

Waters of the United States: Theory, Practice, and Integrity at the Supreme Court

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ABSTRACT—In the Supreme Court's two wetlands cases this Term, a question of statutory interpretation divided the justices sharply, in part because so much rides on the particular statutory provision at issue. The provision, a cryptic definition within the Clean Water Act (CWA), has now provided three separate occasions at the Court where the justices have confronted (1) the *Chevron* doctrine and the Court's own ambivalence toward it, and (2) the CWA's enormous project of restoring the chemical, physical, and biological integrity of the Nation's waters. In this essay, I argue that the way the Court went about resolving its differences is, unfortunately, instructive not just to environmental lawyers. It is illustrative of the Court's failed minimalism, disregard for its own precedents, and tired uses of semantics where truly substantive problems are confronting our society.

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It is perhaps fitting that all three branches have embarrassed themselves trying to define a concept central to American environmental law. In 1972, the Congress declared in the Federal Water Pollution Control Act, known as the Clean Water Act (“CWA”), that it was “the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.”¹ That, of course, never happened—not least because Congress itself never really shared the ambition of that goal. The statute’s longer-term objective of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters”² became, virtually by default, the most definite end to which the Environmental Protection Agency (“EPA”) and the Corps of Engineers could aim. But they have chosen an irregular path to that end, partly because the statute is so equivocal about its purposes and its subject (CWA § 502(7) defines its subject, “navigable waters of the United States,” as roughly “waters of the United States”³) and partly because the courts have been so equivocal about the statute’s *meaning* under our Constitution and practices of statutory construction.⁴ Great hopes had formed around *Rapanos v. United*

¹ Pub. L. No. 92-500, 86 Stat. 816, 816, codified at 33 U.S.C. § 1251(a)(1). It was *Congress’s* declaration because Nixon vetoed Pub. L. No. 92-500, but was immediately overridden. *See* 86 Stat 903-05.

² *Id.* at § 1251(a).

³ 33 U.S.C. § 1362(7). The term “waters of the United States” is defined by the Army Corps of Engineers (“Corps”) at 33 C.F.R. § 328.3 and by the Environmental Protection Agency (“EPA”) at 40 C.F.R. § 230.3(s). INSERT DEFINITION Because of its other, related statutes, the Corps also maintains a regulatory definition of “navigable waters of the United States.” *See* 33 C.F.R. § 329.4 (2005). These two agencies have built a relationship based upon mutual distrust, a function of their having been granted a divided authority to implement the Act and their different institutional cultures. Mark A. Chertok & Kate Sinding, *Federal Jurisdiction Over Wetlands: “Waters of the United States,”* in WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404, at 59, 60-61 (Kim Diana Connolly *et al.* eds., 2005) (hereafter “WETLANDS LAW AND POLICY”). Currently, the definitions parallel each other in substance, although the two agencies’ interpretations and administration of the term have been somewhat uneven over the years. *See id.* at 86-92.

⁴ This essay leaves aside the Corps’ own significant institutional ambivalence toward CWA § 101(a). The history has yet fully to be written detailing the many ways in which the Corps itself is responsible for compromising the chemical, physical and biological integrity of the nation’s waters. *See* ARTHUR E. MORGAN, DAMS AND OTHER DISASTERS: A CENTURY OF THE ARMY CORPS OF ENGINEERS IN CIVIL WORKS

States and *Carabell v. United States*, the two wetlands cases on certiorari this Term. But those hopes were dashed in a 4-1-4 split at the Court that now threatens to make restoring the chemical, physical, and biological integrity of the Nation’s waters even harder.⁵

When the Supreme Court decided *Solid Waste Agency of Northern Cook County v. United States (SWANCC)*,⁶ environmental lawyers were sure the Court would soon return to the scene to clarify what it had done.⁷ In *SWANCC*, the Court rejected agency interpretations of § 502(7)⁸ extending it to certain “isolated, non-navigable, intra-state waters.”⁹ The Court held the waters were beyond the reach of the CWA as legislated in 1972 and as amended in 1977 and again in 1987.¹⁰ In reversing the agencies so bluntly, the *SWANCC* majority advanced a view of regulatory federalism distinctly contrary to the one the agencies had practiced. Indeed, the majority seemed to take jurisdictional geography far more seriously than had the Executive—going so far as to expressly reject a call for deference to which it might ordinarily have responded.¹¹ By doing so, the Court also showcased a view of its own authority that is at least in tension with, if it did not

(1971); MICHAEL GRUNWALD, *THE SWAMP: THE EVERGLADES, FLORIDA, AND THE POLITICS OF PARADISE* (2006).

⁵ See *Rapanos et ux. v. United States*, 126 S. Ct. 2208 (2006).

⁶ 531 U.S. 159 (2001).

⁷ See, e.g., Bradford C. Mank, *The Murky Future of the Clean Water Act After SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 *ECOLOGY L.Q.* 811 (2003).

⁸ The agencies interpreted CWA §§ 404 and 502(7), 33 U.S.C. §§ 1344, 1362(7), as including “waters” having principally biological—as opposed to hydrological—connections to traditional navigable-in-fact waters. Mank, *supra* note 7, at 842-43.

⁹ *SWANCC*, 531 U.S. at 167.

¹⁰ The Federal Water Pollution Control Act (“FWCPA”), took its modern, recognizable form through Pub. L. No. 92-500, 86 Stat. 816 (1972), *codified at* 33 U.S.C. § 1251 *et seq.* It was the 1977 amendments that changed the statute’s official name to the “Clean Water Act,” Pub. L. No. 95-217, 91 Stat. 1567 (1977), although it is still denominated FWPCA in the U.S. Code. The Water Quality Act Amendments, Pub. L. No. 100-4, 101 Stat. 75 (1987), were enacted less than a year after EPA and the Corps of Engineers issued the definition of “waters of the United States” challenged in *SWANCC*, doing nothing to alter those definitions. See Final Rule, 51 Fed. Reg. 41206 (1986).

¹¹ See *SWANCC*, 531 U.S. at 174. The Court refused to afford the agencies the level of deference identified with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *SWANCC*, 531 U.S. at 172-74. It held instead that an implied exception to the *Chevron* doctrine exists where an agency interpretation of an ambiguous statute has the potential to raise “serious constitutional problems.” *Id.* at 172-73.

flatly contradict, several of its precedents—indeed with much of the last half century of administrative law. This is what made *SWANCC* so extraordinary a presence in environmental law for the last five years—and what set the stage for the cases this Term.¹²

The *SWANCC* opinion left its legal geography mostly uncharted, though, especially with respect to wetlands as “waters of the United States.”¹³ Some wetlands are far removed, even completely detached at long intervals,¹⁴ from the “navigable waters” into which they eventually and/or occasionally flow.¹⁵ The *SWANCC* opinion said nothing about delineating federal as opposed to state jurisdiction there.¹⁶ Not that this was especially novel: various navigation acts have referenced “navigable waters” and

¹² As Professor Lazarus argued,

[t]he *SWANCC* Court’s conclusion that the plain meaning of “navigable waters” cannot extend to isolated, nonnavigable, intrastate waters not physically adjacent to waters satisfying what the Court described as the “classical understanding of that term” is not, standing alone, remarkable. To anyone approaching the question as a matter of first impression, the ruling might well seem logical, if not compelling. What made the Court’s ruling so unsettling to environmental law was that the legal issue before the Court was *not* a matter of first impression: the relevant federal agencies (and arguably Congress as well) had all embraced a view broader than that “classical understanding” for more than twenty-five years.

RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 204 (2004).

¹³ The majority in *SWANCC* held that, for such “isolated” waters to be deemed “waters of the United States,” they had to bear some sort of “significant nexus” to navigable waters traditionally defined. *SWANCC*, 531 U.S. at 167.

