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The Antiregulatory Arsenal, Antidemocratic Can(n)ons, and the Waters Wars

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Abstract

The Clean Water Act (CWA) has become a centerpiece in an enduring multifront battle against both environmental regulation and federal regulatory power in all of its settings. This article focuses on the emergence, elements, and linked uses of an antiregulatory arsenal now central to battles over what are federally protected "waters of the United States." This is the key jurisdictional hook for CWA jurisdiction, and hence, logically, has become the heart of CWA contestation. The multi-decade battle over Waters protections has both drawn on emergent antiregulatory moves and generated new weapons in this increasingly prevalent and powerful antiregulatory arsenal. This array of antiregulatory skews and frames can be decisive, especially when wielded before sympathetic judges skeptical about the administrative state or environmental protection. The article questions the legitimacy of this antiregulatory arsenal, points out ways these antiregulatory moves in the Waters setting often dodge actual statutory choices, and identifies countervailing strategies that are more respectful of democratic choices. The new antiregulatory canons are akin to weaponized cannons empowering judges. The article calls for judges to apply more legislatively respectful frames in exploring questions of legal meaning, statutes' policy priorities, or regulatory power as allocated by Congress and wielded by agencies based on scientific or factual criteria prioritized in governing statutes.

Introduction

The Clean Water Act (CWA) has become a centerpiece in an enduring multifront battle against both environmental regulation and federal regulatory power in all of its settings. Looking at this law's track record, or particular regulations and related battles, could lead a reader to misunderstand key drivers of waters-linked legal choice and contestation. Such contestation over waters protection turns on far more than just what Congress wrote, or changing science, or interest group realignments. This article focuses on the emergence, elements, and linked uses of an antiregulatory arsenal now central to battles over what are federally protected "waters of the United States" (hereinafter, either WOTUS or Waters).[1] This is the key jurisdictional hook for CWA jurisdiction, and hence, logically, has become the heart of CWA contestation.

This article traces key moves and developments in this multi-decade battle over Waters protections. As with much law, developments concerning the CWA and WOTUS both draw on regulatory moves and countermoves, but also have themselves generated new weapons in this increasingly prevalent and often powerful antiregulatory arsenal. This array of antiregulatory

[1] Clean Water Act § 502(7), 33 U.S.C. § 1362(7).

skews and frames can be decisive, at least when wielded before sympathetic judges skeptical about the legitimacy or benefits of the administrative state or environmental protection. The article closes by identifying countervailing strategies and arguing for a more democracy-respecting and science-focused approach to the issue of Waters protection and in other environmental regulation battles. The new antiregulatory canons are now more akin to weaponized cannons empowering judges than neutral frames or interpretive canons applied to questions of legal meaning, policy priorities, or regulatory power as allocated by Congress and wielded by an agency based on scientific or factual criteria set forth in statutes.

I. A Brief Review of the Waters Question's Statutory Roots and Early Interpretive Stability

This Part provides a brief review of the CWA provisions at issue in Waters battles and early approaches to that question.

The CWA extends federal jurisdiction to regulate water pollution to "navigable waters," which in turn are defined as "the waters of the United States."[2] The "navigable waters" language was drawn from the Rivers and Harbors Act (RHA).[3] The RHA mainly regulated waterways obstructions, but also regulated water pollution.[4] In early enforcement actions and regulatory interpretations, the Army Corps of Engineers (the Army Corps) interpreted the RHA's Section 13 "navigable waters" language to limit their regulatory power to materials specifically impeding navigation.[5] By around 1970, as pollution concerns intensified, more expansive views of the RHA's protections were asserted by anti-pollution enforcers and, eventually, the Army Corps itself.[6]

The statutory definition of "navigable waters" included in the CWA—"waters of the United States"—built on RHA law, but went even further. Discussions about this 1972 amendment state a desire to provide broader regulatory power than in the RHA.[7] An early narrow Army Corps interpretation of this CWA Waters language was judicially rejected for unduly constraining the agency's own power.[8]

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[2] Id. (defining "navigable waters"); at § 1251(a)(1) (stating it "is the goal that discharge of pollutants into the navigable waters by eliminated by 1985"); § 1362(12) (defining regulated "discharge of a pollutant" as meaning "any addition of any pollutant to navigable waters").

[3] *See supra* Part II.C.iv.

[4] Rivers and Harbors Act of 1899, ch. 435, § 13, 30 Stat. 1121, 1152. For tracing of this history, *see* William L. Andreen, *The Evolution of Water Pollution Control in the United States-State, Local, and Federal Efforts, 1789-1972: Part II*, STAN. ENVTL. L. J. 215, 221, 259, 293-94 (2003) (tracing "navigable waters" law from the RHA to CWA); William W. Sapp et al., *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term Navigable Waters*, 36 ENVTL. L. REP. NEWS & ANALYSIS 10190 (2006) (recounting "navigable waters" developments).

[5] Andreen, supra note 252, at 221–22.

[6] Id. at 258-59.

[7] *Id.* at 280–81.

[8] *See* Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) (rejecting "Waters" regulations promulgated by the Army Corps of Engineers as too narrow in scope); *see also* United States v. Ashland Oil &

For roughly the next 45 years, all government actors, including both Democratic and Republican administrations, embraced or at least concurred in the view that this language extended federal jurisdiction to protect Waters as far as the Commerce Clause would allow.[9] The Supreme Court had decades earlier, in *Appalachian Power*, strongly affirmed that federal authority over the nation's waters extended beyond a mere focus on shipping-linked "navigable-in-fact" waters. The Court stated that "[n]avigability . . . is but a part of this whole" of federal Commerce Clause authority.[10] Similarly, the Court had upheld jurisdiction over waters due to flood control rationales.[11] And further, in the more broadly significant *Hodel* case, the Supreme Court held that pollution-focused regulation aimed at preventing environmental harms from commercial activity easily surmounted challenges to federal constitutional power due to numerous facets of commerce implicated.[12] Nothing in that case focused on interstate water flows and linked commerce as a necessary foundation for federal environmental laws. Promulgated CWA regulations issued during the 1970s, which were only modestly adjusted thereafter, fleshed out particular types of waters subject to federal protection, including a sweep-up provision protecting waters used for, or subject to use for, or affecting, interstate commerce.[13]

As a result, both industrial dischargers and those seeking to dispose dredge or fill materials encountered a strong CWA that disfavored filling of any Waters, plus a requirement of permits for any industrial discharges, with ever tightening reductions in permitted discharged pollution. But because water-edge land is of immense value for development, plus industrial polluters and the agricultural sector claimed concerns with regulatory uncertainties and possible liability, success in weakening the CWA's Waters reach offered a huge economic opportunity.[14]

Transp'n Co., 504 F.2d 1317 (1974) (rejecting polluter arguments that oil spill into a nonnavigable tributary was beyond federal constitutional power and outside the Act's Waters language and antipollution mandates).

[9] For discussion of this expansive intent, *see* Erin Ryan, *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, ENV'T L. 277, 285–294 (2016); William W. Sapp et al., *The Float A Boat Test: How to Use It to Advantage in This Post-Rapanos World*, 38 ENV'T L. REP. NEWS & ANALYSIS 10439, 10442 (2008); Sapp et al., *supra* note 252, at 10201-06.

[10] U.S. v. Appalachian Elec. Pwr. Co., 311 U.S. 377, 426 (1940). For a similar conclusion regarding federal constitutional authority over a dam on a nonnavigable stream with a goal of "control of destructive floodwaters," see United States v. Grand River Dam Authority, 363 U.S. 229, 231 (1960) (also deferring to legislative judgments about beneficial effects on the arteries of interstate commerce).

[11] Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525 (1941) (upholding federal power to protect watersheds for flood control).

[12] Hodel v. Virginia Surface Mng. & Reclamation Ass'n, Inc., 452 U.S. 264, 275-83 (1981).

[13] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41250 (Nov. 13, 1986) ("1986 Rule") (finalizing rule regulating wetlands, those adjacent to other waters, all interstate waters, and all intrastate waters the "use, degradation or destruction of which could affect interstate or foreign commerce"). The Waters-linked promulgated regulation were largely stable from 1977 to 2015, and are found at 33 C.F.R. Part 328 (regulations providing "Definition of Waters of the United States"); 33 C.F.R. Part 230 (regulations setting forth guidelines for assessing dredge or fill disposal).

[14] Due to agricultural exclusions and the rarity of agricultural activities triggering all of the elements required for being a regulated point source discharge, it remains unclear if the agricultural sector's frequent opposition to Waters jurisdiction is personal to that sector or part of an overall industry or Chamber of Commerce unified weakening strategy. Concentrated feeding operations—CAFOs—are expressly subject to jurisdiction under the CWA if polluting a jurisdictional water. See 33 U.S.C. Sec. 502(14) (defining "point source" to include

A 1980s effort to weaken the power of the Environmental Protection Agency (EPA) and the Army Corps of Engineers (the Corps) to protect waters "adjacent" to larger "navigable in fact" waters suitable for ships, shipping, and commerce, or perhaps adjacent to a clear wetland, came up short. The Supreme Court in *Riverside Bayview Homes*, in 1985, unanimously agreed that delegated, expert, science-intensive regulatory judgments about the appropriate line between land and water were worthy of deference.[15] 1977 amendments, in a provision directed at state delegated programs, had added explicit language about regulation of "adjacent wetlands," making the outcome easier as a statutory interpretation matter, and was central to the ruling's affirmation of federal power to protect the wetlands at issue.[16]

This ruling reflected and was consistent with the period's low-conflict consensus about the reach of federal power under the Constitution, the need for judicial deference to expert regulatory judgments, and also agreement about the CWA's reach.[17] Land and water exist on a continuum, and the CWA made protecting the country's Waters from pollution into a national priority. Expert regulatory judgments about where to draw the protective line were not suitable for judicial second-guessing.

"concentrated animal feeding operation" but also exclude "agricultural stormwater discharges and return flows from irrigated agriculture")

[15] *Riverside Bayview*, 474 U.S. at 134 (emphasizing the science and pragmatic expert judgment involved in drawing the line on the continuum between land and water).

[16] Id at 135-39 (discussing the new language, legislative discussions, plus defeated amendments and the common assumptions they revealed about the Act's reach).

[17] See, e.g., *Hodel*, supra note #, 452 U.S. at 275-93 (upholding federal power over mining harms with deference to congressional judgments about policy and finding constitutional authority unproblematic).

II. Framing and Naming the Proregulatory Consensus and Emergent Antiregulatory Arsenal in Waters Jurisdiction Disputes

Since *Riverside Bayview*, little has been settled. Waters jurisdiction has been under perpetual attack, with the decisive antiregulatory Waters shift occurring in the *Solid Waste Agency of Northern Cook County*, or *SWANCC,* case.[18] This Part first examines the preceding period of stability about regulatory power from a broader legal perspective, then turns to the emergence of the antiregulatory arsenal, analyzing how this arsenal has both shaped Waters battles and emerged and been strengthened in Waters disputes.

A. The pre-*SWANCC* proregulatory frames

The regulatory—or perhaps proregulatory—building blocks or frames that led to three decades of Waters stability had several key elements.

First, by the early 1940s, the Supreme Court had affirmed several elements of substantial federal regulatory power. Most importantly, Commerce Clause authority was viewed as expansive, including authority over waters extending beyond mere protection of interstate shipping.[19] For decades, congressional judgments that there were constitutionally sufficient commerce links were close to unreviewable.[20] This was partly due to a shift in the Court's jurisprudence, but also linked to United States growth as an integrated, vibrant, center of commerce with people, goods, and production's benefits and harms all pervasively crossing state borders.[21]

As confirmed in the foundational cases like *Wickard v. Filburn* and *Hodel*, even seemingly small and localized activities and resulting effects linked to statutory protections provided commerce linkages justifying federal jurisdiction.[22] *Gonzalez v. Raich* confirmed, or at least clarified, that adequate commerce links were assessed at the programmatic, aggregate level; seemingly small-scale regulatory interventions or fights were not lost from federal jurisdiction just because they, on their own, were small.[23]

Second, and similarly, statutory savings clauses, floor preemption provisions, and cooperative delegated program federalism designs were used in most environmental and other risk regulation laws.[24] Hence, Congress politically sorted out the federalism-linked choices, setting

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[18] Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (hereinafter *SWANCC).*

[19] See supra notes # to # and accompanying text (introducing *Appalachian Power* and other early major cases about waters and federal power).

[20] See generally Robert A. Schapiro & William W. Buzbee, Unidimensional Federalism, Power and Perspective in Commerce Clause Adjudication, 88 Cornell L. Rev. 1199 (2003) (tracing and critiquing changing Commerce Clause jurisprudence and shift from deferential review to closer more skeptical views).

[21] Id.

[22] Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal power to regulate home-grown wheat due to commercial ripple effects of such conduct); Hodel, supra.

[23] *Gonzalez v. Raich*, 545 U.S. 1, 23 (2005); *see id.* at 37 (Scalia, J. concurring).

[24] See generally William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547 (2007) (presenting and analyzing forms of federal and state power allocations in federal law,

foundational minimum federal requirements, but also welcoming state cooperative efforts and state choices to do more.[25] Such designs did not trigger any major backlash in politics or the courts. The Supreme Court in several major environmental law decisions carefully traced what was federal and what statutes left to state judgment, declining to redraw those lines.[26] As a result, expansive federal power tended to overlap and intertwine with state and local regulation. Earlier constitutional "dual federalism" views that federal and state power were mutually exclusive were jettisoned. Concurrence, not mutual exclusion, became the federal norm.[27]

Third, the seriousness of environmental degradation and ripple effects of pollution for years triggered in Congress a strong majority legislative consensus and bipartisan commitment. For example, although President Nixon vetoed the modern CWA 1972 Act, Congress resoundingly overrode that veto.[28] That legislative consensus was, with only occasional judicial roadbumps, met with a sympathetic judicial reception. If laws were expansive and protective, they would be enforced and interpreted fairly, with courts expressly deferring to the political branches' policymaking primacy.[29]

Not only were environmental laws read sympathetically, but agencies' implementation and enforcement actions, if undertaken in good faith, tended to receive deferential judicial review. Law interpretations were met with deference, especially after the *Chevron* case announced the "*Chevron* Two-Step."[30] That case actually involved a policy shift to embrace market-mimicking forms of environmental regulation to reduce costs, but its usually deferential framework had broader implications. It provided latitude for agencies to adjust their policies to address new risks or embrace better means to address risks.

Likewise, key Supreme Court and D.C. Circuit precedents framed most environmental cases as implicating congressional judgments about allocations of work to expert agencies that were not

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with focus on implications of federal regulatory floors and ceilings); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 Mich. L. Rev. 570 (1996) (discussing federalism rationales and designs for environmental laws).

