the words set to paper, then why put forth the added effort to clarify the ambiguous words on the paper?

Now contrast *Overton Park* with *Milner v. Dep't of Navy*, in which Justice Kagan noted that courts should not allow an ambiguous legislative history “to muddy clear statutory language.”<sup>108</sup> Courts should now turn to legislative history to “clear up ambiguity, not create it.”<sup>109</sup> This approach reflects that “legislative history is not the law.”<sup>110</sup> Unlike the purposivist approach that prioritizes considerations like legislative history, textualism ensures that the regulated community has fair notice of what the law requires.<sup>111</sup> “Fair notice squarely aligns with textualism's goal of approximating how the average, reasonable citizen would interpret a statute.”<sup>112</sup>

With textualism in mind, return to the nondelegation doctrine. In its most recent encounter with the doctrine, the Supreme Court noted that “a nondelegation inquiry always begins (and often almost ends) with statutory interpretation.”<sup>113</sup> Courts must look to the statute's text—considered alongside its context, its purpose, and then its history—to see what task it delegates and the instructions provided to achieve that task.<sup>114</sup>

Add to this inquiry deference to agencies under the *Chevron* doctrine.<sup>115</sup> When a statute is clear, a court's inquiry ends. But when there is ambiguity, a court will defer to an agency's permissible interpretation of that ambiguous text.<sup>116</sup> That “court may not substitute its own construction of a statutory provision for a reasonable interpretation made by

<sup>106</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>107</sup> *See id.* at 412 n.29 (“Because of this ambiguity [in the legislative committee reports] it is clear that we must look primarily to the statutes themselves to find the legislative intent.”).

<sup>108</sup> *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011).

<sup>109</sup> *Id.* at 574.

<sup>110</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018).

<sup>111</sup> *Textualism As Fair Notice*, *supra* note 105, at 542.

<sup>112</sup> *Id.* (cleaned up).

<sup>113</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).

<sup>114</sup> *Id.* at 2123-24.

<sup>115</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>116</sup> *Id.* at 842-45.

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the administrator of an agency.”<sup>117</sup> If through ambiguity Congress “explicitly left a gap for the agency to fill,” then courts will consider that as an express delegation of authority.<sup>118</sup>

Ambiguity, however, may be in the eye of the beholder. “Of course, there is no errorless test for identifying or recognizing ‘plain’ or ‘unambiguous’ language.”<sup>119</sup> In other words, “[o]ne judge’s clarity is another judge’s ambiguity.”<sup>120</sup> And “[a]s is all too often the case with deceptively simple statutory provisions,” a statutory provision—especially one addressing jurisdiction—“admits of a troublesome ambiguity.”<sup>121</sup> The ambiguity may arise when the law is subject to more than two meanings, or when the language confronts the realities of trade and commerce.<sup>122</sup> And if courts cannot defer to Congress’s interpretation of a statute, then how can they defer to the executive agency’s interpretation?<sup>123</sup>

Given that the textualist purview that Congress now faces is more demanding than the more purposivist approach that dominated in 1972, one would think that courts would turn a more critical eye toward the stunted hurdle that is the nondelegation doctrine. Not so—or at least, not yet. Even through the exacting textualist eye, “once a court interprets the statute, it may find that the constitutional question all but answers itself.”<sup>124</sup> In its most recent nondelegation case, *Gundy v. United States*, the Court considered a statute giving the Attorney General “authority to specify the applicability of” sex offender requirements to those convicted before the law’s enactment.<sup>125</sup> And in holding that the law did not violate the nondelegation doctrine, the Court’s plurality noted that if this “delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.”<sup>126</sup> Even in a textualist’s world, nondelegation may have no home. With *Gundy*, the Supreme Court entrenched the doctrine’s impotence and left it without a cure. Perhaps it is time to move on—or perhaps not.

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<sup>117</sup> *Id.* at 843-44.

<sup>118</sup> *Id.*

<sup>119</sup> *United States v. Turkette*, 452 U.S. 576, 580 (1981).

<sup>120</sup> Judge Brett Kavanaugh, “The Role of the Judiciary in Maintaining the Separation of Powers” Joseph Story Lecture, The Heritage Foundation (Feb. 1, 2018), available at <https://www.heritage.org/sites/default/files/2018-02/HL1284.pdf>.

<sup>121</sup> *Phillips Petroleum Co. v. F.E.R.C.*, 792 F.2d 1165, 1166 (D.C. Cir. 1986).

<sup>122</sup> Ruth Bader Ginsburg, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1421-22 (1987).