¹⁴ Dennis W. Magee, *A Primer on Wetlands Ecology*, in *WETLANDS LAW AND POLICY*, supra note 3, at 27, 28-32.

¹⁵ “Wetlands” have long been defined by the agencies as lands that are “inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” 33 C.F.R. § 323.2(c) (1985); 33 C.F.R. § 328.4(b) (2005). But this definition encompasses swamp and cornfield alike. See *United States v. Rapanos*, 376 F.3d 629, 642-43 (6th Cir. 2004).

¹⁶ Thus, unlike *Rapanos* and *Carabell*, no “adjacency” issue was present in *SWANCC*. Estimates vary, but with roughly 278 million acres of wetlands across the country, William L. Andreen, *Water Quality Today—Has the Clean Water Act Been A Success?*, 55 ALA. L. REV. 537, 552-53 (2004), this was easily the most politically charged issue in *SWANCC*. Together with the concept of a tributary, it then became the parade of horrors in Justice Scalia’s opinion in *Rapanos*. See *Rapanos*, 126 S. Ct. at 2214-19 (2006).

their “tributaries” going back decades, implying the existence of a set the courts have long struggled to identify.¹⁷

But the *SWANCC* case emphasized the point of the CWA—the restoration of the chemical, physical and biological integrity of the nation’s waters—intersecting most plainly with the Court’s recent federalism precedents. Hydrographic modifications are so common today and the building of infrastructure that is impervious to precipitation so widespread that wetlands protection and runoff regulation have become hot button social issues.¹⁸ Yet the natural capital functioning wetlands represent makes the test for Commerce Clause authority articulated in *United States v. Lopez*¹⁹ and elsewhere²⁰ no test at all. Destroying this resource is easily among that “‘class of activities’ that have a substantial effect on interstate commerce.”²¹ Even ‘isolated’ wetlands and their

¹⁷ See, e.g., *Leovy v. United States*, 177 U.S. 621, 633(1899) (arguing that tributaries of “navigable in fact” waters cannot be “navigable waters of the United States” because if they were “there is a scarcely a creek or stream in the entire country which is not a navigable water of the United States”).

¹⁸ See Robert W. Adler, *The Two Lost Books in the Water Quality Trilogy: The Elusive Objectives of Physical and Biological Integrity*, 33 ENVTL. L. 29, 30-35 (2003).

¹⁹ 514 U.S. 549 (1995).

²⁰ The Court has decided at least three significant challenges to federal statutes under the Commerce Clause since *Perez v. United States*, 402 U.S. 146 (1971). *Perez* upheld Title II of the Consumer Credit Protection Act prohibiting “loansharking” as part of a larger program attacking organized crime and was the first opinion to set out the familiar three-part test *Lopez* made so famous. Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 702-03 & n.118 (1995). The three cases are *Lopez*, *United States v. Morrison*, 529 U.S. 598 (2000); and *Gonzales v. Raich*, 125 S. Ct. 2195, 2205 (2005). Those three cases were part of a larger renaissance of states’ rights decisions under Chief Justice Rehnquist. See Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 U.C.L.A. L. REV. 217, 218-25 (2004).

²¹ *Raich*, 125 S. Ct. at 2205; *cf. id.* at 2206 (“When Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.”). In *Lopez*, the Court held that, where the legislation regulates neither overtly commercial activity, nor the “channels” or “instrumentalities” of interstate commerce, it may still regulate activities that “substantially affect” interstate commerce and be a constitutional use of Article I authority. *Lopez*, 514 U.S. at 571. Some courts have expressly analyzed the Commerce Clause issues raised by § 502(7) in terms of the protection of the “channels” of interstate commerce. See, e.g., *United States v. Buday*, 138 F.Supp.2d 1282 (D.Mont. 2001); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). Moreover, the Court has long maintained that “[a] complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.” *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981).

destruction most certainly do “substantially affect” interstate commerce.²² So the question in *Rapanos* and *Carabell* was not whether Congress *could* authorize its agencies to regulate remote wetlands and tributaries; the question was always whether it *did* do so in the CWA. It was solely a question of statutory meaning.

It is a question more interesting and complex than any equivalent constitutional question, though, because it straddles the deepest structural fissures running through most of our federal environmental and natural resource laws. The first law of ecology teaches that no part of nature is really separate from another. Tributaries, headwaters, and wetlands, which are now known to conservation scientists as the “places where rivers are born,”²³ are integral to accomplishing the CWA’s restorative objective.²⁴ But their range across North America casts that objective into a federal mission of sweeping proportions. (Almost as sweeping, in fact, as was the federal effort to fill and “reclaim” “swamps” prior to the 1970s.²⁵) Such a mandate could, on the courts’ understanding of the problem, swallow that most local of prerogatives, the “primary power over land use.”²⁶ Whatever its particular priorities, though, Congress has never asserted *exclusive* federal authority

²² See, e.g., Elaine Bueschen, *Do Isolated Wetlands Substantially Affect Interstate Commerce?*, 46 AM. U. L. REV. 931, 954-60 (1997).

²³ J.L. Meyer *et al.*, *Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands* (2003), available at www.americanrivers.org/site/docserver.

²⁴ Magee, *supra* note 14, at 37-43. The Executive Branch has long maintained that the CWA’s most basic objective is the restoration of the chemical, physical, and biological integrity of the nation’s waters. See Opinion of the Attorney General, *Administrative Authority to Construe § 404 Of the Federal Water Pollution Control Act*, 43 OP. ATTN’Y GEN. 197, 197 (1979) (interpreting 33 U.S.C. §§ 1251, 1311, 1344 as having a “basic objective” of restoring and maintaining the “chemical, physical, and biological integrity of the Nation’s waters”). Justice Scalia twice emphasized CWA § 101(b)’s statement that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibility of States to prevent, reduce and eliminate pollution,” once calling it one of the CWA’s “goals.” *Rapanos*, 126 S. Ct. at 2215, 2234. No statute can intelligibly have as its goal some end that would be better served by its nonexistence, though. CWA § 101(b) is rather a *proviso* to the Executive in how it goes about implementing the CWA. See *infra* notes ___ and accompanying text.

²⁵ See Jonathan Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 19-27 (1999).

²⁶ *SWANCC*, 521 U.S. at 174 (“[R]egulation of land use [is] a function traditionally performed by local governments.”) (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)).

over natural resources²⁷—direct testimony to the political safeguards of ‘our federalism.’²⁸ The question presented to the Court in *Rapanos* and *Carabell* was therefore twofold: how geographically extensive is the CWA’s reach and who has the legal authority to say?

II. “WATERS” AND “NAVIGABLE WATERS”

Like most federal environmental statutes, the CWA has been profoundly influenced by legal cases testing the scope of the government’s prescriptive authority.²⁹ Indeed, just like the Endangered Species Act, the CWA employs a critical, jurisdiction-defining term with an extraordinarily muddled legal pedigree.³⁰ It has, one might even say, *invited* such challenges from anyone with enough to lose to motivate them into court. In 1972, Congress amended a statute it had first legislated in 1948, the Federal Water Pollution Control Act, to make it into a more comprehensive, prescriptive, ‘federalizing’ statute.³¹ Cryptically, it took a program that had previously and variously denoted its

²⁷ See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV. L. J. 179, _____ (2006).

²⁸ See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

²⁹ On the central role litigation has played in shaping the CWA’s reach and substance, see ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT 20 YEARS LATER* (1993).