[25] For explorations of rationales for, and benefits of, federal plus retained state power in the climate regulation setting, see William W. Buzbee, Federalism Hedging, Entrenchment, and the Climate Challenge, 2017 Wisc. L. Rev. 1037 (2017). For a citation to literature discussing climate federalism rationales, see id. at 1040-42 at notes 4 and 5.

[26] Union Electric Co. v. EPA, 427 U.S. 246 (1976) (tracing Clean Air Act's divisions and declining to find federal power to second-guess state planning choices complying with federal requirements); International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (in case centered on which state's law governed claims regarding common law pollution harms, carefully reviewing savings clauses to preserve pollution source state's common law and more stringent regulation alongside federal water pollution regulation).

[27] Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism, Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1216-19 (2003) (reviewing multiple and often overlapping ways federal regulation was found constitutional after 1937).

[28] Sapp, supra note #.

[29] See ROBERT L. GLICKSMAN, ET AL, ENVIRONMENTAL PROTECTION: LAW AND POLICY 65-69 (8th ed. 2019) (reviewing periods of environmental law and discussing consensus period of bipartisan legislative support and judicial acceptance of those policy choices).

[30] Chevron USA, Inc. v. Natural Resources Defense Council, 487 U.S. 837 (1984).

up for judicial second-guessing.[31] Congress, agencies, and reviewing courts generally agreed—as reflected in the *Riverside Bayview Homes* Waters case reviewed above-- that agencies in the risk regulation and environmental realms were working in areas of specialized expertise involving scientific, ecological, public health, and technological assessments; agency expertise far surpassed that of generalist courts.[32] This was a key underpinning of *Chevron*, but also a major rationale for deference in many cases from before and after *Chevron*.[33] Major precedents discuss the laws' goals, what Congress or agencies found about the environmental concerns, underlying science, and effectiveness of responsive measures, but with little skeptical judicial parsing or stingy reading of statutory language.[34]

During this period, especially in the 1960s and 1970s, courts actually often skewed in favor of regulatory protections and power, sometimes even chastising agencies that failed to do the protective work mandated by statutes.[35] This was especially evident in early appellate cases under National Environmental Policy Act (NEPA), where the D.C. Circuit rejected grudging formalistic compliance with that law's requirements that agencies assess the environmental effects of their actions.[36]

Lastly, statutory interpretation norms applied to the wave of post-1960s environmental laws were pluralistic, with courts tending to look at laws, underlying legislative history, and the judicial role through a sympathetic and sometimes purposive lens.[37] Courts often adopted a partner role,

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[31] For a classic statement of such attitudes, see TVA v. Hill, 437 U.S. 153, # (1978) (declining calls to narrowly read the Endangered Species Act because "it is . . . emphatically . . . the exclusive province of Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the nation").

[32] For discussion of role of expertise in judicial review of agency actions, see Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1099 (2015) (analyzing facets of agency regulatory expertise and their link to judicial deference rationales).

[33] Prior to *Chevron*, the two most significant opinions about the nature of and rationales for judicial deference to agencies were Skidmore v. Swift & Co., 323 U.S. 134, 139, 140 (1944) (explaining why agency views about law and facts deserve "respect," deference, and "in some cases decisive weight" since agency will have "more specialized experience"); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130 (1944) (stating that "it is not the court's function to substitute its own inferences of fact for the [NLRB's]" because "Congress entrusted" to NLRB such determinations).

[34] See, e.g., Hodel, supra note # (identifying congressional goals and rationales for mining regulation and finding them both constitutional and worthy of judicial deference).

[35] For an influential early such opinion, see Scenic Hudson Pres. Conference v. FPC, 354 F.2d 608 (2d Cir. 1965) (rejecting FPC failure to assess natural resource implications of a project and stating the agency could not "act as an umpire blandly calling balls and strikes for adversaries appearing before it . . . [but] has an affirmative duty to inquire into and consider all relevant facts").

[36] See, e.g., Calvert Cliffs Coordinating Comm., Inc, v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112-15 (D.C. Cir. 1971) (stating that with NEPA's enactment, the AEC "is not only permitted, but compelled, to take environmental values into account" and that its "procedural duties . . . must be fulfilled to the fullest extent possible"). The Supreme Court has, when reviewing actions under NEPA, repeatedly in recent years moved to narrow the power of the law, plus Congress has added NEPA carveouts in numerous statutes. See Glicksman, et al, supra note #, at 251-59, 279 (discussing exemptions and exclusions). For analysis of NEPA's track record in the courts, see David Adelman and Robert Glicksman, *Presidential Politics and Judicial Review*, 50 ARIZ. ST. L.J. 3 (2018).

[37] This was true across regulatory fields. With the rise of textualism, especially in the forms championed by Justice Antonin Scalia, many judges and courts shifted to a more parsimonious or stingy approach that looked at words in isolation, often with little attention to their goals and purposes. For general discussion, from the perspective of a

seeking to work with agencies and Congress to ensure laws were not derailed or rendered ineffective. Especially in the environmental law realm, judicial "resistance norms" or skews against congressional or agency power were virtually nonexistent.[38]

B. The antiregulatory arsenal begins to emerge

All of that started to change, however, with the strategic, sequential development of the increasingly prevalent, mutually reinforcing set of frames or moves that this article focuses on and refers to as the *antiregulatory arsenal*. The article now turns to that emergence by tracing those shifts as both influencing and emergent in Waters jurisprudence, with occasional integration of linked supportive developments and other major cases.[39]

The antiregulatory arsenal is, basically, a near complete reversal of the sympathetic valence of the proregulatory consensus period sketched above. It has several elements that are explored below: Constitutional frames have shifted, with federalism a prevalent scale tipper or barrier to federal environmental power, but often through avoidance canons. Deferential judicial review to delegated, expert agency judgments has given way to judicial embrace of claims of federal overreach and even growing presumptions against federal power. Judicial reluctance to second-guess agency scientific and other data-driven judgments has given way to minimal concern with where actual science or data points. Selective or exaggerated claims of hardship or a sole focus on concerns of those regulated often become the heart of challengers' claims and Supreme Court responses. This has been true even in reviewing regulatory actions with millions of lives at risk.[40]

And, lastly, the rise of textualism, especially in its more microtextual forms, has become a major facet of moves to judicially trim statutory reach and agency powers.

1. The federalism revival and clear statement skews

The Rehnquist Court's federalism revival became central to arguments and actions unsettling this bipartisan political consensus over Waters protection. After decades of deferential judicial review upholding federal laws under the Commerce Clause, a decisive shift occurred in the

supporter of textualism, see John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70 (2006). For criticism of textualism and discussion of statutory interpretation methodology shaping or contesting the antiregulatory arsenal, see infra at Parts #.

[38] See infra at notes # for discussion of antiregulatory shifts, especially with the major questions doctrine.

[39] For a larger historical legal review of the decades long push to weaken the administrative state through an array of concerted strategies, some of which are analyzed in this article see THOMAS MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL (2013).

[40] For a recent example, see National Fed'n of Indep. Business v. Dept. of Labor, --S. Ct.—(Jan. 13, 2022) (NFIB) (striking down Occupational Safety and Health Administration COVID-19 regulation of larger employers requiring worker vaccination or testing as beyond the agency's power, with focus on concerns and burdens on those opposed to vaccination, but no discussion of effects of power rejection on workers left at greater risk).

1990s. After *United States v. Lopez* upheld a challenge to congressional power under the Commerce Clause to regulate guns near schools, attacks on expansive federal environmental laws suddenly had new legal material to leverage and provided a double opportunity.[41] Given the commercial nature of most polluting activities, commercial uses of Waters, plus massive costs linked to harms to Waters, a direct challenge to Commerce Clause-based authority for environmental laws would be a long shot.

However, laws could perhaps be weakened or shrunken through constitutionally weighted "clear statement" arguments that would trim environmental laws' scope under the guise of constitutional avoidance efforts, especially focused on impingements on state turf. In addition, efforts to challenge the reach of environmental laws, rather than complete attacks on their validity, might further shift and expand upon these new limitations on federal Commerce power.[42] Basically, the constitutional shifts made in *Lopez* and the later *Morrison* case, which struck down portions of the Violence Against Women Act, created opportunities for shrinking both federal statutory and constitutional power.[43] This opportunity was seized and the law transformed in 2001.

2. SWANCC's destabilizing ruling

The recasting of Waters law took its most significant shift when the Army Corps asserted jurisdiction over abandoned Midwestern water-filled gravel pits slated for municipal landfilling. The site fell into a category called "isolated waters." The Army Corps rationale for protecting that particular site included reference to migratory bird use of the pits.[44] An earlier Federal Register discussion-- which was not a promulgated regulation, but nonetheless referred to as the "Migratory Bird Rule"-- identified migratory bird use of putative Waters as a potential grounds for federal Waters jurisdiction.[45] Although the statutory term "navigable" is defined with the broader "waters of the United States" phrase, challengers to federal power nonetheless sought to revive the defined term "navigable" as a rationale to deny or limit federal jurisdiction.[46] Challengers also were pushing against regulatory, Supreme Court, and lower court rulings that said the definition of "navigable waters" provided jurisdiction broader than a navigability focus on use by large scale ships, barges, and the like.[47]

In *SWANCC*, the Supreme Court embraced these new power-shrinking arguments and, partly due to its sketchy and mostly unexplained conclusions, launched the revamping of Waters law.[48] The Court revived "navigable" as power-limiting language.[49] Drawing on the Court's own federalism

[41] United States v. Lopez, 514 U.S. 549 (1995).
[42] Brief for the Petitioner at 15–21, 36–45, Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (hereinafter *SWANCC)*.
[43] United States v. Morrison, 529 U.S. 598 (2000).
[44] *SWANCC,* 531 U.S. at 162 (2001); Brief for the Federal Respondents at 8, *SWANCC.*
[45] 1986 Rule, supra note 258, at 41250–51.
[46] Brief for Petitioner at 16–19, *SWANCC.*
[47] *See* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 486 n.6 (1987) ; United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132-34 (1985); Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp 685, 686 (D.C.C. 1975).
[48] *SWANCC*, 531 U.S. at 171–172.
[49] *Id.* at 172–173.

revival, the Court stated the Army Corps was acting at the outer bounds of federal authority, but without a congressional clear statement authorizing the particular power assertion at issue.[50] The word "navigable" still mattered despite its definition; the Court stated the statute did not provide a clear enough statement to authorize jurisdiction over the isolated waters at issue. The Court also saw the jurisdictional assertion as a problematic incursion on states' usual land use regulation primacy, plus drew on a statutory savings clause's references to state "primary" roles and "land use" authority, but otherwise left its constitutional concern unexplained.[51]

This claim that the action was at the boundaries of federal power was crucial to *SWANCC*, but upon examination remains hard to fathom. It was contrary to longstanding views of the CWA and other environmental laws and abundant Commerce Clause jurisprudence; the regulatory action at issue seemingly passed muster in numerous ways. The water-filled pits were created by past commercial use, migratory birds' cross-state movements and linked commerce had long been a basis for federal jurisdiction, and the site's proposed new municipal landfilling was rife with direct commerce links and commerce effects.[52] And the size of the particular disputed Water was not grounds for a loss of jurisdiction. As mentioned above, and as subsequently reaffirmed in *Gonzales v. Raich* had long been the law, Commerce Clause analysis does not excise from federal jurisdiction individual seemingly small-scale applications of overall regulatory schemes that satisfy Commerce linkages.[53] Furthermore, all anti-pollution laws overlap with state and local land use, pollution regulation, and states' broad police powers, but preceding Supreme Court precedents did not see this as a problem.[54]

And while savings clauses, like those in the CWA, preserve room for complementary state roles or greater stringency, as do cooperative federalism provisions, here the actions at issue were within a strongly federalizing law with numerous federalism-linked provisions.[55] The CWA clearly went well beyond state laws' protections and created a new antipollution norm, unless the polluting activity was federally permitted. The CWA was not a crude law that swamped state authority or was of uncertain preemptive effect. The CWA made very particular choices about federal requirements and left abundant room for additional state action. Its preservation of state

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[50] *Id.*

[51] Id.

[52] Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, CORNELL L. REV. 1199, 1227 (2003) (questioning Court assertion of agency action at the bounds of federal power).

[53] See supra notes # and accompanying text.

[54] Hodel, supra note #, 452 U.S. at 275-93 (upholding federal regulation of private mining polluting activity despite mix of preemptive provisions, cooperative federalism options, plus areas of overlap).

[55] Savings clauses are several, each with a different focus. The CWA "purpose" provision embraces states' ongoing "primary" pollution control roles, land use primacy, and preserves their authority to "prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). State common law regimes and right to enact more stringent laws are expressly preserved. 33 U.S.C. §§ 1365(e), 1370. Likewise, state primacy over water allocations is preserved. 33 U.S.C. § 1251(g). Several provisions also allow states to constrain federal actions or federally permitted actions. *See* 33 U.S.C. § 1341 (providing state certification process linked to water quality obligations for federally licensed or permitted actions). Section 404 similarly contains its own dredge or fill-specific savings clause that can constrain federal activities. 33 U.S.C. § 1344(t). Section 313 requires federal land and facilities managers to comply with state water-quality protections. 33 U.S.C. § 1323.

power did not actually anywhere state limitations on federal power. Instead, the law's provisions reflected an embrace of mutual, overlapping, substantial protective powers of the federal government *and* the states. The statute's language had a strongly protective valence, allowing states to do more, but never do less.[56]

The clear statement move, linked here to the constitutional avoidance canon, was not a new move, but as applied in *SWANCC* was odd.[57] At its most basic, the constitutional avoidance canon arises when a constitutional question could be part of a controversy, but that controversy could be resolved without a new binding or partial declaration of constitutional law.[58] Under the logic of this avoidance canon, courts should not dive in and create new constitutional lines, but avoid new constitutional declarations. On the other hand, in most settings where it had been applied prior to *SWANCC*, the constitutional concern was clear, even if the Supreme Court or lower courts avoided an authoritative resolution. In *SWANCC*, however, it was hard to see how there was any concern at all. The preemptive provisions and savings clauses created no constitutional issue, and commerce linkages of several kinds clearly existed. Regulatory overlap of federal and state law was by then a commonplace and had not presented constitutional issues for decades.[59] Nonetheless, consistent with criticisms that "clear statement" moves create a judge-empowering means to rewrite laws, the *SWANCC* Court nonetheless cited the constitutional avoidance canon, then alluded to unspecified federalism concerns, and then used that rationale to narrow the statute's regulatory reach.[60]

The *SWANCC* Court's use of a "clear statement" plus federalism move did not just tip the scale for the case. *SWANCC* created a powerful new precedent for challengers, in large part due to its odd and also unspecified application.[61] If these vague, mostly illogical, concerns were enough, then *SWANCC* could be artillery to challenge federal power without actually explaining the constitutional problem; turf overlap might suffice, and turf overlap pervades environmental laws.[62] Or, as in *SWANCC*, even a strongly federalizing law could, if accompanied by common savings clause language, become suitable for judicial trimming. In addition, all antipollution and natural resource-protecting laws overlap with state and local land use roles, yet that overlap here, combined with the savings clause, was claimed to further justify the *SWANCC* Court's unsettling of Waters law. These challenger and antiregulatory court moves could be cloaked in language of jurisprudential modesty, yet rewrite a law's reach and jettison precedents: Congress simply had

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[56] Close parsing of CWA federalism provisions is infra at notes # and accompanying text.