<sup>123</sup> Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1234 (2016).

<sup>124</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).

<sup>125</sup> *Id.* at 2122.

<sup>126</sup> *Id.* at 2130.

With his dissent in *Gundy*, Justice Gorsuch (joined by Chief Justice Roberts and Justice Thomas) would have given the nondelegation doctrine teeth.<sup>127</sup> Though Justice Alito did not join the *Gundy* dissent, he wrote separately to acknowledge that he would reconsider nondelegation when there was a majority for him to join.<sup>128</sup> And Justice Kavanaugh—who took no part in considering and deciding *Gundy*—later expressed a desire to consider the nondelegation doctrine in future cases.<sup>129</sup> With at least five justices interested in revisiting nondelegation, the nondelegation doctrine appears dormant but not extinct.

### C. THE NONDELEGABLE POLICY OF DECIDING WHAT WATERS THE CLEAN WATER ACT REGULATES

Given this renewed interest, the Clean Water Act and its jurisdictional phrase, “waters of the United States,” violates the nondelegation doctrine. Congress rightly decided that water quality in the United States demanded regulation. It created a permit or prohibit enforcement structure, buttressed with investigative directives and grant programs. And it left to the agencies the tough decision of deciding what “waters” to regulate. Fair enough, as Congress need not legislate with precision.

But Congress must at least provide the agencies with an “intelligible principle” that allows Congress, the courts, and the public to know whether the agencies are following Congress’s guidance. Congress could have listed particular waters that it intended to regulate. Or it could have excluded waterbodies it desired not to regulate. Better yet, Congress could have provided criteria that the EPA and Army Corps must rely on in identifying which of the waters fell within the Act’s jurisdiction and which fell outside it. Benchmarks like these could provide the meaningful way to know what the law requires and whether the agencies and public are following it.

Yet the only standard Congress offered was that the agencies regulate “waters of the United States.” Without a commonly understood meaning, its meaning was—and remains—unascertainable. Does this phrase include only waters, or does it also include wetlands, pocosins, bogs, and desert swales? Does the phrase reach only traditionally navigable-in-fact waters, or does it encompass all waters—whether navigable

<sup>127</sup> *Id.* at 2131-48 (Gorsuch, J., dissenting) (discussing a restated “intelligible principle” test that asks whether the statute assigns to the executive only the responsibility to make factual findings, or whether it sets forth facts that the executive must consider and criteria against which to measure them, or whether Congress—not the Executive—made the policy judgment).

<sup>128</sup> *Id.* at 2130-31 (Alito, J., concurring).

<sup>129</sup> *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).



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or otherwise? If these hyper-technical questions only addressed issues at the fringe of the agencies' jurisdiction, then the constitutional inquiry would not be as difficult to resolve. But these questions go to the heart of the Act, with particular attention to its section 404 dredge and fill permitting structure.<sup>130</sup> If you fill in a wetland, you may be violating the Clean Water Act—or not. The answer depends as much on the wetland's location as it does the year in which the activity takes place.

Justice Breyer tried clarifying the scope of “waters of the United States” by interpreting it so it reflects Congress's intent to fully exercise its Commerce Clause powers and “leave the enforcing agency with the task of restricting the scope of that definition, either wholesale through regulation or retail through development permissions.”<sup>131</sup> Even if we could glean that intent from the statute's text (a murky “if”), the interpretation concedes that Congress offered no guidance to the agencies as to how far the Clean Water Act's jurisdiction extends. At most, it sets a floor at “navigable waters” and a ceiling at “waters.” But even then, land like wetlands is considered to be jurisdictional. So its ceiling is not limited to even “waters.” Without much of any guidance, let alone substantial guidance, the Act lays down no clear rule and provides no framework for the agencies to follow in determining which waters the Act regulates. Even under the easily surmountable test outlined in the *Gundy* plurality, this statutory delegation of authority violates the nondelegation doctrine.

## IV. ANTITHESIS 2: VOID-FOR-VAGUENESS DOCTRINE

The rise of textualism and its concern for fair notice sprang from similar constitutional roots as the concern for excessively vague laws. This concern is known as the void-for-vagueness doctrine.<sup>132</sup> Under it, courts emphasize the Fifth Amendment's prohibition on depriving persons of life, liberty, or property without due process of law.<sup>133</sup> The government violates this guarantee through laws that fail to give people of “ordinary intelligence” fair notice of the conduct it punishes, or through laws so standardless that they invite arbitrary enforcement.<sup>134</sup> Prohibiting vagueness in criminal statutes thus protects due process by ensuring the “ordinary notions of fair play and the settled rules of law.”<sup>135</sup>

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<sup>130</sup> 33 U.S.C. § 1344.