³⁰ As the Court noted in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995), the Endangered Species Act’s defined term “take” has a long history of various definitions in the law, each with its own purposes. The statute’s definition of “take” includes actions that “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The agencies’ regulatory definition of the statute’s definitional terms “harm” and “harass” include habitat modifications but were, themselves, at issue in *Babbitt* and like cases. Many of those cases have come down to evidentiary doubts that some particular action does in fact “harm” or “harass” the listed species. See, e.g., *National Wildlife Fed’n v. Burlington Northern RR.*, 23 F.3d 1508 (9th Cir. 1994); *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996).

³¹ Readers needing a history of the legislative evolution from 1948-1972 can do no better than William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L.J. 215 (2003).

subject as “interstate waters,”³² “interstate or navigable waters,”³³ and “navigable waters of the United States,”³⁴ and, in § 502(7), redefined its new subject, “navigable waters of the United States,” as “waters of the United States, including the territorial seas.”³⁵ For over thirty years now this demarcation of federal authority has taxed the legal system’s collective wits³⁶ for the simple reason that the dignity afforded states in “our federalism” colors statutes like the CWA exceptional, subjecting them to constant judicial scrutiny.³⁷ The CWA, after all, famously announces that it “is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to

³² The very first iteration of the Federal Water Pollution Control Act (“FWPCA”) in 1948 referenced “interstate waters” and defined them as “all rivers, lakes, and other waters that flow across, or form a part of, State boundaries.” Pub. L. No. 80-845 § 10(e), 62 Stat. 155, 1161 (1948). This extension of federal prescriptive authority was certainly narrower than the Congress’s Article I authority as then interpreted by the courts.

³³ The 1961 amendments provided a dilute remedy against the “pollution of interstate or navigable waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of any persons.” Pub. L. No. 87-88 § 8(a), 75 Stat. 204, 208 (1961). The amendments did not define “tributary” or “navigable waters,” although they presumably did adopt the definition of “interstate waters” already a part of the FWPCA.

³⁴ The 1966 FWPCA amendments defined “navigable waters of the United States,” “[w]hen used in this Act, unless the context otherwise requires,” to mean “all portions of the sea within the territorial jurisdiction of the United States, and all inland waters navigable in fact.” Public L. No. 89-753, § 2(4), 80 Stat. 1246, 1253 (1966). It was this set of waters in FWPCA referenced by the Court in Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (Illinois v. Milwaukee I), the Court’s famous interstate common law nuisance case over the sewage discharges to Lake Michigan. *See id.* at 102 (“The [FWPCA] makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters.”).

³⁵ Pub. L. No. 92-500, § 501(7), 86 Stat. 816, 885 (1972). The term “territorial seas” was itself defined to mean “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.” *Id.* at § 501(8). In more than 30 years, Congress has never seen fit to clarify this definition and, in fact, has actually repeated it in other statutes. *See Rice v. Harken Exploration Co.*, 250 F.3d 264, 267-68 (5th Cir. 2001) (finding that Oil Pollution Act of 1990 § 1001(21) was intentional Congressional adoption of CWA § 502(7), including conflicting judicial interpretations).

³⁶ *See* Marjorie A. Shields, *What Are “Navigable Waters” Subject to Federal Water Pollution Control Act* (33 U.S.C. § 1251 *et seq.*), 160 A.L.R. FED. 585 (Supp. 2005) (gathering cases with contrasting holdings on the extension of CWA jurisdiction).

³⁷ *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.”); Younger v. Harris, 401 U.S. 37, 44 (1971) (“‘Our Federalism’ . . . does not mean blind deference to ‘States Rights’ any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses.”).

prevent, reduce, and eliminate pollution.”³⁸ Thus, the semantics of § 502(7), and therefore the scope of the entire statute, seem to *invite* interpretation and perhaps even misinterpretation. It is, after all, not self-evident what real work is done by the definition of an expression that is just the expression itself minus one word. The Court has found this invitation irresistible three times now, but its work product has been less and less about grammar each time.

Article I authority to regulate waters that could be *made* navigable with improvements was established law well before the CWA.³⁹ And as to regulated activities, federal authority had extended beyond just the licensing of vessel traffic,⁴⁰ to the building of wharves, piers, and other infrastructure,⁴¹ dredging and manipulating channels,⁴² and, in fact, even to the complete destruction of the water’s navigability.⁴³ But the legal concept of “navigable waters” runs even deeper than just jurisdiction to prescribe. In fact, the phrase is perhaps a uniquely rich artifact for historians of our

³⁸ 33 U.S.C. § 1251(b). This “policy” traces, in slightly different language, to the 1956 version of FWPCA. Pub. L. No. 84-660 § 1(a), 70 Stat. 498 (1956).

³⁹ See, e.g., United States v. Utah, 283 U.S. 64, 83 (1931). Congress’s Commerce Clause authority has, at least since Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), been split in concept between a broader power to regulate most things commercial and its more specialized complement, a “Navigation Power,” where the latter is available only on waters that are, were, or could be “navigable in fact.” Of course, “navigable in fact” is itself a famous neologism. See Richard J. Pierce, Jr., *What is a Navigable Water?: Canoes Count But Kayaks Do Not*, 53 SYRACUSE L. REV. 1067 (2003) (tracing the development of navigability-in-fact doctrine and arguing that it has grown so malleable as to be incoherent).

⁴⁰ See Gibbons, 22 U.S. at 193-221. Initially, this, too, was as much a question of meaning as of federalism. Cf. *id.* at 193 (“The word used in the Constitution, then, comprehends, and has always been understood to comprehend, navigation within its meaning, and a power to regulate navigation, is as expressly granted, as if that term had been added to the word “commerce.””)

⁴¹ See United States v. Republic Steel Corp., 362 U.S. 482 (1960) (interpreting Rivers and Harbors Act of 1899 broadly to vest in Corps great discretion over the building of navigation infrastructure).

⁴² See United States v. Texas, 339 U.S. 707, 717 (1950); United States v. Oregon, 295 U.S. 1 (1935).

⁴³ By design, a dam may enable navigation between points *A* and *B* while precluding it between *AB* and *C*. See, e.g., Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 326-30 (1936); cf. United States v. Rands, 389 U.S. 121, 122-23 (1967) (“The Commerce Clause confers a unique position upon the Government in connection with navigable waters. ‘The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States.’”) (quoting Gilman v. Philadelphia, 70 U.S. 713, 724-25 (1865)).

federalism, also serving as a predicate for federal court admiralty jurisdiction⁴⁴ and as the (evolving) demarcation between federal and state public trust land and “servitude” ownership.⁴⁵ Against this backdrop, § 502(7) seems like an artless congressional dodge—especially given what is at stake in most of the CWA’s domain.

In the five years following *SWANCC*, the circuits had split over the geographic scope of § 502(7),⁴⁶ the Executive had proposed to amend its definition to curb § 502(7)’s scope and then changed its mind,⁴⁷ and property rights advocates had become convinced that the Executive agencies had run amok.⁴⁸ Congress hardly even considered acting. And instead of resolving any of this mess (as many lawyers had, since *SWANCC*, hoped it would) with *Rapanos* and *Carabell*, the Court just continued to hoard all of the statute’s biggest questions into its own inscrutable future.

Justice Scalia’s “plurality” opinion argues that in order to qualify as “waters of the United States,” wetlands must have some permanent surface connection to “relatively permanent, standing or flowing bodies of water” that are, if not necessarily “navigable”

⁴⁴ See *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871) (holding that the geographic limits of admiralty jurisdiction under Article III are all those waters that are or might be “highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”).

⁴⁵ See *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82 (1913); *United States v. California*, 382 U.S. 448 (1966).