[57] For a classic analysis of the logic and problems with clear statement moves, see William Eskridge and Philip Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992). For further analysis and citations, see infra at notes # and accompanying text.

[58] Id.

[59] See Schapiro & Buzbee, supra note #, at (analyzing SWANCC within analysis of shifting Commerce Clause jurisprudence).

[60] SWANCC, 531 U.S. at 172-74.

[61] *See* Matthew B. Baumgartner, SWANCC*'s Clear Statement: A Delimitation of Congress's Commerce Clause Authority to Regulate Water Pollution*, MICH. L. REV. 2137, 2145–49 (2005); *see generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, VANDERBILT L. REV. 592 (1992) (discussing the usage of clear statement rules pre-*SWANCC*).

[62] *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010) (criticizing uses of "clear statement" moves if not linked to constitutional choices reflected in its text).

not conferred authority with adequate clarity.[63] These interwoven strategies seized in *SWANCC* both reflected changing trends in the law and created powerful legal shifts due to their combination of breadth and indeterminacy.

Also notable in *SWANCC* was judicial inattention to underlying science and economics of the disputed waters. Instead, the Court focused on the word "navigable" as its linchpin. It did not limit protection only to Waters plied by shipping; that previously established law extending jurisdiction beyond large, ship-sized and used Waters remained.[64] Nonetheless, "navigable" was given a meaning that, in the Court's ruling, precluded federal protection for isolated waters. Despite the CWA's provisions focused on "chemical, physical, and biological integrity," and provisions expressly focused on aquatic ecosystem protection against pollution and filling, the Court put those express goals to the side in favor of a shipping-lite focus on this one word, "navigable."[65] This case did not otherwise rely heavily on the textualist toolchest. Nonetheless, as explored further below, this sort of focus on a single word, with neglect of consequences of that read and undercutting of statutory protections, was consistent with an emerging strain of textualist methodology.[66]

Likewise, the case lacked language of deference to expert regulatory judgments, despite the *Riverside Bayview* Court's unanimous view that the waters-land jurisdictional line was one for expert agency application and deserved deference.[67] Instead, the *SWANCC* Court said it "would not extend *Chevron* deference" due to the unspecified federalism and Commerce Clause concerns.[68]

Chevron deference, however, centers on agency language interpretation latitude, not issues of deference to science, technical, or other empirical judgments. *SWANCC* nevertheless also did not mention or engage on the question of deference to the agencies' expert scientific judgments about why such Waters, under the Act, were worthy of deference. Analysis of power, stated constitutional concerns, and analysis of statutory language and inferences from regulatory history seemed to crowd out respect for expert agency scientific judgments delegated to agencies under the Act. Scientific judgments by agencies required by the Act were supplanted by the SWANCC majority justices' focus on a few words, with no analysis of the effects of their own redrawing of the statute's protective lines. The same language, and somewhat similar Waters questions, were at issue in both *Riverside Bayview Homes* and then *SWANCC*, but the Supreme Court majority's attitudes had dramatically changed.

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[63] See also infra at Part III.D.iv (discussing deference regimes and major questions doctrine's link to clear statement moves).

[64] *SWANCC*, 531 U.S. at 167-71 (stating that conclusion but declining "next step");

[65] These many other provisions and textual indicators that the CWA was not focused on navigability, but protecting Waters for the functions and integrity, is address infra at notes # and accompanying text.

[66] See infra at notes # to # (analyzing counterarguments based on provisions the Court neglected).

[67] Riverside Bayview Homes, 474 U.S. at 131-35.

[68] 531 U.S. at 172-73.

3. Rapanos and its many questions

In the *Rapanos* litigation--another case about the reach of the CWA--new opportunities presented by *SWANCC*, the federalism revival, and growing use of antiregulatory skewing were further exploited and fiercely contested.[69] *Rapanos*, as well as its included companion case, *Carabell*, again involved disputes over how to deal with Waters that in some respect were "adjacent" or linked to larger waters that no one disputed were federally jurisdictional. The challengers saw *Rapanos* as a vehicle to extend *Lopez*, *Morrison*, *SWANCC*, and "clear statement" claims as well, possibly weakening the CWA and federal power more broadly.[70] If victorious, more waterside land could be developed and pollution discharged with impunity.[71] Opponents also sought to build on yet another new regulatory crosscurrent, namely weakening of decades of deference to agency law interpretations under the *Chevron* case, an emergent anti-deference trend that *SWANCC* had helped get rolling.[72]

Supporters of waters protection raised counterarguments and wielded different frames and methodologies. Pro-environmental interests and dozens of states emphasized the stable, bipartisan nature of CWA Waters protections.[73] They argued that *Riverside Bayview Homes* largely ruled as a precedent due to substantial overlap in the particular Waters-land borders at issue.[74] Defenders highlighted strong commerce linkages in the actual facts of case before the Court. Even the Bush administration—a generally antiregulatory administration—called for retention of longstanding views of federal CWA power.[75]

The resulting 4-1-4 Court *Rapanos* split left confusion in its wake, but then resulted in a period of consensus about how it should be read in its applied precedential impacts. No single majority opinion spoke for the Court, although numerical majorities joining certain elements was apparent (and expressly stated). Different opinions addressed the array of statutory, constitutional, and precedent-based claims.[76]

Justice Scalia, speaking only for a plurality in his opinion's limiting language, drew on his "new textualism" toolchest. He mostly ignored legislative history, then dismissed decades of administration and court views about Waters authority, viewing them as reflecting "entrenched

[69] There were 65 briefs and amici filed in the *Rapanos* legislation. For discussion, see Felicity Barringer, *Reach of Clean Water Act Is at Issue in 2 Supreme Court Cases*, N.Y. TIMES, Feb. 26, 2006, at A8.
[70] Petitioners' Reply Brief at 12–17, Rapanos v. United States of America, 547 U.S. 715 (2006) (No. 04-1034) (hereinafter *Rapanos*).
[71] Brief for the National Association of Home Builders as Amicus Curiae in support of petitioners at 5–6, *Rapanos*.
[72] Petitioners' Reply Brief at 4–6, *Rapanos*; Brief of The Cato Institute as Amicus Curiae Supporting Petitioners at 17–19, *Rapanos*.
[73] Brief of Former EPA Administrators as Amici Curiae Supporting Respondents at 4–7, 26–21, *Rapanos*. [Disclosure—the author of this article was a co-author of this brief.]
[74] Brief for the United States, *Rapanos*.
[75] *Id.*
[76] *Rapanos*.

executive error" and overreach.[77] Science and systematic assessment of effects were not addressed. For him, it was a question of clear language, with a heavy weighting (it appeared) of concern with regulatory excess. He sought to establish such claimed excess through citations to and sketches of past litigated cases resulting in court decisions. He did not consider broader regulatory costs and benefits, agency track records overall (whether litigated or not), or adjudicatory records or rulemaking materials about Waters protected, relevant science, and effects of various uses and Waters harms. The selection bias risks of looking only at challenges to regulatory power as proving systemic regulatory overreach were obvious and basic, but that risk was ignored in favor of the rhetorical punch such examples provided.[78] But the logic weakness of relying on cases alleging regulatory overreach as establishing a pervasive problem of overreach should have been apparent, acknowledged, and perhaps explained away (if possible).

Instead, after his anecdotal documentation of claimed overreach, Justice Scalia's plurality opinion focused on dictionary definitions of "water" or "waters," the use of "the" before "waters," the "waters" relationship to permits required for "point sources," and a brief foray into federalism to reject agency deference and the claim of agency jurisdiction.[79] Calling his view the "natural," "common sense" and even the "only plausible" reading, he advocated a brand new, unprecedented limiting read.[80] His plurality opinion asserted that the CWA only protected permanently flowing, continuously connected waters.[81]

This novel limiting read of the statute was utterly without precedent in any phase of the CWA's history. In its effects--were it a majority opinion-- it would have radically curtailed the Act's reach. It would have newly removed from federal protection most of the arid West and Southwest, where hot and dry conditions often leave riverbeds and other water-linked features dry. That the Scalia plurality's conclusions would provide a federal green light for pollution of waters where they are an essential and particularly rare and precious resource was given no attention. In such settings, they would be least protected. In fact, Scalia said nothing about the consequences of his interpretation, apart from criticizing the dissenters as offering a "policy-laden" conclusion that would (in his view) let the Army Corps "regulate the entire country as waters."[82] This claim of pervasive federal overreach was again unsupported by any record basis in his opinion, citation, or underlying materials.

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[77] Id. at 722-29 (Scalia, J., plurality op.)(asserting "immense expansion of federal regulation of land use"); at 752 (making "error" point).

[78] For explanation of selection bias, see DAVID L. FAIGMAN ET AL., 1 MODERN SCIENTIFIC EVIDENCE § 5.16 (2008) (stating that "[s]election bias refers to a sample being drawn in a way that makes it unrepresentative of the population to which inferences are to be made"). For discussion of the problem of selection bias in assessing deference regimes and their effects, see William N. Eskridge & Lauren Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan, 96 Geo. L. J. 1083, 1122-23 (2008).

[79] *Rapanos* at 735-38.

[80] Id. at 730-35, 739.

[81] Id. at 739.

[82] Id. at 746-47.

Justice Kennedy's swing vote opinion—the 1 in the 4-1-4 split-- which focused on what he called "significant nexus" waters that were assessed for their connections and functions, was mostly embraced by the four dissenters.[83] His test largely tracked factors and criteria in the statute, as long utilized in promulgated Waters regulations, and also applied in adjudicatory judgments about Waters. He still called for judicial affirmation that an adequate "significant nexus" existed. The dissenters agreed with protecting both Kennedy's waters and the small but sometimes different waters protected by the Scalia plurality. As the dissenters stated, this meant a five-justice majority agreed with protecting Kennedy "significant nexus" waters, and eight justices agreed with also protecting the more limited but different sorts of waters protected under Scalia's opinion.[84] A clear majority rejected the Scalia plurality jurisdiction-limiting language. The dissenters would have deferred to the underlying regulatory judgments, but expressed agreement with Kennedy about the sorts of variables and protective goals that should inform questions about Waters jurisdiction.

4. Post-*Rapanos* regulatory vacillation to *Sackett*

Between 2015 and 2021, the Waters battles shifted to agencies and the courts. The Obama administration by rule in 2015 sought to restore Waters protections based substantially on a "connectivity" study of all peer reviewed science regarding Waters' functions.[85] That was met with a cascade of challenges, echoing the claims and artillery wielded in *SWANCC* and *Rapanos*. The Obama Clean Waters Rule also sought to offer both some simplified distance-based lines about what was protected and also make clearer several express carveouts from jurisdiction. Those regulatory judgments were also challenged, with a challenger public relations campaign claiming the regulation would reach puddles and tiny ditches, and calling for regulators, courts, or legislators to "ditch the rule."[86] The Obama regulation was stayed by the 6th Circuit, although the Supreme Court subsequently held that the rule was not subject to that court's direct review.[87]

The Trump administration, in a series of reversal actions, built heavily on the plurality opinion in *Rapanos* by Justice Scalia to argue that they legally had to shelve the Obama Clean Waters Rule.[88] In an unusual regulatory twist, but one used in several other major Trump administration actions, the agencies claimed that they were compelled to adopt this deregulatory view that, in

[83] Id. at 759-87 (Kennedy, J. concurring in the judgment); 787-812 (dissenting opinions).
[84] *Rapanos*, 547 U.S. at 808-09 (Stevens, J. dissenting, joined by Justices Souter, Ginsburg, and Breyer) (explaining how Court majorities voted to protect both "significant nexus" waters and the less protective but differently framed plurality waters).
[85] Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37053 (June 29, 2015) (Final Rule).
[86] See Buzbee, The Tethered President, supra note # at 1382-83 & note 117 (discussing and citing sources regarding this "ditch the rule" campaign).
[87] National Ass'n of Mfrs v. Department of Def., 138 S. Ct. 617, 627, 634 (2018).
[88] The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22257–59 (Apr. 21, 2020) (Final Rule). The Trump Administration's regulatory roll-back of the Obama-era Clean Water Rule faced many court challenges. See Pamela King & Hannah Northey, *Who's Suing Over Trump's WOTUS Rule?*, E&E NEWS (June 24, 2020) (reviewing challenges).

this instance, ran contrary to over 40 years of executive branch views of the CWA.[89] They basically ignored the plurality nature of the Scalia opinion, majority rejection of its limitations, and contrary majority support for the waters protected under the Kennedy opinion.[90] That Trump agency action, in turn, led to its own judicial challenges and several rejections.[91] After President Joseph Biden assumed control of the White House in 2021, his EPA and Army Corps started the process to issue a new Waters regulation that differed from both preceding administrations.[92]

Litigation and regulatory actions in the meantime continued, with EPA and the Army Corps approaching Waters jurisdiction issues through adjudicatory judgments and under longstanding regulations, as they had after *Rapanos*, but before either the Obama or Trump regulations.

One of those adjudicatory actions led to an early 2022 Supreme Court challenge from a 9th Circuit ruling. In *Sackett v. EPA*, in response to pleas from antiregulatory interests about regulatory confusion, overreach, and need for clarity, the Supreme Court voted to wade yet again into the Waters question. The challengers' arguments were basically the entire antiregulatory arsenal rolled into one set of largely echo-chamber briefs.[93]

The *Sackett* certiorari grant was unusual: A strong lower court consensus existed on waters protected; the regulatory approach by EPA, the Corps, and DOJ in adjudicatory judgments had long been held legal; and with a regulatory proposal midstream, there was a transitional moment in agency interpretations.[94] The particular enforcement setting underlying the challenge appeared to be resolved. The challenges raised in *Sackett*, however, again built on the same mutually reinforcing set of antiregulatory frames.