<sup>131</sup> Rapanos, 547 U.S. at 811 (Breyer, J., dissenting).

<sup>132</sup> Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 108; Johnson v. United States, 576 U.S. 591, 595 (2015).

<sup>135</sup> Johnson, 576 U.S. at 595 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

## A. VAGUENESS AS THE OTHER SIDE OF THE NONDELEGATION COIN

A void-for-vagueness doctrine shares with the nondelegation doctrine the same concerns over separation of powers. With a vague statute, Congress has impermissibly delegated basic policy matters to those enforcing the law, such as agencies.<sup>136</sup> A vague law invites the agency to resolve disputes on “an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”<sup>137</sup> With vague, uncertain statutes, how is the ordinary person supposed to know what conduct the statute polices? “A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?”<sup>138</sup> With vague statutes, the answer is not evident.

To be sure, there are many otherwise constitutional laws that place a person’s fate on their ability to estimate rightly to “some matter of degree.”<sup>139</sup> Citizens bear some responsibility for resolving ambiguity by playing “an active civic role” in informing themselves of what a law requires.<sup>140</sup> But if the regulated community cannot readily understand what conduct the statute prohibits, then the statute fails to provide fair warning.<sup>141</sup> Without fair warning, a vague statute will trap the innocent.<sup>142</sup>

That is why the void-for-vagueness doctrine is “a corollary of the separation of powers,” much like the nondelegation doctrine.<sup>143</sup> Like the nondelegation doctrine and its “intelligible principle,” the void-for-vagueness doctrine requires that Congress, and not any other branch, define the basics of what conduct the law permits or prohibits.<sup>144</sup> As with nondelegation doctrine, “perhaps the most meaningful aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.”<sup>145</sup> A legislature may not abdicate its responsibility “for setting the standards of the criminal law” by enacting standardless statutes that allow the executive and judicial branches “to pursue their personal predilections.”<sup>146</sup>

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<sup>136</sup> Grayned, 408 U.S. at 108-09.

<sup>137</sup> *Id.*

<sup>138</sup> Johnson, 576 U.S. at 597 (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing *en banc*)).

<sup>139</sup> *Id.* at 603-04 (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)).

<sup>140</sup> *Textualism As Fair Notice*, *supra* note 105, at 548.

<sup>141</sup> *Id.* at 550 (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

<sup>142</sup> Grayned, 408 U.S. at 109.

<sup>143</sup> *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

<sup>144</sup> *Id.*

<sup>145</sup> *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

<sup>146</sup> *Id.* at 575.

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But unlike the nondelegation doctrine, as some have argued, the void-for-vagueness doctrine rests on “principled judicial application” that does not “threaten to unsettle so much of modern government.”<sup>147</sup> Unsurprisingly then, courts have relied on the void-for-vagueness doctrine to strike down unconstitutional statutory provisions while the nondelegation doctrine finds refuge only in dissents and academia.

The void-for-vagueness doctrine’s extent, however, is limited. What ambiguity the Constitution tolerates depends on the statute. Economic and civil enactments may enjoy greater ambiguity, while laws imposing criminal penalties require greater precision.<sup>148</sup> With economic and civil statutes, courts are more willing to resolve ambiguity by deferring, “perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it.”<sup>149</sup> When those charged with enforcing the statute adopt regulations, courts may then charge the regulated community with some duty “to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.”<sup>150</sup> As the Supreme Court noted in dictum in its 1982 decision, *Village of Hoffman Estates*, an “administrative regulation will often suffice to clarify a[n economic regulation] standard with an otherwise uncertain scope.”<sup>151</sup>

In the nearly-forty years since *Village of Hoffman Estates*, the Supreme Court has embraced a greater focus on textualism. In turn, the Court increased its demands of Congress’s statutes—whether criminal or civil—by focusing more on the statute’s language. Two years after the Court decided *Village of Hoffman Estates* it decided *Chevron*. While the Court has not overturned *Chevron* and courts still defer to reasonable agency interpretations of genuinely ambiguous statutes, the Court appears less willing to subordinate to the other branches its interpretative powers to say what the law is.<sup>152</sup> This hesitancy may arise from concerns for the separation of powers and for ensuring that statutes provide fair notice. Allowing agencies to clarify vague civil statutes with regulations aligns with *Chevron*. But is that consistent with textualism’s goal of providing fair notice by approximating how average, reasonable citizens would interpret statutes?<sup>153</sup> The question touches on the intersection of nondelegation, vagueness, and textualism, with no ready answer.