⁴⁶ *FD & P Enterprises v. U.S. Army Corps of Engineers*, 239 F. Supp.2d 509, 513-516 (D.N.J. 2003). The clear majority of cases to reach the circuit level affirmed the extension of jurisdiction over remote wetlands and headwaters of various types. See, e.g., *Treacy v. Newdunn Assoc. LLP*, 344 F.3d 407 (4th Cir. 2003); *United States v. Rueth Development Co.*, 335 F.3d 598 (7th Cir. 2003); *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001); *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005). For example, where the wetlands at issue were adjacent to and drained into “a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay,” the court held the extension of CWA jurisdiction was reasonable. See *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003). One case, however, did reject the extension of CWA jurisdiction to remote wetlands, see *In re Needham*, 354 F.3d 340 (5th Cir. 2003), and another rejected a strictly hydrological connection test where the connection was via ground water, see *D.E. Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), setting up the circuit split the Court addressed in *Rapanos* and *Carabell*.

⁴⁷ See U.S. Army Corps of Engineers and Environmental Protection Agency, Advanced Notice of Proposed Rulemaking, 68 Fed. Reg. 1991 (2003).

⁴⁸ See, e.g., Brief of Amici Curiae Washington Legal Foundation *et al.* in Support of Petitioners, 2005 WL 3308794.

in the traditional sense, more than just “transitory puddles or ephemeral flows of water.”⁴⁹ In contrast to this emphasis on ‘permanence’ and proximity to navigable-in-fact waters, Justice Kennedy’s “concurrence” argued that wetlands “possess the requisite nexus” if they “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.””⁵⁰ What is so extraordinary about these opinions, though, is that Justice Kennedy’s views have more in common with Justice the dissent⁵¹ than with the so-called plurality and the five justices in the plurality agree on virtually no rationale for the result.

⁴⁹ *Rapanos*, 126 S. Ct. at 2220-21 (Scalia, J., joined by Roberts, C.J., and Thomas, Alito, JJ.). The Scalia opinion is misleadingly denoted as the plurality if by that it is meant as the authoritative statement of the judgment in the case. While both the Scalia and Kennedy opinions remand with instructions for further proceedings, the Scalia but not the Kennedy opinion directs that in those proceedings only the finding of adjacency of petitioners’ wetlands to ““waters” in the ordinary sense of containing a relatively permanent flow” possessing “a continuous surface connection” will support federal jurisdiction. *Id.* at 2235. Kennedy’s opinion leaves other possibilities open for supporting federal jurisdiction on the lands at issue in the two cases. Nonetheless, as precedent—clearly the more important dimension of the litigation from society’s perspective—Kennedy’s opinion may prove the more restrictive of the two. In constitutional contexts, the Court has said that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”” *Marks v. United States*, 430 U.S.188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Assuming *Marks* is on point, Justice Kennedy’s rationale for the remand might not be that much more “narrow” than Justice Scalia’s and, in any event, levies a clear proof burden. In *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005), the Court granted certiorari the week after *Rapanos*, vacated the Seventh Circuit’s opinion and remanded with instructions for further proceedings in light of *Rapanos*. *Gerke Excavating, Inc. v. United States*, 126 S. Ct. 2964 (2006). This means that two different lower courts have an opportunity to sort out the relative breadth of the two opinions.

⁵⁰ *Rapanos*, 126 S. Ct. at 2241-42 (Kennedy, J., concurring in the judgment)

⁵¹ The dissent argued that the extension of § 502(7) to intermittent tributaries and most wetlands is, regardless of the agency interpretations on point, the best interpretation of the statute. See *Rapanos*, 126 S. Ct. at 2264-66 (Stevens, joined by Souter, Ginsburg, and Breyer, JJ., dissenting). As Justice Stevens made clear, this is the essence of Parts I and II of Justice Kennedy’s opinion. *Id.* at 2264.

III. MEANING AND REFERENCE: THE TRUTH ABOUT ‘WATERS OF THE UNITED STATES’

*Riverside Bayview Homes, Inc. v. United States*⁵² and *SWANCC* were both, in a sense, predictable. The CWA’s cryptic text was undoubtedly a Congressional punt,⁵³ although it is unclear at whom it was aimed: a judiciary increasingly mindful of state dignity or the administrative agencies?⁵⁴ It makes a fair amount of sense, though, that wetlands adjacent to navigable-in-fact waters⁵⁵ would be covered and some waters inherently local in scale would not. After all, if § 502(7) meant the agencies were empowered to regulate the wholly intra-state, isolated, man-made ponds that were at issue in northern Cook County,⁵⁵ where would Executive power end? Having recourse to some general theory in answering such basic questions would be useful, surely.

Unfortunately, there seems to be no such general theory—at least not one that appears very reliable. The CWA’s language can be interpreted to very disparate results just by way of the canons of statutory construction,⁵⁶ and that is before academic jurisprudence

⁵² 474 U.S. 121 (1985).

⁵³ See Peter Aranson *et al.*, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

⁵⁴ Cf. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1070 (2006) (“One of the most basic decisions a legislator must make . . . is whether to delegate to an administrative agency or to the courts.”). Stephenson’s model suggests that rational legislators should prefer to delegate to agencies, although the CWA is silent as to the scope of the agencies’ rulemaking powers and as to the scope of judicial review of agency rulemakings like the one implementing § 502(7).

⁵⁵ Indeed, in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), the Fourth Circuit rejected the regulatory interpretation that would be at issue in *SWANCC* four years later. In dicta, that court even said that “it is arguable that Congress has the power to regulate the discharge of pollutants into any waters that themselves flow across state lines, or connect to waters that do so, regardless of whether such waters are navigable in fact, merely because of the interstate nature of such waters, although the existence of such a far reaching power could be drawn into question by the Court’s recent federalism jurisprudence.” *Id.* at 256 (citing *Printz v. United States*, 521 U.S. 898 (1997), *United States v. Lopez*, 514 U.S. 549 (1995), and others); see also *Tabb Lakes Ltd. v. United States*, 715 F. Supp. 726, (E.D. Va. 1988), *aff’d*, 885 F.2d 866 (4th Cir. 1989) (voicing doubts in dicta that the migratory bird nexus was sufficient for Corps jurisdiction). Another case, *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995), *cert. denied sub nom., Cargill v. United States*, 116 S. Ct. 407 (1995), upheld the migratory bird ‘rule,’ but by a very narrow margin of deference.

⁵⁶ See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

and/or theories of language are involved.⁵⁷ Legal theory today is enmeshed in the philosophy of language, much as it has been for forty years, because its practitioners all recognize law's eternal flirtation with indeterminacy.⁵⁸ Yet contemporary theories of language bring a measure of clarity to one thing about § 502(7): how much is open to debate.

Now, if there is one category of legal term whose meaning *should* be relatively clear, it is so-called natural kind terms like 'water' or 'species.'⁵⁹ Certain currents in the philosophy of language over the last several decades suggest that using such terms is the equivalent of rigidly designating whatever in the world is at the end of the utterance—whatever is its referent—as a matter of fact.⁶⁰ "Waters" of the United States might just mean whatever in the world an expert would find was a water body.⁶¹ The problem here is that where 'land' stops and 'water' starts is so deeply unclear in so many different contexts—as geomorphologists and ecologists have argued with increasing conviction

⁵⁷ See generally BRIAN BIX, *LAW, LANGUAGE AND LEGAL DETERMINACY* (1993).

⁵⁸ Once the province of "legal realists," the theory that legal argument is a cover for naked preferences now belongs to social scientists employing the "attitudinal model." See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997).

⁵⁹ See David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFFS. 105 (1988) (propounding a realist theory of legal interpretation grounded in the semantics of "natural kind" terms). It is not clear that natural kinds help legal interpretation very much as a general matter. See DENNIS PATTERSON, *LAW AND TRUTH* 51-53 (1996). I use them here for exemplary purposes only.