The Court's framed petition grant question was itself puzzling, skewed to a judge-empowering answer. It may have reflected a legal error and also failure to understand the science-intensive nature of jurisdictional determinations. The Court's question stated: "Whether the U.S. Court of Appeals for the 9th Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. Sec. 1362(7)." The puzzler is that the lower court had no choice but to study Supreme Court opinions and obey what it perceived as binding precedent. The Supreme Court, however, undoubtedly has power to revisit and clarify,

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[89] For analysis of this unusual "statutory abnegation" strategy of the Trump administration, where agencies newly claimed to completely lack power previously asserted, see William W. Buzbee, *Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L. J. 1509 (2019).

[90] See supra notes # and accompanying text (reviewing the Rapanos case opinion alignments).

[91] See, e.g., Navajo Nation v. Regan, No. 20-cv-602, 2021 WL 4430466, at *5 (D.N.M,Sept. 27, 2021); Pasqua Yaqui Tribe v. U.S. EPA, ___ (D. Arizona Aug. 30, 2021) (finding regulation built on Scalia plurality and resulting massive loss of federal protection to be contrary to the statute and arbitrary and capricious).

[92] 86 Fed. Reg. 41,911 (Aug. 4, 2021) (announcing such intent); Revised Definition of "Waters of the United States) 86 Fed. Reg. 69,372 (Dec. 7, 2021) (proposing new Waters regulation and commencing notice and comment process).

[93] Excerpts of those briefs are cited below as examples of the antiregulatory arsenal's elements.

[94] For review of this grant and linked battles, see Pamela King & Hannah Northey, *Supreme Court Tees Up Wetlands Fight That Could Cuff EPA*, E&E NEWS (Jan. 24, 2022). The Biden administration opposed the cert. petition due to this moment of regulatory transition plus consensus in the lower courts and agencies about the tests applicable to Waters questions. Brief for the Respondents in Opposition at 13-14, 17-20, Sackett v. EPA (Nov. 2021).

so a more logical question would focus on the question itself, under the Act's language. Second, the Court framed the question as though only wetlands are at issue, yet the question of what are jurisdictional Waters is the linchpin of the whole statute.[95] Petitioners, and those seeking to shrink the Act's protection and perhaps federal Commerce Clause power, have long tried to shine their attacking lights on wetlands, given their (by definition) less river-like nature. No one could know if the Court took the bait, or really planned confine its ruling just to wetlands protections and federal power.[96]

Lastly, the question as framed in *Sackett* seemed to be calling for a single test, yet the United States is vast and contains innumerable types of waters, geographic attributes, different underlying science, and water functions. No single brief "test" can be created, unless the Court plans to disregard the Act's own quite specific sexpress goals, criteria for protection, decades of rulemakings and underlying regulatory materials, congressionally devised procedures and requirements to determine what is a protected water, effects of those varied possible regulatory choices, and then applying those factors and procedures to what pollutant dischargers hope to do.

The resulting mix of *Rapanos*, *SWANCC*, the earlier *Brown & Williamson* decision have, as a line of precedent, subsequently been harnessed in frequent calls for "clear statement" presumptions against federal power and against deference to agency power claims in other major regulatory battles.[97] Along with the earlier Commerce Clause revival precedents, these cases together create linkable anti-regulatory gambits.

The article now breaks out these key antiregulatory moves in very brief form, first showing how they have been used in Waters battles and with brief reference to other battles, such as those over climate regulation and COVID-linked requirements. It then in the closing Part critiques them for their lack of democratic legitimacy and disrespect for the empirical expert judgments allocated to agencies, and explores countervailing strategies.

[95] 43 Op. Att'y Gen. No. 15, at 5 (Sept. 5, 1979) (calling Waters jurisdiction the "linchpin" of the statute that should be applied through a "single judgment" regardless of the type of polluting activity at issue).

[96] In merits briefing, Petitioners in Sackett sought to expand the question framed by the Court. See Petitioners' Reply Brief, Sackett (July 8, 2022).

[97] *See e.g.* Opening Brief of Petitioners on Core Legal Issues, at 36–41, West Virginia v. U.S. E.P.A. (D.C. Cir. Jan. 21, 2016) (No. 15-1363) (emphasizing such arguments in challenge to the Obama administration Clean Power Plan).

III. The Antiregulatory Arsenal, Distilled

The Waters battles are hence not an isolated body of legal tumult, but reflect and contribute to a growing antiregulatory jurisprudence. This brief part breaks out the shifts identified above, identifies other settings they will likely be used, but also reflects on their ubiquitous, powerful, and largely legally unmoored nature. Examples from recent briefs, mostly from the *Sackett* case, are provided as examples.

A. Anti-federal skewing and deference lost

These antiregulatory moves, in their collective impact, end up strongly working against any federal regulation with national reach. Indeed, that may be their very reason for existence. Federalism under our nation's Constitution is a two-edged sword, with congressional choices about federalism allocations often wielded with nuance and reflecting varied choices about federal and state roles. That federal law is supreme and potentially preemptive is part of the Constitution's federalism design. Agencies have long been the vehicle for carrying out federal law, with deference regimes central to their regulatory implementation adjustments and judgments.

In the antiregulatory arsenal, however, states are viewed as needing protection; assertions of federal regulatory power are met with pushback.[98] That laws tend to embrace a mix of preemptive regulatory floors, some carveouts from federal power, savings clauses that range from the general to quite specific, and then cooperative delegated program federalism options, does not seem to matter. Likewise, the norm of federal and state overlap and intertwined authority is viewed not as a welcome attribute, but a problematic bug.

Likewise, claims that the breadth of federal power is suspect is itself problematic since, by its very nature, federal regulation is meant to have a national reach. States are often given latitude to devise compliant plans, usually under cooperative delegated program structures, but nationally uniform requirements are the norm and often a key rationale for federal environmental and other risk-reducing laws.[99]

A shift is underway from routine application of *Chevron* deference. Although that case involved a major policy change in regulation affecting almost every factory in the country, it is now often ignored or declared inapplicable due to the breadth of the action's claimed effects.[100] Advocates and courts sometimes leave it unmentioned.

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[98] See Brief of Amici Curiae State of West Virginia and 25 Other States in Support of Petitioners, Sackett, supra, (passim) (emphasizing alleged federal overreach and impingement on state turf) .

[99] See Esty, supra note # (reviewing rationales for federal environmental regulation).

[100] See, e.g., Brief of the Cato Institute et al. as Amici Curiae in Support of Petitioners (April 18, 2022), Sackett, supra (arguing against deference to agencies and for judicial resolution but without mention of *Chevron*)

Especially now with the Roberts Court, the antiregulatory majority now often adopts anti-deference or even "clear statement" demands and "major questions" presumptions against federal power. The 2022 *West Virginia* climate regulation case, which rejected EPA's power despite a strong textual and factual justification for the Clean Power Plan's (CPP's) "generation shifting" strategy, will likely now be the quintessential antiregulatory arsenal citation and example.[101] A key starting move by the Court was the claim that CPP's strategy was extraordinary and had huge political and economic effects. [102] This was questionable, if not clearly controverted by regulatory materials. Actual regulatory materials published by the Trump administration compared its own deregulatory policy weakening to the effects of the CPP's "generation shifting"-based pollution reduction goals. The CPP had been stayed by the Supreme Court and never came into effect. Nonetheless, as the Trump administration's analysis found, emissions reduction targets of the CPP had been exceeded by business shifts even though the regulation never came into effect.[103] The Trump administration's rollback action would have made no difference.[104] Basically, the CPP was actually neither ambitious nor disruptive. Inaction exceeded its mandated reductions. Nonetheless, the majority opinion rested almost entirely on the Court's choice to subject the challenged agency action to the "major questions doctrine's" skeptical, usually fatal, scrutiny due to such claimed major effects.[105]

These are all major shifts in presumptions. Breadth of language and power are now rationales for limiting federal agencies' power, rather than grounds for supporting and deferring to their actions.[106]

B. Anecdotal tales of overreach

In cases cutting back on federal regulatory power or seeking such outcomes, both antiregulatory advocates and aligned judges and justices often go well beyond the actions presented to claim much broader overreach or abuses of regulatory power.[107] In each new case, earlier case language about overreach is then quoted as establishing the fact of broader problems or abuses.[108] Other reported cases are cited as establishing much broader and contestable claims

[101] West Virginia, supra. [ADD REPORTER OR WL CITES WHEN AVAILABLE]
[102] West Virginia v. EPA, __U.S.__, slip op., Roberts, J., majority op. at 10, 23-25 (No. 20-1530) (June 30, 2022) (arguing that CPP would have had massive consequences).
[103] West Virginia v. EPA, __U.S.__, slip op., Kagan, J. dissenting at 23-25 (No. 20-1530) (June 30, 2022) (challenging the claim of massive consequences with recounting of this history and findings).
[104] Id. (citing 84 Fed. Reg. 32561) (quoting Trump administration rulemaking preamble that "'there [was] likely to be no difference between a world where the [Clean Power Plan was] implemented and one where it [was] not"); and see id. at 23 note 6 (discussing CPP projected impacts and arguing that they were modest).
[105] West Virginia, slip op. at 16-31 (for the first time the Court itself labelling the "major questions doctrine" and applying it to conclude no clear enough statement authorized the EPA action challenged).
[106] See West Virginia, slip op. at 5-13 (Kagan, J. dissenting) (criticizing majority's major question's doctrine articulation and application by analyzing interconnected logic and coverage of the Clean Air Act and how use of broad language and term "system" was meant to confer discretionary authority on EPA).
[107] See, e.g., Brief of Amicus Curiae State of Alaska in Support of Petitioners 2-3, 6-11, Sackett (April 18, 2022) (extensively recounting tales of regulatory overreach and burdens attributable to Waters disputes in Alaska, mostly with no citation to any regulatory materials supporting the claims).
[108] For a brief weaving anecdotes, case quotes, and only rarely reference to supportive regulatory materials, see W. Va. brief, Sackett, supra.

about inappropriate action. Rarely in these cases do advocates or judges painstakingly establish from actual regulatory materials that these claims are accurate. Since cases get to the courts after rulemakings or adjudicatory actions, and usually where a combination of both create a substantial regulatory record about regulatory programs' effects or factors, often applied in more context-specific settings in adjudicatory settings (whether enforcement actions or permit evaluations), finding such documentation is possible. Relatedly, regulatory impact analyses assessing the costs and benefits of regulatory actions often themselves contain support or refutation of claims of illogical or egregious regulatory overreach later asserted.[109] They too nonetheless are rarely cited.

Also notable is that tales of agency overreach or abuse are rarely leavened with analysis of the extent to which underlying statutes, in their protective policies, explain or even require the actions under attack. Nor is analysis of benefits of a regulatory scheme provided; the focus is on burdens.[110]

C. Microtextualist moves and erratic attention to context

The last, but perhaps most important, common element in the antiregulatory arsenal is changing statutory interpretation methodology. Methodology that consistently and with thoroughness involves parsing of the major environmental laws' texts and their operative logic would probably tilt in a protective direction. After all, environmental laws tend to be quite express about their antipollution, environmental and health-focused protective goals and decisional criteria, who is to play what roles, and through what procedures. The antiregulatory arsenal, however, tends to rely on decontextualized microtextual analysis. Advocates and sympathetic judges look at a few words in isolation, often with inattention to larger context or surrounding illuminating provisions or how a statute works or even its express statements of goals, purpose, or findings.[111]

Sometimes, advocates or antiregulatory judges seem to engage in "textual gerrymandering," where the texts they choose and others they ignore or downplay appear strategically chosen to favor their desired outcome.[112] Findings and purpose provisions are derided as not reflecting operative terms' more particular bargains. Digging further into legislative history or other historical context and legislative evidence is largely condemned; those sources of illumination, with their usual explanation of why and how a statutory provision works, tend to be written to make clear what a statute or provisions is meant to do. When excluded from analysis, they are

[109] See Caroline Cecot, Deregulatory Cost-Benefit Analysis and Regulatory Stability, 68 Duke L. J. 1593 (2019) (analyzing how cost-benefit analyses accompanying major rulemakings can elicit and include information that constrain later agency policy vacillations possible under governing policy change law).

[110] See, e.g., Brief of W. Va., supra, at 21-28 (providing a litany of alleged burdens on states and businesses of the "significant nexus" test and arguing for its judicial rejection).

[111] For example, as analyzed below, the CWA includes dozens of provisions declaring its antipollution goals and environmentally focused criteria to guide regulators, especially with wetlands. Notably, the Sackett petitioners in their initial brief do not even cite to most of these key provisions. For criticism of this omission and review of the missing language, see Brief of Amici Curiae 167 Members of Congress in Support of Respondents, Sackett (June 17, 2022) (disclosure—this author was the lead author of this brief).

[112] Eskridge & Nourse, supra note .

not there to check contrary conclusions drawn from isolated statutory words or frequently referenced (but themselves sometimes cherry picked) dictionary provisions.

But other cases will at times rely heavily on larger structural inferences, or even claims about problematic consequences of particular statutory reads.[113] To the extent textualism's main claim is that it is neutral and constrains judges from pursuing their preferred policy ends, erratic levels of focus and methodological heterogeneity actually empower judges with many ways to reach their preferred ends. As Professor Gluck has argued, this methodological heterogeneity and erratic applications of the textualist toolchest undercut claims it is a formalist, predictable, and constraining school of interpretation.[114]

Similarly, and related to the shift away from deference regimes mentioned above, advocates or judges focusing on a few words to reach agency-disempowering conclusions tend to avert their gaze from larger complexities in how laws and regulations actually work.[115] Agencies do heavily weigh such real-world complexities; they live with their regulatory programs and statutes every day, hearing from those regulated and protected how their regulatory regimes and actions work or fall short.[116] Agencies also are often major players in drafting statutes and, of course, develop understanding over the years how statutes and their many linked provisions and programs interact.[117] Were courts to put those different levels of agency versus court expertise onto the scale, it would tip power back to agencies. Instead, words are decontextualized from surrounding words, from analysis of regulatory interactions, with little or no analysis of documented effects of outcome choices. The result is a weakening or even elimination of deference to agency judgments and insensitivity to how a regulatory program actually works.

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[113] For a notable Supreme Court environmental law example of the Court drawing on claimed large effects to justify a trimming of statutory power, see Utility Air Regulatory Group v. Environmental Protection Agency, __U.S.__, 134 S. Ct. 2427, 2440, 2441 (2014) (ignoring low statutory tonnage triggers and rejecting EPA regulatory sequencing of regulatory rollout to reduce burdens due to call for "reasonable, context-appropriate meaning" and allowing only regulation that "may sensibly be encompassed" within the "particular regulatory program" with focus on need to read statutory provisions "in their context" and in light of "design and structure of the statute as a whole") (citations and quotations omitted).