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<sup>147</sup> *Nondelegation Canons*, *supra* note 97, at 315.

<sup>148</sup> *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498-99 (1982).

<sup>149</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

<sup>150</sup> *Vill. of Hoffman Ests.*, 455 U.S. at 498.

<sup>151</sup> *Id.* at 504.

<sup>152</sup> See Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 934-35 (2021) (discussing how Chief Justice Roberts and Justices Thomas, Breyer, Alito, Gorsuch, and Kavanaugh have expressed either skepticism of or a desire to overturn *Chevron*).

<sup>153</sup> *Textualism As Fair Notice*, *supra* note 105, at 542.

Whatever the answer, it seems that courts are more willing to reconsider the constitutionality of an ambiguous, standardless statute on the void-for-vagueness doctrine than on the nondelegation doctrine.

#### B. AN UNCONSTITUTIONALLY VAGUE CLEAN WATER ACT

A standardless “waters of the United States” definition violates the void-for-vagueness doctrine. Given the historical and commonly understood meaning of “navigable waters” in 1972, if Congress had left the phrase undefined, it would have passed muster under the void-for-vagueness doctrine. Forgoing that path, Congress expanded the scope of the Act’s jurisdiction to an uncertain reach.

Complicating this uncertainty is that the Act criminalizes violations with fines and imprisonment.<sup>154</sup> As a criminal statute, courts expect that Congress legislates with greater precision.<sup>155</sup> Yet, the “reach of the Clean Water Act is notoriously unclear.”<sup>156</sup> The Supreme Court’s *Rapanos* opinion reflects this lack of clarity. If neither the agencies nor Supreme Court justices can arrive at a consensus about what Congress meant by “waters of the United States,” then how could we expect a person of ordinary intelligence to know what the law requires? Must they determine its reach by hydrological or biological analysis? Other expert evidence? Google? Gut instinct?<sup>157</sup>

Consider, too, that a permit under the Clean Water Act takes more than two years on average to obtain and costs several hundred thousand dollars.<sup>158</sup> And that effort will be subject to the ebbs and flows of changing regulations between administrations, forcing the regulated community to track the Federal Register and latest district and circuit court opinions. This demand implies that a person of ordinary intelligence will have fair notice so long as they perform the exhausting task of tracking, for instance, in which counties in New Mexico the 2015 regulation applies as a result of an injunction issued in pending litigation.<sup>159</sup> It also

<sup>154</sup> 33 U.S.C. § 1319(c).

<sup>155</sup> *Vill. of Hoffman Ests.*, 455 U.S. at 498-99.

<sup>156</sup> *Sackett*, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

<sup>157</sup> *Johnson v. United States*, 576 U.S. 591, 597 (2015).

<sup>158</sup> See *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (“The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.”).

<sup>159</sup> Ellen M. Gilmer & Ariel Wittenberg, *Court Sides with WOTUS Foes As Legal Fight Gets Messier*, GREENWIRE (May 29, 2019), <https://www.eenews.net/greenwire/stories/1060425141/> (discussing how ten counties in New Mexico joined a coalition that obtain an injunction against the Clean Water Rule, leaving it unclear whether the Clean Water Rule was stayed in those ten counties or the entire state).

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implies that they have read the ninety-three page Navigable Waters Protection Rule that followed.<sup>160</sup> When done performing that task, that person must also keep tabs on litigation over that Rule, including whether the Tenth Circuit has lifted a district court injunction prohibiting enforcement of the Rule,<sup>161</sup> or whether the District Court for the Northern District of California denied a similar request for an injunction.<sup>162</sup> Perhaps one court may take sympathy and issue a nationwide injunction.<sup>163</sup>

Courts thus have demanded that a person of ordinary intelligence is supposed to know what the law regulates. But “[w]ho can even attempt all that, at least without an army of perfumed lawyers and lobbyists?”<sup>164</sup>

Yet that is what the Clean Water Act demands of the public.<sup>165</sup> Take the recent Ninth Circuit decision, *United States v. Lucero*.<sup>166</sup> The Ninth Circuit began by acknowledging, as it must, that “[m]ost Americans would be surprised to learn that dry land might be treated as ‘navigable waters’ under the Clean Water Act.”<sup>167</sup> But that surprise is immaterial because, according to the Ninth Circuit, a person must still engage in the “time-consuming, difficult, and expensive” task of determining whether a particular piece of *land* fits within the Clean Water Act’s definition of “waters of the United States.”<sup>168</sup> At issue in the case was Mr. Lucero’s dumping of fill into a wetland between July and August 2014.<sup>169</sup> And during those summer months, the agencies had one regulatory definition of “waters of the United States” in effect.<sup>170</sup> So the court rejected the criminal defendant’s void-for-vagueness argument because the agencies’ regulation defining “waters of the United States” at

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<sup>160</sup> Navigable Waters Protection Rule, 85 Fed. Reg. 22,250.