⁶⁰ See, e.g., Hilary Putnam, *The Meaning of 'Meaning,'* in MIND, LANGUAGE AND REALITY: PHILOSOPHICAL PAPERS VOLUME 2, at 215 (1975); SAUL A. KRIPKE, *NAMING AND NECESSITY* (1972).

⁶¹ Putnam, *supra* note 60, at 241 (" [I]f there is a hidden structure, then generally it determines what it is to be a member of the natural kind, not only in the actual world, but in all possible worlds."). Given the existence of experts, not all speakers of a concept need know its exact extension. *Cf. id.* at 227 ("[T]here is a *division of linguistic labor*. We could hardly use such words as 'elm' and 'aluminum' if no one possessed a way of recognizing elm trees and aluminum metal; but not everyone to whom the distinction is important has to be able to make the distinction."). That would certainly square with basic principles of administrative law. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (deferring to agency's interpretation of statutory term "employee," a term with several meanings at common law, by reasoning that Congress intended agency expertise and national uniformity to be the result, not ad hoc judicial discretion).

and as the *Rapanos* Court was painfully aware.⁶² In short, as a physical (and as a spatio-temporal) reference, “waters” is actually pretty vague.⁶³

Cases like this have paved the way for another, different theory of language that is deeply skeptical of any “fact of the matter” where meaning is concerned. This theory would fix the meaning of the concept “waters” by resort to the conventions of speech observed by competent speakers, in essence allowing usage to determine meaning instead of reference.⁶⁴ On this theory, “waters of the United States” means just whatever lawyers, judges, and administrators have used it to mean. But even now we have no way to settle what the concept actually hooks up with: CWA practice itself established how many different credible usages of the concept there are.⁶⁵ Even within the *Rapanos* plurality there seemed to be significant variation in what the justices thought practice had brought to the term.⁶⁶ And all this is before we bring in the messy social institutions

⁶² See, e.g., RONALD U. COOKE & RICHARD W. REEVES, *ARROYOS AND ENVIRONMENTAL CHANGE IN THE AMERICAN SOUTH-WEST* (1976). From arroyos, to bayous, to beach erosion and accretion, to floodplains, to ground/surface water interchanges, to mangroves, to oxbows, to wetlands, the places where the boundary between land and water is either constantly in flux or fundamentally vague are too numerous to pretend otherwise. Cf. *Rapanos*, 126 S. Ct. at 2221 n.5 (Scalia, J., joined by Roberts, C.J., and Thomas, Alito, JJ.) (admitting that line drawing between “waters” and land is inherently contingent on the purposes for which the lines are being drawn).

⁶³ Cf. T.E. Wilkerson, *Species, Essences and the Names of Natural Kinds*, 43 PHIL. Q. 1, 7-10 (1993) (arguing that some natural kinds such as ‘species’ turn out, on reflection, to cover over enormous variabilities in nature, and thus create significant ambiguities in reference).

⁶⁴ See, e.g., Michael Dummett, *Realism, in TRUTH AND OTHER ENIGMAS* 145, 146 (1978). Perhaps the fairest ascription of this “anti-realist” view would be, ironically, to certain American “legal realists” like Llewellyn. See H.L.A. HART, *THE CONCEPT OF LAW* 139 (2d ed. 1994).

⁶⁵ Compare *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (local irrigation district’s canals held to be “waters of the United States”) with *United States v. City of Fort Pierre*, 747 F.2d 464 (8th Cir. 1984) (wetlands created by man-made manipulations of adjacent river not “waters of the United States”); Compare *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (split panel unable to agree what constitutes “adjacency” sufficient to put wetlands within “waters of the United States”) with *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993) (wetlands above headwaters that were adjacent to tributaries susceptible to use in interstate commerce held to be “waters of the United States”); see infra notes __ and accompanying text.

⁶⁶ Justice Scalia’s opinion made specific note that it was “beyond parody” that § 502(7) had been extended to storm sewers, drainage ditches, and “dry arroyos in the middle of the desert.” *Rapanos*, 126 S. Ct. at 2217-18 (2006) (Scalia, J., for Roberts, C.J., Thomas, and Alito, JJ.) (“These judicial constructions . . . are not outliers. Rather, they reflect the breadth of the Corps’ determinations in the field.”). This was in keeping with his conclusion that the only wetlands properly subject to federal jurisdiction were those “with

invoked in the expressions: some theory of our federalism, after all, must settle what “of the United States” truly means.⁶⁷ To parse apart the possible congressional intentions within that set of issues is to broaden the inquiry indefinitely.

Thus, it cannot be doubted that § 502(7) is an archetype of what legal theorists view as law’s areas of “open texture.” The generality of the term is at once the source of its power and its mischief for any theory of law, at least any theory of law meaning to account for law’s normativity. Where (most) modern positivists would view the term as a source of discretion because the law is ambiguous (and perhaps deliberately so),⁶⁸ Dworkin, Rawls, and various moral “realists” view it as an implied duty to make the law more just through instantiations and a gradual judicial synthesis of meaning.⁶⁹ Modern legal theory orbits this philosophical divide like a planet to a sun even though it has given off more heat than light for years now.⁷⁰

a continuous surface connection” to “permanent” water courses, such “that there is no clear demarcation between ‘waters’ and ‘wetlands.’” *Id.* at 2222-23. In his own opinion, though, the Chief Justice argued that this state of the law cried out for more agency attention and especially the creation of better, clearer definitions. *Rapanos*, 126 S. Ct. at 2235, (Roberts, C.J., concurring in the judgment). Justice Kennedy’s opinion takes pointed and specific issue with Justice Scalia’s disbelief that “waters” could include arroyos—an argument Justice Kennedy seems to have the better of. *See* COOKE & REEVES, *supra* note 62.
⁶⁷ *Cf. Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (Easterbrook, J.) (“[T]he Clean Water Act does not attempt to assert national power to the fullest. “Waters of the United States” must be a subset of “water”; otherwise why insert the qualifying clause in the statute? (No one suggests that the function of this phrase is to distinguish domestic waters from those of Canada or Mexico.)”) (emphasis in original).

⁶⁸ *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958).

⁶⁹ *See* Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 (1963); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955); *cf.* RONALD DWORIN, *LAW’S EMPIRE* 245 (1986) (“Law as integrity . . . requires a judge to test his interpretation of *any part* of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole.”) (emphasis added). I use ‘realist’ to describe Dworkin, Rawls, and others in the epistemological sense, distinguishing them from the “antirealists” who maintain that meaning and truth are entirely a function of (fallible) human conventions.

⁷⁰ *Cf.* BIX, *supra* note 57, at 182 (“The dependence of legal determinacy questions on matters that seem to be simply language-based but are not, is due to the nature of normative discourse. . . . [I]n the context of a moral or legal imperative, it is important to know the limits of a term’s application, because it is important to know whether an action is included or excluded from a prohibition or authorization.”). This is what differentiates ‘ordinary language’ and its tolerable flimsiness from legal language and its necessary functionality.

Putting aside some nuances and intermediate positions between the two, the dispute comes down to the scope and legitimacy of the judicial role. Where positivists since H.L.A. Hart have viewed judges as constrained professionals doing the hard (often scut) work of applying pre-existing norms to present particulars, Dworkin views the judiciary as the agency of justice, always working to earn law's authority on its behalf.⁷¹ Justice, Dworkin has long argued, requires that adjudicators no less than other officials settle only for the single best interpretation of the law—on what the law *really* requires. Yet where Dworkin and others expect that (legal) truth might “exceed its demonstrability,”⁷² and thereby require a thick, constitutive function for adjudication, modern positivism responds that texts like § 502(7) have no more than a core of settled meaning, surrounded by a (potentially vast) ‘penumbra’ of *plausible interpretations*.⁷³ Thus, the dispute—what to do about legal indeterminacy and its resultant discretion—can keep going right into the heart of law's practical normativity.⁷⁴

⁷¹ See RONALD DWORKIN, *JUSTICE IN ROBES* 183-86 (2006) (arguing that legality and the content of law must turn not just on “social facts” or a law's sources and pedigree, but also on its moral content).