[114] Abbe Gluck, Textualism without Formalism: Justice Scalia's Interpretation Legacy, in JUSTICE SCALIA: RHETORIC AND THE RULE OF LAW 81-85 (Brian G. Slocum & Francis J. Mootz III, eds. 2019) (challenging idea that textualism is a formalist method).

[115] For example, the Sackett petitioners nowhere even discuss the environmental effects of their advocated shrinking of federal Waters jurisdiction. Despite the CWA's express protective focus, their brief is all about burdens, allegations of regulatory overreach and jurisdictional confusion, and claims the CWA only protects waters that are "channels" of commerce. Petitioners' Brief on the Merits, Sackett (April 2022), *Sackett*. Similarly, in *West Virginia*, neither the Court majority nor concurring opinions discuss the lost benefits of their narrowing read of the Clean Air Act. West Virginia, supra note #.

[116] See generally Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015) (drawing on survey of agency officials to analyze how agencies interpret statutes and also their roles in the legislative enactment process).

[117] Id.

IV. Political Branch Primacy and Responses to the Antiregulatory Arsenal

The antiregulatory arsenal is powerful. With a 6-justice antiregulatory majority now ensconced in 2022 on the Supreme Court, it is also unlikely to fade in the near future. This closing Part analyzes doctrinal counters and strategies that might nonetheless check aggressive reliance on this arsenal. Some success with these strategies might, over time, shift doctrine or at least case outcomes in ways more respectful of political branch choices and statutory primacy.

Notably, new legislative or regulatory actions are no guarantee of success. After all, the antiregulatory arsenal moves are judicially created scale tippers that at times give little attention to the actual statutory choices, skeptically assess regulation, and embrace anecdotes and assertions over attention to actual data, science or regulatory materials.

Nonetheless, if legal doctrine as judicially established in court precedents, and not raw political power, remains relevant—and this is concededly a question-- then regulatory actions are more likely to survive judicial review when Congress, agencies, or advocates do the following:

--rigorously provide or engage with statutory criteria, context, structure, and congressional choices about actors' roles;

--carefully engage with science and other evidence made relevant under the statute;

--present and challenge evidence before agencies, forcing agencies (to the extent possible) to collect and assess those stakeholder contentions and materials and, hence, focus later reviewing courts on resulting findings that have an actual record basis and that were tested through quasi-democratic and often adjudicated deliberative regulatory procedures.

With stronger statutory, regulatory, and procedural analysis and factual vetting, advocate and judicial reliance on the antiregulatory arsenal will be more difficult and likely tempered with attention to legislative choices, science, and other effects analysis made relevant under statutory criteria.

A. Statutory interpretation and drafting counters

The antiregulatory arsenal tends to be cloaked in claimed respect for statutory choices and, frequently, power shrinking interpretive choices made in light of asserted inadequate statutory "clear statements" authorizing disputed regulatory powers.[118] Language is often decontextualized and recharacterized, with champions of antiregulatory ends tending to shun much other than isolated snippets of language.[119] Picking up on Justice Scalia's multidecade attack on uses and abuses of legislative history, antiregulatory judges and advocates also tend to shun interpretive cues that might be gleaned from legislative evidence generated during the legislative enactment process. Since legislators tend to talk about legislation to persuade other legislators, the president, and the public, such legislative evidence typically focuses on a law's

[118] See supra notes # and accompanying text (introducing clear statement move and literature).

[119] See William Eskridge & Victoria Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718 (2021) (labeling the isolating textualist move as "textual gerrymandering" and highlighting ways it can lead to erroneous and illogical interpretive outcomes).

goals and public-regarding rationales.[120] Later advocate or judicial refusal to consider such evidence predictably will reduce the body of material that might point in a protective direction.[121] These methodological shifts, however, do not render wholly futile efforts to draft legislation with clarity or rigorously work with statutes' actual words and choices.

1. Statutory language clarity

Statutory drafting clarity about regulatory goals, criteria, process, and actors is, of course, the most effective counter to power challenges. The clearer Congress is in making choices that are memorialized in the statute's text, the more constrained will be all subsequent players working with that statute.[122]

However, broadly empowering statutes as enacted during the early to mid-20th century, with short but highly discretionary conferrals of authority, now create risks of judicial resistance. For example, the Occupational Safety and Health Act, or the National Environmental Policy Act, and perhaps some of the federal lands-regulating or resource extracting statutes with broad language or difficult balancing exercises, are unlikely to be given a liberal protective read. The Supreme Court's *NFIB* Covid-19 decision rejecting the Occupational Safety and Health Administration's authority to enact a "vaccine or test" policy for workplaces provides a near template for checking any pathbreaking or unusual, or especially novel and onerous, regulatory actions under statutes empowering agencies with broad language.[123] The Court's *per curiam* opinion emphasized not those imperiled by COVID in the workplace as well as their families and community, but instead called the vaccine policy "a significant encroachment into the lives—and health—of a vast number of employees." It expected a "Congress to speak clearly"—really more clearly—to find such power authorized.[124] The power was not "plainly authorized."[125] The breadth of the risk, and that it was encountered both in and out of the workplace, was fatal: "That kind of universal risk" could not justify OSHA's action because it would "permit[] OSHA to regulate the hazards

[120] See Andrei Marmor, *The Immorality of Textualism*, 38 LOYOLA OF L.A. L. REV. 2063, 2065, 2077-79 (2005) (reviewing key elements of textualism and exploring how it coincides with the antiregulatory conservative agenda by downplaying materials reflecting protective goals).

[121] Professor Macey has called for enforcement of public-regarding, publicly stated statutory rationales despite less apparent bargains and rationales that might also or even better explain statutory choices. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). Likewise, legislators and their staff consider, support, and craft statutes and often hold related hearings and craft linked reports to achieve a mix of accomplishing protective defined ends, persuading others and the president to support legislation, garnering support for electoral popularity, and often guiding agencies that will have to implement statutes. See Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012) (arguing that statutory interpreters should consider the rules governing the legislative process and political reasons for creating such materials and drafting choices unrelated to judges' later review).

[122] For example, in *American Hospital Ass'n v. Becerra*, __U.S. __, __, slip op. at 2, 8-11 (June 15, 2022), a unanimous Supreme Court, in an opinion penned by Justice Kavanaugh, carefully traced a statute's "meticulous[]" provisions setting forth healthcare compensation reimbursement rights, with the statute's "text and structure" refuting an agency claim of authority to cut health reimbursements but without a prerequisite survey process.

[123] See NFIB, supra note # .

[124] NFIB, slip op. at 5-6.

[125] Id.

of daily life."[126] Only if "particular features" of a workplace made the "virus pose[] a special danger" might OSHA be able to act.[127] Hence, in NFIB, and in the antiregulatory arsenal, broad conferral of powers, or possibly even broad undefined language within otherwise detailed statutes, may be met with judicial resistance in the form of a "clarity tax," in the words of Dean John Manning.[128]

Environmental laws, in their key modern framework versions enacted since the late 1960s, tend to have far more clearly delineated goals, operational sections, federalism choices, and definitional clauses than such earlier, short, broadly worded statutes. Because text is at least stated as given primacy by all judges today, rigorously linking those actual textual choices remains an advocate's most powerful tool. Environmental laws' intertwined choices and textually evident logic, if highlighted, might ameliorate or check arguments rooted in narrowing reads.

But maybe not. In the 2022 *West Virginia* case, the Court conceded the statute's key terms could justify the "generation shifting" strategy embraced by the Obama administration, but found the terms too "oblique," an "empty vessel," and in too much of a "backwater" provision to justify EPA's policy.[129]

Given this symposium issue's focus on the CWA at 50, this article turns primarily to examples drawn from the CWA and also Waters contestation, including questions and contentions in the major precedents and as framed in *Sackett (*which was pending when this article was written).

2. "Waters of the United States" as a statutory methodology puzzle

The ongoing battles over what is a federally protected jurisdictional "navigable water" has, at its roots, a statutory interpretation question. Contestation is traceable to that term's seemingly circular definition of "the waters of the United States." But this definition is clearly an expansion from a mere focus on navigability. The CWA is undoubtedly broader in its antipollution reach than the Rivers and Harbors Act, which did have a primary navigability focus and secondary, later developed antipollution reach.[130] Scholarship and legislative history of the CWA both confirm what the textual addition itself reveals; federal jurisdiction was made more expansive.[131] Still, leaving unanswered in the statute's text itself the question of which "waters" were reached with this expansion was unfortunate. Were the jurisdictional linchpin of the law made clearer, space for antiregulatory arsenal salvos would be substantially diminished. The statute, nonetheless, provides far more material that, in its actual texts, structure, and operational

[126] Id. at 7.
[127] Id.
[128] John Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010) (questioning use of substantive canons of interpretation to further claimed constitutional values as a "clarity tax" contrary to the tradeoffs and particular choices of the Constitution).
[129] *West Virginia*, supra, slip op. at 25-30.
[130] William W. Sapp, et al, *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term Navigable Waters*, 36 ELR NEWS & ANALYSIS 10190, 10195-96, 10200-03 (March 2006) (reviewing this history and expansions of protections under the CWA).
[131] Id.

mandates and logic, counters—and should have long ago countered—arguments and court opinions skewed against the heart and logic of the CWA.

A prime example of how textual analytical rigor can be powerful to counter the antiregulatory arsenal is provided by again parsing of the Supreme Court's choice of the question for *Sackett*: what should the "proper test" be for jurisdiction over "wetlands" under the CWA? Right off the bat, the Court's question revealed statutory and programmatic ignorance, error, or statutory disregard at several levels. Effective responses are challenging due to a Catch-22 choice: CWA Waters are the jurisdictional hook for virtually all of the key operative antipollution provisions in the statute. This includes industrial pollution discharges from pipes and other point sources, oil spills, and dredge or fill disposal permits that are often the main permitting affecting wetlands. (Wetlands also can also be tainted with effluent discharges from industrial point source discharges regulated under Section 402 or be dumping ground for oil; wetlands protections and rationales are not coextensive with Section 404 reach questions.)

Those trying to protect the Act's longstanding reach in *Sackett* were thus confronted with a strategically tough decision in responding to the Court's framing of the question presented. They had to decide whether to emphasize the broader importance of Waters jurisdiction question, and hence risk broadening the implications of a resulting decision, or take the Court's word choice seriously and simply focus on wetlands and how and when they should be protected as CWA Waters. Such a narrower focus, however, could also lead to inattention to surrounding provisions that shed light on permissible or best statutory meanings. In addition, the Court's framed question seemed to be implicitly assuming that it is for the Court to craft such a test. This too is wrong, for reasons now explained.

Most important to check antiregulatory derailments via judicial power grabs are four sorts of statutory text-based sources of meaning illumination, as illuminated through this CWA *Sackett* analysis.

First, if Congress chose to include express statements of purpose, whether in their own findings and purpose provisions, that textual commitment should be emphasized. Similarly, when a law's operative provisions through their operative logic, functions, and decisional criteria reveal their protective design, that should be central to later advocate, agency, and judicial choices about meaning. Express statements of purpose are far different from judges intuiting a purpose or goal and then expanding on it.[132] So, for example, with Waters questions, the CWA's opening provision emphasizes its integrity goals, namely that the statute is meant to protect the nation's Waters' "chemical, physical, and biological integrity."[133]

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[132] David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97 (2013) (discussing arguments against purposive interpretation and providing counterarguments for attention to express statutory language and operational logic); Anita Krishnakumar, *Backdoor Purposivism*, 69 DUKE L. J. 1275 (2020) (summarizing textualist opposition to purposive statutory interpretation but documenting extensive ongoing reliance on purposive arguments, even by judicial critics).

[133] The Act contains pervasive antipollution mandates, all linked to three specified "integrity" goals: "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a).

Similarly, and with greater detail, numerous provisions spell out various water quality goals with environmental, health, and recreation-focused criteria guiding all regulatory actions. All of them focus on preventing water pollution and filling of waters unless permitted. The jurisdictional language, in which "navigable waters" is given its broad definition of "the waters of the United States," is just that—a statement of statutory jurisdictional breadth, not a statement of the statute's goals or criteria for assessing a water's status. Other provisions confirm both what the statute is aimed at doing and also refute claims it is focused on navigational commerce or only channels of commerce, as the Petitioners in *Sackett* argued.

The relationship of "waters" protections criteria and navigation is actually made clear in two provisions that mention "navigation," but within provisions with dozens of express environmental, health, and recreational criteria that must guide regulators in categorizing waters and deciding whether to permit pollution. After specifying these environmental criteria, antipollution policies, and antifill presumptions, Section 404 adds regulators can "additionally" take into account "navigation and anchorage" concerns. [134] The Act's water quality provisions similarly state that navigation is a secondary "consideration." [135] This linguistic nuance reveals that navigation is a concern, but clearly secondary to the antipollution and environmental integrity goals and linked analysis of waters' functions and protection of water quality.

Second, some textualists deride purpose or goals language even when it is expressly put into the enacted law, emphasizing that a statute's operative provisions are what really matter and reflect actual choices and tradeoffs. Operative provisions that require particular actions, especially those that spell out criteria for regulatory action, are indeed central and must be engaged. There too, however, the CWA is even more clear about its focus as revealed by what it mandates and criteria it sets forth to guide agency actions. In numerous provisions, the CWA is expressly about constraining or stopping pollution, requiring permits for any polluting activity (except some nonpoint and agricultural carveouts), in stating an express no-discharge aspiration. In its design, the CWA steadily tightens levels of pollution control over time and requires heightened pollution controls for new pollution sources, toxics discharges, or if water quality remains impaired after technology-based effluent limitations are imposed.[136]

In addition to its antipollution focus, the CWA repeatedly makes clear the "why" of such prohibitions and provides criteria for regulatory judgments. As shown in the next few paragraphs, the Act's express criteria focus on protecting Waters' ecosystem, recreation, health, and human functions. It is not a law about navigation, nor is it a law about land use regulation. The CWA is about protecting the environment from polluting activities that affect Waters resources for the services and functions they provide.