<sup>161</sup> *Judge Blocks WOTUS Rule in Colorado While Legal Challenges Increase*, InsideEPA.com (June 22, 2020), <https://insideepa.com/daily-news/judge-blocks-wotus-rule-colorado-while-legal-challenges-increase> (U.S. District Court for the District of Colorado issued a stay in Colorado only that blocked implementation of the 2020 regulation).

<sup>162</sup> *California v. Wheeler*, 467 F. Supp. 3d 864 (N.D. Cal. 2020).

<sup>163</sup> *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018).

<sup>164</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>165</sup> See *United States v. Lucas*, 516 F.3d 316, 328 (5th Cir. 2008) (“Even in the absence of disputed agency warnings, the prevalence of wet property at BHA and an area network of creeks and their tributaries leading to the Gulf, some of which connected to wetlands on the property, should have alerted ‘men of common intelligence’ to the possibility that the wetlands were waters of the United States under the CWA.”); *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 917 (5th Cir. 1983) (“if they wished to protect themselves from liability they could have applied for a permit and thus obtained a precise delineation of the extent of the wetland, as well as the activities permissible on the land.”).

<sup>166</sup> *United States v. Lucero*, 989 F.3d 1088 (9th Cir. 2021).

<sup>167</sup> *Id.* at 1091.

<sup>168</sup> *Id.* at 1102.

<sup>169</sup> *Id.* at 1092.

<sup>170</sup> Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,036 (Aug. 25, 1993).

the time of the incident—codified at 33 C.F.R. § 328.3(b) in 2014—was “nevertheless clear.”<sup>171</sup>

Pause to reflect on this outcome. Had Mr. Lucero waited ten months, he may have faced a different regulation: the Clean Water Rule. Had he waited a little more after that, a still different regulation would have governed.

But set aside how the regulation had been substantially “revised several times” since Mr. Lucero’s criminal act.<sup>172</sup> His void-for-vagueness argument failed, not because the statute was clear, but because the regulation in effect at the time of the act (but later replaced) was clear.<sup>173</sup>

Perhaps administrative regulations may sufficiently narrow potentially vague statutes.<sup>174</sup> But even when allowed, courts will extrapolate the statute’s meaning from a regulation only “to some degree.”<sup>175</sup> Agencies faced with an unconstitutionally standardless delegation of power cannot cure Congress’s violation “by adopting in its discretion a limiting construction of the statute.”<sup>176</sup> Nor can an agency cure the violation by declining to exercise some of that delegated legislative power.<sup>177</sup> Nor should courts allow agencies to cure an unconstitutionally vague statute through regulation—especially in the criminal context.<sup>178</sup> Allowing agencies to save the unconstitutional statute in this way risks ad hoc, subjective, arbitrary, and discriminatory enforcement.<sup>179</sup> Deferring to agency interpretations of an unconstitutionally vague statute is all the more troubling when the agency interpretations lack any “consistency with earlier and later pronouncements.”<sup>180</sup>

Having batted around for decades many competing regulations that interpret a vague Clean Water Act, one wonders why courts would extrapolate to *any* degree a statute’s meaning from a regulation to cure a void-for-vagueness challenge. In *Lucero*, the Ninth Circuit avoided the challenge of interpreting “waters of the United States” by considering exclu-

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<sup>171</sup> Lucero, 989 F.3d at 1102.

<sup>172</sup> *Id.* at 1104.

<sup>173</sup> *Id.* at 1101-02.

<sup>174</sup> See *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 504 (1982) (“The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance.”).

<sup>175</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

<sup>176</sup> *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001).

<sup>177</sup> *Id.* at 473.

<sup>178</sup> See *George v. Junior Achievement of Cent. Ind., Inc.*, 694 F.3d 812, 816 (7th Cir. 2012) (finding that the Secretary of Labor has no delegated rulemaking or adjudicative authority when interpreting statutes they are enforcing as its prosecutor).