⁷² STEPHEN GUEST, *RONALD DWORKIN* 6 (1991).

⁷³ HART, *supra* note 64, at 141-47; Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 98, 123-25 & n. 40 (Jules Coleman ed., 2001); Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in *id.* at 355. Hart himself always believed that the areas of “open texture” were relatively few and that, as an empirical matter, judicial discretion was quite interstitial. *Id.* at 154, 274. He gave no support for this, though, and some later positivists shy from the same claim. See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 191-96 (1991); BIX, *supra* note 57, at 36-62.

⁷⁴ Positivism conceives of a norm's (inter-subjective) preexistence as integral to the judge's authority to apply it, indeed, to the judiciary's claim to authoritative decision making. See HART, *supra* note 64, at 100-17. But, to be clear, I am not implying that Hart was one of those who viewed discretion as a bad thing. Hart actually thought that the law's use of general terms having an open texture could be an advantage, a way of enabling judges to make reasonable decisions. HART, *supra* note 64, at 125-26. Dworkin, in contrast, maintains that law's normativity, consisting he argues in an interpretive attitude, depends on its overall justification as much as its fit with past practice. DWORKIN, *LAW'S EMPIRE*, *supra* note 69, at 285 (“A successful interpretation must not only fit but also justify the practice it interprets.”). And that is not to say Dworkin thinks fit unimportant. See DWORKIN, *JUSTICE IN ROBES*, *supra* note 71, at 183 (“Legality is sensitive in its application . . . to the history and standing practices of the community that aims to respect the value, because a political community displays legality, among other requirements, by keeping faith in certain ways with its past.”).

Yet, while both had a picture of meaning at the base of their theory of law, neither convinced the practitioners of law or of legal theory of their picture's fidelity, either to how law is practiced or to what law should be. Hart thought he had found a third path between the naïve formalism of the ancients and the radical indeterminism of Holmes and his successors. Dworkin successfully obfuscated the path Hart had lit by arguing it went nowhere, that it was a theory of law without its most central element: its obligations to justice. What the legal academy has been left with are two theories of law that differ in many of the same ways semantic realism differs from anti-realism. And, in their bare form, each is subject to devastating critique based on practitioners' tacit knowledge of their ordinary practices. But once they are fully reticulated, with artful qualifications in sophisticated expository accounts, each is quite plausible—even elegant.

Of course, if these theories all fail to fix authoritatively the legal meaning of a term like “waters of the United States,” a fair question might be: why bother with them at all? Why care about legal theory if it is so contingent and slack at exactly the junctures lawyers go in search of such tools? The answer is because we desperately need *some* means of differentiating legitimate from illegitimate applications of the statute. We need to know whether propositions of law using the concept to define federal jurisdiction are *true*⁷⁵ (or ‘sound’ or some such other hedge from the strong claim of truth)—not just whether judges of one ideology or political party are likely to hold to the propositions.⁷⁶

⁷⁵ Knowing that ‘x is true’ is the same as knowing under what conditions stating that ‘x is true’ is correct. G.P. BAKER & P.M.S. HACKER, LANGUAGE, SENSE AND NONSENSE: A CRITICAL INVESTIGATION INTO MODERN THEORIES OF LANGUAGE 257-58 (1984). Knowledge of these truth conditions might take any of several forms, though. Cf. PATTERSON, *supra* note 59, at 18 (arguing that both people who believe reference determines meaning (“realists”) and people who believe usage determines meaning (“antirealists”) “believe that the truth of propositions of law is a matter of truth conditions” that are independent of the speaker/proposition itself).

⁷⁶ Compare DWORKIN, JUSTICE IN ROBES, *supra* note 71, at 94-104 (arguing that the degree to which the justices in *Bush v. Gore* allowed their personal politics to influence their judgment should be regretted by

It was clear before *SWANCC* and *Rapanos* that § 502(7) and the CWA’s extension to “isolated” waters, ditches, and intermittent tributaries involved issues running much, much deeper than just a statutory definition.⁷⁷ Indeed, if anything, *SWANCC* just intensified the federal judiciary’s vigilance toward the statute’s tensions with recent federalism precedents.⁷⁸ And, on first inspection, Dworkin’s theory of the judiciary gathers some confirmation from the 99+ pages of opinions in *Rapanos*. But the impression is misleading in a way that tells us something not just about the state of legal theory today, but also about the practice of law before one of the Nation’s courts that has so obviously internalized Dworkin’s philosophy. For, while this Court has Hercules’ hubris, it has none of his discipline and evidently cares little about *law’s* ‘integrity.’⁷⁹

IV. RESTORING NATURE’S INTEGRITY: THE OBJECTIVE AND THE REAL(ITY)

It is, of course, impossible to restore the “chemical, physical, and biological integrity of the Nation’s waters” without reinventing American civilization as we know

all lawyers) *with* Cross, *supra* note 58, at 265 (“Among many political scientists, aspects of the attitudinal model [assuming that judicial decisionmaking is not based upon reasoned judgment about what law requires but rather upon each judge’s political ideology and the identity of the parties] have become a virtual truism.”).

⁷⁷ In fact, that much was evident long before *SWANCC*. In *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983), a citizen suit was brought to enjoin the clearing of a 20,000 acre parcel of land in Avoyelles Parish, Louisiana, lying within the Bayou Natchitoches basin—land that was seasonally flooded and mostly forested wetlands “adjacent” to navigable rivers. EPA and the Corps were defendants because the plaintiffs argued the parcel was within the scope of the CWA and, thus, that the Corps and EPA were under a duty to assert jurisdiction. *Id.* at 902. While the district court took the extraordinary step of making the wetlands findings itself in a trial *de novo* pursuant to 5 U.S.C. § 706(2)(F), the court of appeals reversed, arguing that that was “the kind of scientific decision normally accorded significant deference by the courts.” *Id.* at 906. But the Court of Appeals was troubled by the agencies’ quick change of methodology for wetlands determinations to include vegetation adapted to *intermittent* inundation and saturation as well as that adapted to more regular/constant inundation. *Id.* at 907-08 & n.18. Ultimately, the court held that the change was legal and not procedurally invalid under the Administrative Procedure Act, *id.* at 910-15, but it did so quite aware of the ramifications for the CWA’s geographic scope. *Id.* at 917-18.

⁷⁸ *See, e.g., United States v. Deaton*, 332 F.3d 698, 705-08 (4th Cir. 2003)

⁷⁹ Dworkin’s concept of integrity in law is what unites it with justice. *See* DWORKIN, *LAW’S EMPIRE*, *supra* note 69, at 225 (“According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”).

it.⁸⁰ It has been said the agencies more or less accidentally ignored this mandate’s biological and physical prongs, but that is not true. Shortly after the Act’s passage, EPA held a national symposium on CWA § 101(a) “integrity” and what its restoration would entail. It was a national meeting of minds, but it failed to settle very much.⁸¹ Nonetheless, the agencies issued rules defining “waters of the United States” in 1975, 1977, and again in 1986,⁸² eventually broadening their definition to include most tributaries, headwaters, wetlands, and other attenuated elements of a lotic system.⁸³ This Part explains how two relatively conservative administrative agencies gradually decided, in six different Presidential administrations, to expand federal jurisdiction as they have.