For example, and of especial importance to the Court's *Sackett* question framing, Section 404 contains language about its environmental aims, its anti-fill tilt, and is laden with environmental criteria. This focus on waters functions and water quality, as well as health, fisheries, and

[134] 33 U.S.C. § 1344(b).
[135] *See also* 33 U.S.C. § 1313(c)(2)(A) (after listing environmental, health, and welfare factors for water quality-based regulation, adding "and *also taking into consideration* their use and value for navigation") (emphasis added).
[136] Glicksman, supra note # at 557-59 (reviewing key provisions and programs in overview of CWA's design).

recreational goals, is expressly stated in part of Section 404, but especially in Section 404's incorporation by reference for all dredge or fill disposal permits of the presumptions and criteria stated in Section 403(c) for constraining ocean discharges. Apart from the "additionally" language referenced above, none of these provisions are about navigation. Section 404 regulatory choices must comply with mandated "guidelines" to be crafted by EPA, in "conjunction" with the Army Corps, that prioritize "effect[s] of disposal on human health or welfare, including . . . plankton, fish, shellfish, wildlife, shorelines, and beaches."[137] They must consider "effect[s] of disposal" including effects on "ecosystem diversity, productivity, and stability; and species and community population changes."[138] It further calls for consideration of "esthetic, recreation and economic values," thus expressly requiring attention to the commercial effects of Waters protection or failures of such protection.[139] It also calls for alternatives to such disposal, especially "land-based alternatives."[140] Note also that because the term "wildlife" is in addition to specified "fish" and "shellfish," under antisurplusage interpretive norms coupled with dictionary definitions, this language choice supports an argument that the statute's protective reach focuses beyond species swimming in the water or in soils beneath or within the water.[141]

These environmental, ecological, and biological goals are further reified in EPA's Section 404(c) veto provision. This provision empowers EPA to object to—to veto, in environmental practitioner parlance-- a proposed or Army Corps granted dredge or fill disposal permit if "it will have unacceptable adverse effects on municipal water supplies, shellfish beds, and fishery areas (including spawning, and breeding areas), wildlife or recreational areas."[142] Again, the law focuses on the environment and Waters' functions.

In addition, the 1977 Act amendments expressly made clear for the first time that "wetlands" are protected, while subject to possible state programmatic assumption under a delegated or cooperative federalism program structure. Under this provision, the Corps and EPA would retain their powers over "wetlands adjacent" to transportation and foreign commerce-linked types of waters.[143] If this were all that the CWA reached, then the delegation option under Section 404 would delegate nothing regarding wetlands. The language implies that state delegated primacy under federal law reaches waters that are not themselves directly used for commerce or navigation or adjacent wetlands. Again, close textual analysis both reveals tenable or best meanings, but also can refute other advocated meanings.[144]

Third, also relevant to curtailing the antiregulatory arsenal is close attention to the who and how of each statute. Advocates, agencies, and judges must all respect the allocations of authority and

[137] Section 403(c).
[138] Id.
[139] Id.
[140] Id.
[141] The first definition in most dictionaries, such as the Oxford English dictionary, lists "animals, insects, and birds," with no express reference to water-based species.
[142] Section 404(c).
[143] Section 404(g)(1)
[144] See Eskridge & Nourse, supra note # at # (discussing how attention to larger language clusters will illuminate both tenable meanings and often preclude others).

what delegated actors must do with that authority. In the CWA, no major task is handed to federal judges. The CWA is not a law like early securities or antitrust laws that, by design, were drafted to allow agencies, government lawyers, and then courts to develop a body of statute-driven regulatory common law, crafting protective policies through the courts on a judicially written case-by-case basis. Instead, the CWA makes express choices about the key federal agencies and also roles of the states. Hence, Section 404's cross reference to 403(c) is express that EPA's "Administrator" is to be the crafter of implementing guidelines, working with the Army Corps. EPA must make scientifically driven, environmentally protective judgments based on these lengthy, detailed criteria about when Section 404 dredge or fill disposal permits may be granted.[145] Other than later express references to other actors, EPA is expressly delegated overall primacy to "administer this chapter."[146] EPA also retains its Section 404(c) veto power when environmental degradation concerns are serious.[147] The Army Corps is given the key role in making initial Section 404 permit choices based on site-specific, science-based judgments, subject to consultation rights of EPA, other agencies that might have concerns, and state and local preserved authority.[148] Congress hence chose the key expert actors; courts are not among them apart from subsequent judicial review roles.

Related, antiregulatory moves often seek to put a heavy thumb (or foot) on the scale under the auspices of federalism concerns to protect state roles and, sometimes concomitantly, limit the federal domain. Statutes like the CWA, however, make very particular and often subtle choices about the mix of federal and state roles. Little is left to surmise, if a statute is given a "fair" and careful reading, as the Roberts Supreme Court has now called for in several major cases.[149] The overarching reality is that the CWA of 1972 was a massive new federal statute setting forth new goals, priorities, and limitations, with antipollution and integrity goals made express, paramount, and repeatedly stated.[150] The 1977 amendments strengthened its reach, especially to protect wetlands.[151]

Furthermore, the Act's Section 404 policies and prohibitions were uniform national mandates. Similarly, the whole logic of Section 402 NPDES permits was to require nationally uniform

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[145] See 404(b), cross-referencing 403(c) for criteria for Section 404(b) guidelines.

[146] Section 101(d)

[147] Section 404(c) (setting forth criteria and process for EPA's Section 404 "veto" power).

[148] See Section 404(a) and (b) (spelling out the Secretary of the Army permitting roles and others' roles).

[149] The "fair reading" phrase has now been embraced by most justices on the Supreme Court. See e.g., BP P.L.C. v. Mayor and City Council of Baltimore, 141 S. Ct. 1532, 1538-39 (2021) (citations omitted) (stating that courts cannot remake statutes with a judicial "thumb on the scale," but must give statutes a "fair reading"); King v. Burwell, 576 U.S. 473 (2015) (calling for a "fair reading" of a statute, which in that case involved close attention to how the statute functions, congressional express goals, and consideration of consequences of interpretive choices before the Court). [#ADD OTHERS FROM 2022]

[150] The Court has called the CWA "'the most comprehensive and far reaching'" environmental law that "Congress ever had passed" and that established "'an all-encompassing program of water pollution regulation." *Ouellette*, 479 U.S. at 489, 492 (1987) (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 317-18 & n. 12 (1981)).

[151] Riverside Bayview, supra, 474 U.S. at 135-39 (reviewing debate over wetlands protection, statutory battles, and amendments enacted as confirming wetlands as a "concern" of the CWA)

levels of pollution control by industrial categories, linked to the pollutant at issue.[152] Permits had to draw on EPA-created regulations that provided such information by category. As evident in the statute, in legislative history, in court decisions, and in scholarship, the statute's logic was to enact uniform national policy that would prevent a destructive environmental "race to the bottom" among the states.[153] Decades ago, the Supreme Court identified such categorical regulation as necessary to serve the CWA's goal of "national uniformity."[154] But as with other federal laws, effective achievement of ambitious national environmental aims requires additional state and local efforts, if aligned or more protective, and also benefits from site-proximate work by states offered delegated program roles. Critically important are savings clauses that allow states to do more, while other sections make clear that certain turfs remain for the states—namely, riparian water governance and other forms of allocation of quantities of waters, nuisance liability, and possible more stringent state regulatory requirements.[155]

The CWA, like other federal environmental laws, thus sets federal regulatory floors, allowing states to do more. Federal approvals do not limit state and local governments' authority to say "no" or further tailor when, where, and how polluting conduct make occur. Federal law does not supplant state and local land use planning.[156] Hence, and importantly, federal permits do not guarantee or require a state or local government to agree about that pollution source's location, rights to operate, or levels of pollution allowed, provided state regulation is "no less stringent" than federal requirements. States simply cannot try to authorize something prohibited or embrace laxity if the conduct is subject to particular forms of constraint under federal law, regulations, or permits.[157]

Fourth, procedural choices further illuminate actors and criteria for regulatory actions. Federal CWA permitting—including both industrial discharge permitting under Section 402 and Section 404 dredge or fill disposal permitting, as well as EPA's veto provision—are themselves subject

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[152] See generally Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 Mich. L. Rev. 570 (1996) (discussing rationales for CWA and other environmental laws, with uniformity across nation a pervasive major goal).
[153] *See* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547 (2007) (analyzing implications of federal regulatory floors and ceilings); Esty, supra note # at 601-02 (reviewing rationales for strengthened federal regulation, among them concern with races to the bottom).
[154] E. I. du Pont de Nemours & Co. v. Train, 420 U.S. 112, 129, 138 (1977).

[155] See 42 U.S.C. 1251(b) (stating "it is the policy of Congress to recognize, preserve, and protect that primary responsibilities and rights of the State to prevent, reduce, and eliminate pollution," and "plan development and use (including restoration, preservation, and enhancement) of land and water resources"); 1251(g) (stating States retain authority "to allocate quantities of water"); 1370 (allowing additional state regulation if "no less stringent" than federal requirements).
[156] See 33 U.S.C. 1251(b) (preserving state right to "plan the development and use . . . of land and water resources").
[157] The Act clearly authorizes states to be more stringent or act in additional ways to protect their waters. Section 505(e) preserves state common law protections alongside federal law. Additional protection through state regulation is also authorized, as long as it is not "less stringent" than federal requirements, *see* 33 U.S.C. §§ 1365(e), 1370, as the Supreme Court confirmed in *International Paper Co. v. Ouellette*, 479 U.S. 481, 497-500 (1987) (recognizing the ability of states where pollution originates to impose nuisance liability and regulate more stringently than federally required).

to specified notice and comment procedures. These procedures provide opportunities for input and objections by all players concerned with water pollution permitting. Such disputes can range from Section 404 questions about the nature and function of categories of water, a particular site's waters, the magnitude of risks and whether they would justify an EPA Section 404(c) veto, or a polluter's status which can influence permitting stringency under Section 402 NPDES permitting, or possible eligibility for "nationwide" general permits that authorize types of actions by category. Both permit stakeholders and regulators must, in those settings, engage actual facts and science. This also includes Section 401 state rights to shape federal activities that would cause pollution and possibly impair state water quality.[158] The water quality and Total Maximum Daily Load backstop program further sets a national priority that, even beyond uniform federal permits, requires polluters and states to do more if water quality remains impaired.[159]

No stakeholder can sit out these many delineated congressionally devised procedures, fail to introduce arguments and evidence or disputed contentions, then later in the courts rely on conjecture. Courts, similarly, under long established doctrine should, in all but limited irregular settings, respect these congressional choices of venues for evidentiary contestation, regulatory modes specified, and only draw on materials contained in the "whole record" before the agency.[160]

This attention to express goals, statutory criteria, operational logic, assigned actors and process, and a record thereby created, highlights the atextual and cherry-picked nature of elements of the *SWANCC* and *Rapanos* decisions. In *SWANCC*, the somewhat abrupt key majority paragraph penned by Chief Justice Rehnquist gives substantial weight to navigability as a concern that required emphasis even with the far broader definition Congress provided. Attention to virtually all other statutory provisions discussed above reveals the law to be about limiting pollution, constraining and prohibiting discharges, and with a focus on environmental and ecological functions of waters, and overlapping "integrity" goals. Only by weighting navigability and ignoring other express provisions and operational reach and logic could this *SWANCC* language seem at all tenable.

Likewise, the *SWANCC* majority cherry-picked one federalism provision—the savings provision preserving state "primary responsibility" over pollution, but then skewed its reading to preserve state land use regulatory authority not to fulfill federal CWA goals, but as a rationale to limit federal power. This was an atextual move that failed to look at the language in context of the many federalism choices. Complementary and overlapping federal and state roles, with the CWA overall creating a new protective superstructure of national requirements that neither states nor polluters could dodge, went unmentioned. The *SWANCC* majority replaced the actual

[158] Seesawing views of state versus federal authority under Section 401 were evident in battles over new constraints on state power under Section 401 in a Trump Administration regulation, subsequent litigation, and then a surprising Supreme Court stay of a trial court ruling that had found the Trump regulation to be illegal. Louisiana v. American Rivers, #ADD CITE, SCT (2022).

[159] See 33 U.S.C. 1312-15 (setting forth water quality and TMDL requirements).

[160] Overton Park, (reviewing nature of "arbitrary and capricious" judicial review and obligation to assess action's regularity based on the "whole record")

statutory reticulated choices and decades of rulemakings and adjudicatory proceedings with the judicial view that federal regulation unduly impinged on state interests and had to be limited in the absence of a "clear statement." No record was cited in support of this critically important empirical assertion. The Court basically rejected the federalism balance struck by Congress in the statute.

Similarly, both the Scalia plurality opinion and Kennedy concurring "significant nexus" opinion in *Rapanos* also can be criticized when measured against the CWA's many intertwined and reinforcing provisions, although with the Scalia opinion far more clashing. Nothing in the CWA supports the heavy weight Scalia places on surface connection and permanent flow. It simply is not there, nor does it logically follow when assessed against the Section 403(c) criteria that set forth the Section 404 rationales and basis for permitting guidelines. They focus on water quality, functions of waters, fisheries protection, health, and recreation. The Scalia plurality's microtextual, decontextualizing focus on the "the" and "waters," plus dictionaries, is inattentive to the CWA's actual larger statutory context, structure, express goals, or national uniformity goals.

Indeed, in its operational logic and inevitable consequences, the Scalia plurality—were it a majority view—would necessarily eliminate from national protection many if not most types of Waters features found in the United States west, southwest, and hotter, drier portions of California.[161] It also might render unprotected flood-prone areas of the country that rely extensively on levees or settings where wetlands that are sometimes blocked by natural berms that are episodically both built up and breached during major storm events. The Federal Respondents in *Sackett* highlighted this levee example as a reason to reject the Scalia plurality test or similar tests advocated in the case.[162]

Paradoxically, in the states where water is most scarce and precious, the Scalia approach would have eliminated the CWA's applicability over dredge or fill disposal activity, industrial pollution discharges, and oil and spill regulation and protections. Water features critical to recharging aquifers and carrying rare but heavy rains downstream in clearly evident riverbeds to larger rivers like the Colorado River would, it appears, be excluded. This sort of unequal and geographic exclusion is flatly contrary to national uniformity and protective design of the CWA that is expressly required throughout its hundreds of pages.[163] Nothing anywhere in the statute, its legislative history, science, or scholarly analysis, supports a new judicial carveout of Waters in the arid west and southwest or in the southeast where levees and berms block continuous water connections.

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[161] S. Mažeika, et al., *Distorting science, putting water at risk*, 369 SCIENCE 766, 767 (2000) (in analysis of Trump administration regulation proposing to shrink federal Waters jurisdiction, finding that Scalia Rapanos plurality opinion on which the Trump regulation was substantially based would newly eliminate the CWA's protections in arid regions).

[162] Brief for the Respondents, supra note #, at 30-31, Sackett (discussing Scalia plurality test if applied in settings with levees and berms).

[163] The Supreme Court recognized the CWA's categorical regulation as necessary to serve the Act's goal of "national uniformity." *E. I. du Pont de Nemours & Co. v. Train*, 420 U.S. 112, 129, 138 (1977).