<sup>179</sup> *Grayned*, 408 U.S. at 108-09.

<sup>180</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

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sively the agencies' regulations and not the statutory language.<sup>181</sup> This type of back-door *Chevron* analysis avoids the court's constitutional duty to say what the law is.<sup>182</sup> "Whether the Government interprets a criminal statute too broadly . . . or too narrowly . . . a court has an obligation to correct its error."<sup>183</sup>

For now, courts have punted on their obligation to correct the constitutional violation happening with the Clean Water Act. And the resulting regulatory changes between each successive administration invites the question: *What fair notice does the law provide if its jurisdictional reach is subject to major changes with each new administration?* Because Congress impermissibly delegated to the executive branch the basic policy decision of what waters the Act regulates, the Act's "navigable waters" definition violates the void-for-vagueness doctrine.

#### V. SYNTHESIS: A SUSTAINED RESOLUTION DEMANDS A LEGISLATIVE COMPROMISE

There is significant overlap and redundancy between the nondelegation and void-for-vagueness doctrines. Each ensures that, when enacting a statute, Congress directs agencies in clear enough terms to provide the regulators and the regulated with adequate notice about what conduct that statute regulates. And each ensures accountability by requiring that the branch most accountable to the People—Congress—makes the tough policy decisions.

Congress failed to make that tough policy decision in 1972 with the Clean Water Act. The regulatory volleyball happening since is a symptom of an underlying problem with the statute. The substantial ambiguity and vagueness in the phrase "waters of the United States" provides significant discretion to the EPA and Army Corps to fashion their own definition about the Act's outer limits. This discretion violates the separation of powers and its related nondelegation and void-for vagueness doctrines.

While this article intends to explain why the Clean Water Act violates these two doctrines, it does not intend by implication to remove or diminish the tools our government requires to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.<sup>184</sup> The Act's success despite its constitutional infirmities shows why a healthy country needs effective water quality control. This article thus

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<sup>181</sup> United States v. Lucero, 989 F.3d 1088, 1101-05 (9th Cir. 2021).

<sup>182</sup> Marbury v. Madison, 5 U.S. 137, 177 (1803).

<sup>183</sup> Abramski v. United States, 573 U.S. 169, 191 (2014).

<sup>184</sup> 33 U.S.C. § 1251.

aims to show that the Act must be improved. And for now, that task of improvement is for Congress, and only for Congress.

Of course, Congress's attempt at a solution might not resolve the problem. A lack of consensus or uncertainty may remain after Congress amends the Act. And the next Congress may undo the amendment with an amendment of its own, creating a game of legislative volleyball much like the regulatory volleyball of old. In other words, the synthesis (legislative action) may become a new thesis (legislative uncertainty), and the dialectic starts anew.<sup>185</sup> After all, Publius forewarned of the "internal effects of a mutable policy" out of concern for Congress's—rather than the Executive's—constant repealing and revising of laws.<sup>186</sup>

But a legislative volleyball outcome is still more constitutionally sound than the status quo because the elected members of Congress—rather than agency officials—will have made the policy choice about what the Clean Water Act regulates. Moreover, that outcome may seem unlikely as it assumes a responsive Congress that produces legislation with the breakneck frequency of less politically accountable agencies. The problem our Nation faces is not a reactive Congress, but one that does not act at all.

Continued intransigence among our representatives and senators has laid substantial uncertainty upon the regulated community. To know what the law requires, go ask your local lawyer or hydrologist. Though be forewarned: Their good advice will expire with the next court case or next presidential election. This same uncertainty also undermines effective stewardship of our environment. When technology or case law exposes a regulatory gap, neither agencies nor courts can fill the resulting void easily when no statute allows them.

So, in a word, this article is a warning. Having harmed both the environment and regulated community through avoidable uncertainty, Congress must act. It must seek the input of hydrologists, biologists, and other scientists; consider how federal jurisdiction affects states and regulated entities alike; and heed the institutional knowledge of the enforcing federal and state agencies. Our members of Congress must compromise and forge legislation with clear bounds about what the law requires. And in the end, despite its existing defects, we may have a Clean Water Act still. But only if we can keep it.

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<sup>185</sup> *Hegelian Reflections*, *supra* note 12, at 188 (the dialectic reconciles the thesis and antithesis "in a 'synthesis' which becomes another 'thesis' and the process starts again.").

<sup>186</sup> THE FEDERALIST NO. 62 (Alexander Hamilton or James Madison).