A. Restoration as an Ecological Practice

Remote and isolated wetlands and tributaries, notwithstanding their legal attenuation from the traditional concerns of the federal government, are the parts of the

⁸⁰ See, e.g., In re Operation of the Missouri River System, 421 F.3d 618, 624 (8th Cir. 2005) (“In its natural state, the river subjected the surrounding basin to extensive flooding every spring.”). “Chemical” integrity clearly has dominated agency and public attention to the exclusion of the other two. See generally Adler, supra note 18. And while eliminating the discharge of chemical pollutants in all of the Nation’s waters is work enough for many times the staff EPA has devoted to water programs, ADLER ET AL., supra note 29, at 227-57, “[t]here is considerable and more consistent evidence that the “physical and biological integrity” of the nation’s waters has been steadily and seriously declining” Adler, supra note 18, at 50.

⁸¹ James R. Karr, *Biological Integrity: A Long Neglected Aspect of Water Resource Management*, 1 ECOLOGICAL APPLICATIONS 66, 69 (1991).

⁸² See Corps of Engineers, Notice of Interim Final Rule, 40 Fed. Reg. 31320 (1975); Corps of Engineers, Notice of Final Rulemaking, 42 Fed. Reg. 37122 (1977); Corps of Engineers, Notice of Final Rulemaking, 51 Fed. Reg. 41206 (1986).

⁸³ In the 1975 interim final rule (which would become the basis of the 1977 rulemaking), the Corps’ basic definition swept in all waters used in the past, present or possibly in the future “as a means to transport interstate commerce landward to their ordinary high water mark and up to the head of navigation,” including all artificial channels, canals, etc., all “tributaries . . . up to their headwaters and landward to their ordinary high water mark,” wetlands “contiguous or adjacent to other navigable waters,” and “other waters including “intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters” whose regulation was deemed necessary for “the protection of water quality” 40 Fed. Reg. at 31324-325. While the Corps defined “headwaters” (arbitrarily) as “the point on the stream above which the flow is normally less than 5 cubic feet per second,” id. at 31325, it did seek to preserve field office discretion to include headwaters in appropriate cases. Id. No general definition of “tributary” was even attempted, though.

nation's lotic systems perhaps most in need of regulatory protection today. "Isolated" wetlands, after all, are identified more by their legal aspects than by their physical or biological aspects.⁸⁴ For thirty years the agencies have struggled to draw lines around the parts of aquatic ecosystems they should govern.⁸⁵ NatureServe, a national network of natural heritage programs and environmental consultants that services many state and local governments, recently documented the roles "isolated wetlands" play. It confirmed their critical importance to the protection and restoration of aquatic habitat, water quality, and biotic integrity.⁸⁶ Indeed, what the agencies' experiences document is that restoring the natural integrity of the Nation's waters is utterly impossible without something like the most energetic and integrative public response in the history of the administrative

⁸⁴ See R. W. Tiner et al., *Geographically Isolated Wetlands: A Preliminary Assessment of Their Characteristics and Status in Selected Areas of the United States 2-1* (U.S. Fish & Wildlife Serv., 2003) (questioning the scientific validity of distinguishing "isolated" wetlands). As Justice Kennedy understood, establishing hydrological or biological connections between remote wetlands and navigable waters is easy; differentiating those with significant, proximate connections is hard. See *Rapanos*, 126 S. Ct. at *24-25. The little rigorous taxonomic work that has been done on stream magnitude, the most intuitive method for doing so, is more art than science. See Robert A. Kuehne, *A Classification of Streams, Illustrated by Fish Distribution in an Eastern Kentucky Creek*, 43 *ECOLOGY* 608 (1962); cf. Meyer et al., supra note 23, at 6 (differentiating perennial, intermittent, and ephemeral streams).

⁸⁵ Cf. 42 Fed. Reg. at 37129 ("[S]treams with highly irregular flows, such as occur in the western portion of the country, could be dry at the "headwater" point for more of the year and still average on a yearly basis a flow of five cubic feet per second because of high volume, flash flood type flows which greatly distort the average."). By 1977, the Corps was making clear that its exclusion of "headwaters" from regulated tributaries was not to fence them out of § 502(7)'s scope necessarily, but rather to manage personnel resources and to set where Corps permitting authority stopped as a presumption. See *id.* Not surprisingly, the rulemaking was taken up into Congressional debates as reason to clarify § 502(7), although the 1977 amendments ultimately made no such change. See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 914-15 (5th Cir. 1983). This would later become one of the majority's arguments supporting § 502(7)'s extension to wetlands in *Riverside Bayview Homes, Inc. v. United States*, 474 U.S. 121, 132-33 (1985).

⁸⁶ See P. Comer et al., *Biodiversity Values of Geographically Isolated Wetlands in the United States* (2005).

state.⁸⁷ Clearest of all, though, is that the biota of the Nation's waters is in decline: North America's most imperiled species are almost all aquatic species.⁸⁸

While the Corps and EPA initially tried to focus only on the principal surface waters and their immediate threats, this strategy quickly became untenable.⁸⁹ Soon enough, the agencies learned that they could restore the natural integrity of a 'water' only with a whole watershed approach, an inclusive method meant to identify and neutralize the variety of disturbances to aquatic ecology.⁹⁰ Though at least six justices between *SWANCC* and *Rapanos* have viewed this as mission creep⁹¹—as agencies run amok—it is actually far more mundane: the agencies are adapting institutionally to achieve the CWA's integrity objective in our legal system. Here, too, though, questions of meaning

⁸⁷ See, e.g., Notice, Departments of Agriculture, Commerce, Energy, and Interior, Environmental Protection Agency, Tennessee Valley Authority, Army Corps of Engineers, Unified Federal Policy for a Watershed Approach to Federal Land and Resource Management, 65 Fed. Reg. 62566 (2000); Andreen, *supra* note 16, at 591-93.

⁸⁸ ADLER ET AL., *supra* note 29, at 61-85; DAVID S. WILCOVE, *THE CONDOR'S SHADOW: THE LOSS AND RECOVERY OF WILDLIFE IN AMERICA* 105-37 (1999).

⁸⁹ ADLER ET AL., *supra* note 29, at 94-96, 212-14. Following Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975), the regulatory definition of "navigable waters of the United States" came under searching judicial scrutiny several times. See, e.g., Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978) (calculation of mean high water mark on salt marshes in San Francisco Bay); United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979) (intrastate stream never used for commercial navigation, terminating in two intrastate reservoirs); United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979) (wetlands adjacent to intrastate lake); United States v. DeFelice, 641 F.2d 1169 (5th Cir. 1981) (privately owned canal). In only one of these cases I was able to find, United States v. City of Fort Pierre, 747 F.2d 464 (8th Cir. 1984), did a court reject the Corps' interpretation of its jurisdiction (over a man-made slough with a hydrological connection to navigable waters that was caused by Corps activities).

⁹⁰ Much has been done to publicize the shift to a watershed approach. See U.S. EPA, *A Review of Statewide Watershed Management Approaches, Final Report* (April 2002). Of course, its overall effectiveness and compatibility with existing federal law are still very much open questions. See James R. May, *The Rise and Repose of Assimilation-Based Water Quality, Part I: TMDL Litigation*, 34 ENVTL. L. RPT. 10247 (2004).