Justice Kennedy's "significant nexus" concurrence, which in its protective logic and explanations about protective waters was agreed with in the four dissenters' opinion penned by Justice Stevens, was partly consistent with the CWA viewed through an integrated functional lens, but partly atextual in others.[164] The explanations for when and why "significant nexus" waters deserved protection largely tracked the Section 404 and 403 (c) criteria, the Act's water quality-focused provisions, longstanding regulations, and decades of adjudicatory actions and the policies they reflected and further created. Kennedy looked at the functions of waters and linked features and how their protections would further the statute's expressly stated goals and criteria. He noted that sometimes Waters are of especial value precisely due to their being blocked from other Waters.[165] For this reason, the four dissenters agreed with protecting such "significant nexus" waters.[166]

On the other hand, the statute clearly assigns to EPA and Army Corps primacy for making such judgments based on science and the protective goals stated in the law, both in regulations and then through specified procedures in programmatic delegations and in deciding on particular permits. By creating a new test putting generalist judges in the critical oversight role, Justice Kennedy was disregarding the contrary choices of Congress. The dissenters disagreed with this element of the Kennedy opinion.

Petitioners' briefing in *Sackett* further made a sort of stealth huge attack on the CWA's reach that similarly, upon close examination, ran counter to the statute's express reach and procedural choices. The petitioners and allies made central to their arguments that CWA jurisdiction—in their conclusory but unsupported views—is obviously severed if a human constructed road or homes stand between an alleged Water and an indisputably jurisdictional Water.[167] It is true that Waters can lose their jurisdictional status if permitted activity changes them, if natural processes change their nature, or if the Army Corps confirms something is no longer a water.[168] But that is

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[164] The *Rapanos* dissenters agreed with protecting "significant nexus" waters, creating a numerical majority. *Rapanos*, 547 U.S. at 808-09 (Stevens, J. dissenting, joined by Justices Souter, Ginsburg, and Breyer) (explaining how Court majorities voted to protect both "significant nexus" waters and the less protective but differently framed plurality waters)

[165] The Kennedy concurrence focuses on the functions of wetlands waters, especially the ways wetlands "filter and purify" water and reduce pollution flows, harms, and flooding, sometimes even due to "the absence of an interchange of waters." *Rapanos,* 547 U.S. at 775-78 (Kennedy, J., concurring in the judgment).

[166] The *Rapanos* dissenters agreed with protecting "significant nexus" waters, creating a numerical majority. Rapanos, 126 S. Ct. at 2265 (Stevens, J. dissenting, joined by Justices Souter, Ginsburg, and Breyer) (explaining how Court majorities voted to protect both "significant nexus" waters and the less protective but differently framed plurality waters).

[167] Petitioners' Brief on the Merits at 4, 8, 50, 52, Sackett v. U.S., __S. Ct. (No. 21-454) (April 2022) (arguing that due to road and homes blocking Sackett site from Priest Lake, the site lacks an allegedly required surface-water connection" and therefore "EPA has no basis" to regulate the site)

[168] Permits allowing fill can render them nonjurisdictional. Regulations state than "[c]hanges" in a water's jurisdictional status can occur due to natural processes. 40 C.F.R. § 328.5. "Man-made" changes, however, can only alter jurisdictional lines after Army Corps "examin[ation]" and "verif[ication]." *Id.* For further analysis contesting

it. Nothing in the statute or longstanding understandings confirm this much repeated claim of Petitioners and amici allies.

This stealth attack claiming that human barriers obviously sever federal jurisdiction, which is unsupported with evidence about the effects of such a policy, or any underlying regulatory record support, or caselaw, ran counter to five decades of contrary views of all administrations and courts. In fact, this longstanding and statutorily grounded policy was never challenged in the ways required by the CWA and Administrative Procedure Act.

The Sacketts basically needed to make this argument because this was the physical setting of their disputed property and building plans. But for a road and some houses, they were much like the site found jurisdictional in *Riverside Bayview Homes*, or arguably more clearly jurisdictional giving documented "shallow subsurface flow" connecting the site, a tributary, and a large jurisdictional lake.[169] Justice Scalia's plurality similarly argued that breaks in surface connection would eliminate jurisdiction. He too did not grapple with contrary statutory language, contrary enduring regulatory policy, or the implications of such a view if it meant that, across the nation, human constructed interruptions would eliminate federal protections. Much as the Supreme Court in *Maui* understood and prohibited clever efforts to destroy protection through several strategic steps or manipulation of engineering design, close analysis provides strong arguments against the petitioners' unbriefed but oft-mentioned astonishment that blocked Waters could ever be jurisdictional.[170]

The flaws with this contention that human constructed blockages destroy jurisdiction are highlighted by analysis of the statute's choices and linked effects. Again, microtextual antiregulatory moves are subject to effective counters that engage more of the disputed statutory provision's statutory context. First, the whole design of the CWA regulates human activity that, through pollution discharges or dredged or fill material disposal activities, impair or destroy waters. Allowing a tributary, wetland, or edge of a major river or coastline to lose protections due to linked or earlier human construction or pollution would, in effect, gut the act.

Several provisions quite specifically address and preclude this move to sever CWA jurisdiction due to human constructed barriers. Most important is Section 404(f)(2), which creates a major exclusion to a long listing of exemptions from Section 404 strictures. Even "incidental discharges" linked to efforts to "bring[] an area of the navigable waters into a use to which it was not previously subject," and where "flow or circulation might be impaired or the reach of such waters be reduced" remains subject to Section 404's permit criteria and requirements: it "shall be required to have a permit under this section."[171] Due to this provision and Section 403(c)'s

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this claim (co-authored by this author who served as lead counsel on the brief), see Sackett v EPA, Brief of Amici Curiae 167 U.S. Members of Congress in Support of Respondents 29-33 (June 17, 2022).

[169] Brief for 167 U.S. Members, supra, at 29-33 (reviewing case facts and related law).

[170] *County of Maui, Hawaii v. Hawaii Wildlife Fund*. 140 S. Ct. 1462, 1473 (2020) (rejecting test that would trigger "evas[ive]" manipulation of discharge pipes because the majority did "not see how Congress could have intended to create such a large and obvious loophole").

[171] 33 U.S.C. § 1344(f)(2).

criteria, regulations have likewise long precluded construction methods, impoundments, berms, roads and the like from destroying jurisdiction.[172]

Importantly, those longstanding regulations and the statutory provision on which they rest basically mean the following: apart from natural processes that destroy a water or regulatory actions approving a status shift (such as a permit), once something is a Water, it usually remains a Water even if humans somehow seek to change or destroy it.[173]

These longstanding regulations were not challenged in *Sackett*. Were they to be challenged, stakeholders and regulators would have had to apply the science and statutory criteria, then assess the effects of any such change on a national basis against the Act's ubiquitous protective, environmentally focused goals. Any national policy shift from current promulgated Code of Federal Regulations requirements and prohibition would have to engage fully with the past record, the past rationales for protections, decades of experience and effects under the still effective regulation, and empirical assessment of the effects of any redrawing of regulatory lines. It would also have to comport fully with the Court's rigorous fact-intensive analysis required for agency policy changes.[174] Decades of regulatory experience under this policy would need to be engaged, effects of both old policies and new policies assessed and compared, and a new flatly contrary policy justified as a matter of fact and law.

B. Regulatory effects complexity counters

The second major counter to the antiregulatory arsenal's elements still must draw heavily on rigorous, holistic, statutory analysis, but turns in a different direction. Instead of focusing on enacted statutory texts to check cherry-picked textual claims and freewheeling sorts of policy revision, the focus is on the science, business, and fact side of regulatory choosing. All statutes, especially environmental laws, include goals and establish criteria that must be engaged in any regulatory action. Agencies, stakeholders, and later reviewing courts must engage with "contingent facts" that statutory criteria and procedures choose.[175] Especially prevalent in environmental laws are benchmarking forms of regulation that set limits or mandates based on what the "best" in some comparator category can achieve.[176] Courts asked to make major

[172] Implementing regulations dating back to the 1970s state that waters "used in the past" for interstate commerce or in tidal settings remain waters. 40 C.F.R. § 328.3(a)(1). "Impoundments" of waters remain waters. 40 C.F.R. § 328.3(a)(4). "Adjacent" waters are defined as "bordering, contiguous, or neighboring," and they remain jurisdictional "adjacent wetlands" even if "separated from other waters of the United States by man-made dikes or barriers, natural river beams, beach dunes and the like." 40 C.F.R. § 328.3(a)(4), as codified in 1977. 42 Fed. Reg. 37, 122, 37, 144 (July 19, 1977). EPA and the Army Corps have long instructed field investigators to consider past wetland hydrology despite recent human construction alterations. *See, e.g.,* U.S. Army Corps of Eng'rs, U.S. EPA, U.S. Fish and Wildlife Service, & U.S.D.A. Soil Conservation Service, *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*, 13, 31, 50-55 (1989).

[173] 33 C.F.R. 328.3(a)(1) (protecting waters "used in the past" as waters); (4) (protecting "impoundments of waters otherwise defined as" Waters); 40 C.F.R. 230.3(s)(4) (similarly protecting impounded waters) ADD MORE

[174] Encino Motorcars; Fox; State Farm; WWB, Consistency and Contingency BULR

[175] Buzbee, The Tethered President, supra note # (reviewing role of contingent facts in constraining agency policy shifts).

[176] For example, CAA Section 111 requires EPA to set limits based on what is achievable with the "best system of emission reduction" that is "adequately demonstrated." 42 U.S.C. 7411. Likewise, the CWA requires regulation by

regulatory policy revisions should be overtly presented with the same avalanche of empirical complexities that make any agency regulation, especially agency policy change, a challenge.

Although antiregulatory advocates and judges often present the world through a simplistic lens focused on burdens on targets of regulation, or sometimes a focus only on the business side of the regulatory ledger, such a one-sided focus can never be legally justified. All laws state protective goals, with their focus often on preserving or enhancing the value of the thing protected. Economic effects, costs, or other ripple effects must be analyzed as well. The Supreme Court's *Michigan v. EPA* decision also creates a default requirement of consideration of both regulatory benefits and associated costs of any regulatory action, unless shaped or precluded by statutory language.[177] No agency could legally ignore statutory criteria and evidence about regulatory choices' effect in a thorough balanced way; agencies must supply such balanced, statutorily respectful analysis. Courts tempted to engage in skewed, one-sided concerns about effects should similarly be challenged (or subject to polite entreaties) as well.

To reach the sympathies of antiregulatory courts and direct their attention to statutorily relevant criteria and effects, advocates may need to emphasize costs borne by other business, state and local governments, and other tangible monetizable stakes and harms. What is a cost, benefit, or new burden depends on the valence of the action. Whether an action strengthens or weakens regulatory requirements, costs and benefits of the shift will be apparent and must be assessed unless precluded by statute. Environmental laws may not, as written, be skewed to favor business concerns, but if the effort is to awaken politically biased or partisan judges to congressional choices and all relevant effects, attention to such effects concerns may be essential.

For example, in the recent *West Virginia* case, power companies crafted just such arguments in support of EPA's regulatory power.[178] And although the Supreme Court trimmed EPA's power and the CAA's reach in its far-reaching opinion, the Court was responsive to the power companies' argument. The companies sought to protect longstanding industry practices and investments and, it appears, feared a Supreme Court opinion that would unsettle their regulatory and business arrangements. As alluded to above, the case focused on EPA's power to set emissions caps for power plant greenhouse gas emissions by taking into account all of the ways –inside and outside "the fenceline" of power plants --such emitters actually reduce emissions while they also juggle business factors and environmental obligations under local, state, regional, and federal environmental and energy laws.[179] This baseline analysis frame is crucial under the CAA's relevant provision because pollution limits must be based on levels achievable by the

categories of emitters and pollution types, with levels of stringency dependent as factors such as age, toxicity, cost, facility size, but with further stringency required if receiving water quality is impaired. See Glicksman et al., supra note #, at 78-80 (describing this form of regulation generally), at 557-59, 589-607 (describing and then introducing materials regarding key CWA provisions utilizing such regulatory forms).

[177] 506 S. Ct. 2699 (2015).

[178] Brief for the Power Company Respondents, West Virginia (Jan. 18, 2022).

[179] The "inside" or "outside" the "fenceline" frame was widely used in the case and also in earlier battles over regulations.

"best system of emission reduction" that is "adequately demonstrated."[180] The power companies focused on such contingent facts in aligning themselves with EPA's position, pleading with justices evidently hostile to EPA's power not to unsettle their business environment. The companies emphasized the challenge of crafting cost-effective compliance strategies and their constant adjusting of parameters as part of running their businesses within complex, interconnected electricity grids.[181] Power plants in all states operate within statewide, regional, or sometimes nationally interconnected grids, constantly needing to balance not only the engineering physics of the electricity sector's energy generation and demand, but also the search for, and investments in, the most cost-effective and profitable ways to operate.

Generalist judges rarely have an inkling how these sorts of industry-specific and context-specific factors play out in a dynamic, changing business sector and nation with states that favor different policies. For this reason, power company advocates emphasized this complex empirical matrix of regulations, day-to-day plant operations, fuel supply, investments, and current realities of balancing and pollution trading already in use.

The *West Virginia* Court's opinion in several places was responsive to these arguments in favor of regulation, but which were focused on business effects. The Court carefully distinguished between the task of setting emissions limitations and the separate issue of how polluters and states could comply with federally set limits.[182]

The power companies' concerns in *West Virginia* are not unique. In any competitive business sector, one target of regulation may complain while others may take advantage of regulation or even be invested in anticipated future business and regulatory environments.[183] A court decision protecting one polluter may fundamentally unsettle others' investment choices and even basic business models. Or a decision might inadvertently reward business sector laggards, or even bad actors. Or, to reach federalism-focused courts, state and local governments –whether arguing for or against a federal regulatory action--will want to emphasize repercussions they may face and investments they may have made that could be unsettled by an uninformed antiregulatory court decision. Because the prevalent environmental law choice is to allow states to do more to protect the environment, this means states and often their businesses will have sunk costs into their different, additional choices that create distinctive regulatory environments.[184] No court ruling or underlying regulatory action should, if true to congressional choices, contradict that statutory design.

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[180] Clean Air Act, U.S.C. 7411(a) and (d) (setting forth requirement for new sources and existing sources in the same category subject to new source regulation).

[181] Id. at 45-47 (discussing how industry works with flexibility to comply with multiple business and regulatory sources of constraint).

[182] *West Virginia*, supra, slip op. at 5 (stating that "generally speaking, a source may achieve that emissions cap in any way it chooses"), 22 and note 1 (distinguishing setting of emissions cap and "allow[ing] cap-and-trade or similar averaging measures as compliance mechanisms").

[183] Buzbee, Federalism Hedging, supra note # (analyzing benefits of multiple levels of regulatory authority under federalism as akin to financial "hedging" and a prudent way to reduce environmental losses and business disruptions were federal climate regulation ineffective, changed, or judicially rejected).

[184] Id.

Such empirical reality-based complexities come in several forms that can be described in general terms. First, both regulations and more individualized regulatory actions such as permitting usually involve a *first-level assessment of harms or risks of harms of the activity in its pre-regulatory action state*. This kind of baselines analysis, which is about the simplest level of empirical assessment in the environmental law setting, is nonetheless well beyond judicial competence. What kinds of effects are happening and can be anticipated in particularized receiving environments? If focused on the polluter, what is the range of capabilities of such polluters and control technology and practices one finds in the current operating environment?

A second level of empirical analysis both shapes and assesses the regulatory response. What level of control or risk-reducing measures can and should be required? Or to put it differently, *where can protective regulations reasonably go in light of both statutory "best" benchmarking variants and new products and practices?* Here too, such analysis involves both environmental effects analysis but also knowledge about the targets of regulation and what they have done or can do. Even more challenging and beyond judicial ken are predictive expert regulatory judgments, often by engineers, field scientists, or economists with specialized expertise, all of whom must assess future trends, actions, and their effects. And often businesses invest in and develop business models and expertise in light of where they think the law is going, or should go.

For example, in the CWA, such empirical effects analysis is ubiquitous. A common empirically focused attribute is found in Section 404 guidelines for dredge or fill activity, categorical regulations about industries and polluters that in turn are drawn on in facility permitting, and also water quality-focused portions: all call for assessment of environmental effects, human and health repercussions, costs and benefits of all kinds, and business and polluter realities and potential at varied levels of general or individual analysis.[185]

Moreover, a third type of empirical assessment of regulatory effects requires *knowledge of the web of other statutes, regulations, and practices that shape a sector's activities and would interact with any new regulatory choices*. Again, this tends to involve knowledge about the intertwined workings of federal statutes, regulations, implementation and adjudicatory actions, and important court precedents. Yet another series of layers must look at similar webs or layers of regional, state, and local laws, plus contractual arrangements and informal practices built on these legal matrices. Again, no generalist court can have this knowledge. Even a judge who, perhaps due to past work, knows something about a sector and its regulation will not be current about business and regulatory realities surrounding later actions.

Cost-benefit analysis also can be part of factually driven counters to antiregulatory proclivities. Cost-benefit analysis has now been part of the regulatory landscape going back to the 1970s, yet remains the subject of ongoing debate over its legality, accuracy, efficacy, and even its morality.[186] Such analyses' actual uses in regulatory actions changes in varied settings and times, but such analyses provide another powerful empirical hook to check judicial overreach.

[185] See supra note # and accompanying text (describing and citing casebook materials presenting such strategies).
[186] For skeptical, critical view, see # LISA HEINZERLING & FRANK ACKERMAN, PRICELESS (2004). For a recent defense of CBA and, especially, how it could serve to check regulatory vacillations, see Cecot, supra note #.

Such analyses tend to document both baseline risks and then provides comparison of costs and benefits of varied possible regulatory responses, including the final regulatory choice. High stakes permit proceedings, however, rarely involve systematic preparation of cost-benefit reports like the Regulatory Impact Analyses accompanying promulgation of most major federal regulation. They may, however, similarly generate or reflect empirical assessment of costs, benefits, and other empirical wrinkles raised by that permit.

Since *Overton Park*, regulators and stakeholders know the importance of creating a supportive record, even in adjudicatory determinations.[187] Advocates can and indeed must draw on such studies and findings, whether supporting or challenging a factual assertion before an agency or later reviewing court. Since specious or shoddy agency analyses tend to be spotted and result in challenges, such analyses are less likely to contain cheap talk or be laden with speculation. And if an advocate can highlight consistent strains in such analyses over varied administrations, that creates an even more powerful fact-based check on judicial surmise.

C. Methodological critique of unfounded, skewed, or illogical claims

Another strategy to check the antiregulatory arsenal is more awkward to assert, but remains essential. Advocates and sympathetic regulators or judges will at times engage in speculation, anecdotes, or modes of reasoning that flunk any basic sound methodology or logic. In particular, advocates seem increasingly willing to present one-sided and lightly supported or unsupported claims about regulatory overreach or egregious regulatory burdens. Or advocates will draw on a mix of case language or perhaps reported cases to make broader claims about such alleged regulatory abuses. But conclusory surmise or rhetorical flourishes do not make something true.

Similarly, it is utterly illogical to cite a few reported cases involving regulatory disputes as establishing anything overall, as does Justice Scalia for the plurality in *Rapanos*.[188] Cases are, by their nature, brought where issues are in dispute and the challenger, despite deference regimes, thinks it has a chance of winning and that a regulatory error or abuse has occurred. Litigated regulatory challenges hence will represent only a tiny percentage of overall regulatory actions or effects achieved under any statute or program. Unless and until one knows the denominator of all similar actions, or overall costs and benefits associated with a program, one cannot draw any conclusion from a few contested actions resulting in judicial opinions. They might be outliers, or they might indeed be representative. But one reality is quite certain: the small number of litigated challenges are highly unlikely to reveal anything about the overall benefits or effects of a regulatory program. If judges do not understand the problem of selection bias, then advocates need to educate them.

Sometimes the error and counter are simple facts about the overall nature of a regulatory program, business, or engineering. For example, in *Rapanos*, during the oral argument, justices' questions sympathetic to the challenger were based on an assertion that federal Waters protections simply could not exist if a disputed Water was piped or involved water moving at

[187] *Overton Park* required agencies to justify their actions based on the "whole record" before them at the time of the disputed action, with more intrusive review if the agency did not in the action provide an explanation.
[188] See supra at notes # and accompanying text (presenting this analysis and selection bias problems with it).

times through ditches. Solicitor General Paul Clement, a noted political conservative lawyer and at that point the George W. Bush Administration's Solicitor General, responded simply and powerfully. Such a concept of jurisdictional severance due to any piping or human constructed ditches or channels could not be right due to realities of waters in their passage through urban areas. He recounted the Corps' encountering many sorts of waters' modifications. He said it is now at "the point where the difference between that which is a man-made channel and that which is a natural channel is both difficult to discern and utterly besides the point for this regulatory scheme." Relatedly, he said, "some things that are part of the storm drainage system of a city are actually things that were previous navigable natural waters."[189] This tested bright line to limit the CWA's reach was revealed to be specious due to Clements' greater knowledge of, first, how waters have been pervasively modified and, second, why regulators as a result viewed such human modifications as irrelevant to Act jurisdiction.

D. Check unfounded empirical claims

Agencies and stakeholder concerned with unleashed antiregulatory judges could modify how agencies work to establish a more robust record that would, or should, constrain later judging. Agencies could explicitly seek particular information from stakeholders, then memorialize what it reveals. Agencies similarly could target questions to particular claimants making apparently hyperbolic claims about regulatory excess or burdens, much as legislators after hearings will ask witnesses to support or amplify their assertions. The recent Supreme Court *Prometheus* decision seems to give agencies broader latitude to seek stakeholder information, but then act if not confronted by contrary responsive information.[190]

Another move is evident within the Waters' battles. After *SWANCC* and *Rapanos* began to weaken Waters' protections, EPA issued public notice that it was gathering the best peer reviewed science about categories of waters and their functions. The resulting "Connectivity Report" was also shared when completed, with criticisms welcomed.[191] Later, the Obama Administration drew on this compilation of the best peer reviewed science to justify the regulatory lines it drew in the Clean Water Rule. Such a massive data or science collecting exercise serves to reduce administration-to-administration policy vacillation. After all, a later administration reassessing a policy would have to engage with its own earlier science or data, especially if relied on in an earlier regulatory action.[192] It also similarly constrains reviewing judges because it is part of the agency's record, plus it provides actual science and empirical information that may differ from judicial conjecture or advocates' contentions.

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[189] Rapanos v. U.S., oral argument, 2006 U.S. Transcr. 11 at 12, 16.

[190] Federal Communications Comm'n v. Prometheus Radio Project, 141 S. Ct. 1150, 1158-61 (declining to judicial impose an agency obligation to conduct studies or generate supportive information when information was sought from stakeholders and they did not introduce controverting materials).

[191] Environmental Protection Agency, Connectivity of Streams & Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Jan. 2015) (reviewing peer reviewed science regarding functions of diverse types of waters).

[192] Buzbee, The Tethered President, supra, at # (discussing how agency data, studies, and other factual investigations will require attention and additional justification if the same agency later shifts policy with different factual conclusions).

Another remedy would rely on a currently disfavored move. Agencies could do more of their work through formal trial-like on-the-record rulemakings or adjudications. In such settings, everyone—the government included—would need to introduce key science and data supporting regulatory contentions. Of particular value, cross examination of witnesses testifying under oath would provide a further crucible to test and perhaps reveal specious contentions.

A more oblique strategy is for regulatory disputants to push hard against standing to raise disputes in court unless claims of hardship are documented in sworn affidavits. Criminal perjury sanctions remain a deterrent to exaggeration and dissembling.

E. Major questions counters

The major questions move or canon—now often called a doctrine—is an interpretive skew that, by its nature, cuts against any agency assertion of new power that is significant. In its recent strengthening and recasting, especially in the 2022 *West Virginia* case, it has gone from a rarely utilized lens rooted in careful documentation of legislative signals about regulatory power to general hostility to strong regulation.[193] Early cases that began to craft this new doctrine or canon looked for major agency policy shifts, shifts that were hard to anticipate, and especially moves into areas where the underlying statute or perhaps statutes made the agency's new power assertion suspect.[194]

In its newest form, emergent since around 2020 on the Supreme Court and wielded by the antiregulatory majority six, it is mostly about judicial suspicion or hostility to agency powers. Even agencies working in the sweet spot of their turf, or with express past Supreme Court approval of their power, have been met with major questions attacks and power rejections. It may, concededly, now be operating as a cover for judicial rejection of policies the judges dislike. Nonetheless, neither the Supreme Court nor lower courts are unfettered by countervailing statutory choices and evidence, regulatory track records, and judicial precedents; they may serve to weaken reliance on this emergent "power canon."[195]

The major questions doctrine is problematic due to the discretionary judicial power it involves, but several countervailing moves might nonetheless possibly check major questions abuse. First, amassing statutory signals of all sorts that support the regulatory power asserted is critical. This means countering microtextual isolating interpretative and advocacy frames. Advocates supporting the regulatory power must provide text-based analysis that weaves support from all contextual, definitional, operational, and structural signals possible.[196]

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[193] *West Virginia's* rejection of EPA regulation based on a "generation shifting" strategy was based mostly on the Court's embrace and then broadening of the now officially named "major questions doctrine." Slip op. at 16-31 (framing analysis with the major questions doctrine then applying it to reject EPA's generation shifting strategy).

[194] Id., slip op. at 16-20 (discussing previous precedents building the elements of the doctrine).

[195] Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933 (2017) (criticizing what is now generally referred to as the major questions doctrine and other frames labeled the "power canons")

[196] An example of such analysis is provided supra at notes # to # regarding the Waters jurisdiction question.

Second, a strain in Supreme Court precedents has historically recognized that broad power to address new circumstances can be conferred with broad language. As then Judge (now Justice) Brett Kavanaugh wrote in 2016, "courts should still defer to agencies in cases involving statutes using broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.'"[197] The recent OSHA COVID-19 vaccine decision concededly cuts against this line of cases, finding the breadth of the claimed power under broad language a reason to reject OSHA's action.[198] Relatedly, major questions frames often rest, at their heart, on claims of massive regulatory effects. But if the statute, by its very nature, has broad national effects, that should counter such a move. So, in the WOTUS setting, the Court's correct earlier characterizations of the CWA as a massive piece of antipollution legislation should serve to counteract breadth of impacts as a rationale for judicial shrinking of a statute.[199] Relatedly, claims of overreach or massive effects should, in the regulatory setting, be somewhere reflected in record proof. And if such record support is absent, that absence should be the focus on argument about applications of the major questions doctrine due to claimed major or disruptive effects.

Lastly, since the major questions move can turn on the novel use of a particular regulatory tool, or reaching of new targets, those supporting regulation will need to frame ways the action is consistent with longstanding views of regulatory power or history. Not all new risks mean no power; agencies are often empowered to address new risks, but through the procedural vetting of rulemaking. If the agency has, over the years, identified new sources of risk and then acted, or developed different and more effective regulatory tools, yet another new regulatory assertion looks less like disruption and more like continuity. And, relatedly, pervasive statutory choices to set regulatory strictures based on the "best" of some comparator by their very nature should move regulation into new and more stringent directions. Finding all novel and stringent regulatory actions suspect would often be illogical and counter to what Congress expressly chose in "best"-based benchmarking analysis.

Conclusion

The new antiregulatory arsenal is powerful, as evident in CWA Waters' battles and also as a series of moves partly constructed from past Waters' advocacy and decisions. This arsenal is now a pervasively important factor in devising, attacking, and defending regulatory policies. It is hard to avoid, especially due to ways the antiregulatory arsenal often is wielded with disregard of statutory choices, record evidence, and roles and procedures Congress devises within each statute. Nonetheless, close attention to the web or lattice-like set of statutory text signals, regulatory records, and roles allocated and preserved by Congress, might serve to check its aggressive use. But the Supreme Court is so powerful not because it is necessarily right, but

[197] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153 (2016) (book review of ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

[198] See NFIB, supra note #.

[199] See supra note [around 149] (quoting Supreme Court opinions about the comprehensive nature of the CWA)..

because it is last.[200] It can in effect rewrite statutes or weaken regulators' powers and, in a time of political gridlock, thereby gut protective laws with enduring weakening effects. And the more it creates new antiregulatory moves and frames, the more advocates will build on that law and construct new regimes hostile to the administrative state.

The key facets of the antiregulatory arsenal are, in effect, a near opposite of the longstanding reliance on *Chevron* deference.[201] Instead of agencies presumptively acting in realms of discretion where they will receive deference from courts, the reviewing climate and presumptions are becoming decidedly unsympathetic, undeferential, and often overtly hostile to agencies doing the work required of them by Congress. The antiregulatory arsenal may only be a judicial creation, but despite its lack of democratic provenance, it remains a powerful weapon empowering judges and those opposed to regulation to weaken the implemented reality of this nation's environmental laws.

[200] This is a paraphrase of Justice Robert Jackson, who stated of the Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) (quoted in Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 541 (2014)).

[201] Chevron, supra (upholding bubble strategy option for states and polluters and, in so doing, setting forth a deferential two-step frame for judicial review of agency interpretations of law, especially in technical, scientific, and complex settings).