⁹¹ I count both Chief Justices and Justices O'Connor, Scalia, Thomas, and Alito. Justice Kennedy seems to have changed his mind slightly since *SWANCC*. Of course, quite notoriously, the 1986 changes to the regulatory definition, done on the heels of the *Riverside Bayview* opinion, professed an intent only to "provide[] clarification" and not to broaden the agencies' interpretation of § 502(7)'s geographic scope. See 51 Fed. Reg. at 41216-41217. This same preamble discussion, though, was where the agencies first gave general notice that they interpreted the term to extend to waters that "would be used as habitat by birds protected by Migratory Bird Treaties" and "[w]hich are or would be used as habitat for endangered species." *Id.*

still dominate the legal analysis, threatening to undo ongoing, directly deliberative regulatory work by way of an empty, yet paradoxically prescriptive, legal semantics.

B. “What Is A Tributary?”⁹²: Judicial Hubris and the Irrelevance of Agency Learning

The central legal issue once the Court found that wetlands “adjacent” to navigable waters and their tributaries are within the scope of § 502(7)⁹³—but had also found that “isolated” waters are outside it⁹⁴—is what constitutes a real “tributary.”⁹⁵ The agencies have never defined a tributary and for good reason: every general principle formulated as such runs square into either (1) the diversity of hydrographic modifications throughout the nation and their importance to local people, or (2) the enormity of the restorative project, biologically. A regulatory definition of tributary “clarifying” the scope of § 502(7), in short, brings troubles both of political morality and of practicability. Yet five justices—those joining Justice Scalia’s opinion and Justice Kennedy—seemed convinced that the agencies’ refusal to dive into this breach was some kind of failure on their part.⁹⁶

⁹² Linda Greenhouse, *In Roberts Court, More Room for Argument*, N.Y. TIMES, May 3, 2006 (attributing this question to Chief Justice Roberts in the *Rapanos* and *Carabell* oral argument).

⁹³ United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

⁹⁴ Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001). The Court took care in 1985 to note that the provisions of the regulatory definition covering non-adjacent wetlands were not at issue, Riverside Bayview, 474 U.S. at 124 n.2, and it also took care to reference what the subject wetlands were adjacent to: a “navigable waterway.” *Id.* at 131; *id.* at 131 n.8 (assuming adjacency is to “bodies of open water”).

⁹⁵ *Rapanos*, 126 S. Ct. at 2217-19. Courts have put tributaries of navigable-in-fact waters within § 502(7)’s scope since the early 1970s, even prior to the agencies’ first rulemakings. *See, e.g., United States v. Holland*, 373 F. Supp. 665 (1974); United States v. Ashland Oil and Transp. Co., 504 F.2d 1317 (1974).

⁹⁶ *Compare Rapanos*, 126 S. Ct. at 2220-24 (Scalia, J., joined by Roberts, C.J., Alito, and Thomas, JJ.) (arguing that “the waters” with its “definite article” has a “natural definition” that can be taken from a 1954 dictionary that includes only “relatively permanent, standing or flowing bodies of water”) *with id.* at 2251-52 (Kennedy, J., concurring in the judgment) (finding that the Corps’ “existing standard for tributaries,” any landform with a mean high water mark, provides “no assurance” that the CWA’s geographic scope will be appropriately limited). Indeed, the sole purpose of Chief Justice Roberts’ separate opinion seems to be to chastise the agencies for not having followed through on their amendments to the regulatory definition of § 502(7).

Whose is the bigger failure, though? Take an example. So-called “engineered transfers”⁹⁷ are shaping up to be one of the major integrity issues today.⁹⁸ Are they “tributaries” or “point sources”? The statutory definition of “point source” includes “any discernable, confined and discrete conveyance” including ditches and channels⁹⁹—and that means that some engineered transfers could conceivably be either. Lamé analogies are easy here, but the harder, more meaningful question goes directly to the highest plateau within the statute: at what does the integrity objective aim, exactly? Are the agencies truly obligated to “restore” the physical integrity of, for example, the Connecticut River? Counting its tributaries, it boasts over 1,000 dams (some of which were built centuries ago) and has, for almost a century, gone without tributary flow that now goes to Boston’s reservoirs.¹⁰⁰ If EPA and the Corps have no restorative obligations under the CWA growing out of that history, on what (implicit) grounds can it be shown? That it would be too costly?

These are not only the biggest moral questions with which a statute like the CWA confronts us. They are also its purest questions of statutory interpretation—ones our “minimalist” Supreme Court has ducked, counting *Rapanos* and *Carabell*, at least eleven

⁹⁷ See Brief Amici Curiae of the States of Colorado, New Mexico, Idaho, Nebraska, North Dakota, and Utah Urging Reversal in Support of the City of New York, Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 2006 WL 1612695 (2d Cir. 2006) (hereafter “Western States Brief, Catskills II”) at 2-3 & n.1 (“Since most of the precipitation in the West falls as snow . . . it is necessary to divert and deliver water through a complex system of manmade and natural conveyances and reservoirs. This allows the West to sustain its cities, farms, and ranches.”).

⁹⁸ See, e.g., Miccosukee Tribe of Indians v. South Florida Water Management Dist., 280 F.3d 1364 (11th Cir. 2002), *rev’d in part*, South Florida Water Management Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004); Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) (Catskills I), *aff’d in part, remanded in part*, Catskills II, 2006 WL 1612695 (2d Cir. 2006); Dubois v. Dept. of Agriculture, 102 F.3d 1273 (1st Cir. 1996).

⁹⁹ 33 U.S.C. § 1362(14).

¹⁰⁰ See Connecticut v. Massachusetts, 282 U.S. 660 (1931); *cf.* Western States Brief, Catskills II, at 6 (“[T]he ability to divert, transport, store and use water is critical to the social and economic well-being of the West. Moving water from one basin to another through engineered transfers is essential to meet municipal, industrial and agricultural demands.”).

times now¹⁰¹ and which Congress and the agencies have been ducking since 1972. In an important sense, there is no “natural kind” differentiating real from other tributaries of “navigable waters.”¹⁰² Too many of our aquatic ecosystems have become what they are today because of profound human derangements of their watershed.¹⁰³ And many tributaries are ecologically integral without being either permanent or significant.¹⁰⁴ Thus, unsurprisingly, the agencies have waffled on general propositions.¹⁰⁵

In 1975, EPA’s General Counsel found that, on the best interpretation of the statute and its legislative history, massive irrigation projects and engineered transfers

¹⁰¹ “Minimalism,” a philosophy of deciding things on the narrowest and shallowest grounds possible, is usually packaged as a model of judicial restraint (not one of incoherence). *See, e.g.*, CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999). The CWA cases that have raised the integrity ideal at the Supreme Court are exemplars. *See S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 126 S. Ct. 1843, 1852-53 (2006); *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102-12 (2004); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 175-97 (2001) (Stevens, J., dissenting); *Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (Mem., Thomas, J., dissenting from the denial of cert.); *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 707-22 (1994); *Arkansas v. Oklahoma*, 503 U.S. 91, 102-114 (1992); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-20 (1982); *Middlesex County Sewerage Auth. v. National Sea Clammers Assoc.*, 453 U.S. 1, 32-33 (1981) (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part); *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 200-04 (1980).

¹⁰² Even under a realist semantics where there is supposed to be “a causal-historical path of the appropriate sort connecting our use of the term, via various intermediaries, with the [thing] itself,” Brink, *supra* note 59, at 117, science has thus far failed to find that path for lotic systems as wholes, leaving essentially no truth conditions for any claim of a controversial sort here. *Cf.* COOKE & REEVES, *supra* note 62, at 187-89 (concluding the evidence supports a causal correlation between human land use changes and arroyo formation, but leaving to the “area of speculation” which land use changes are responsible). In a pragmatic sense, of course there are manageably coherent concepts of ‘natural’ as distinct from ‘artificial’ waters. The reflecting pool on the Capitol Mall is intuitively different from the Tidal Basin beside the Jefferson Memorial even if both are ‘artificial’ in some sense. But to assume this intuition can be formulated into a general principle distinguishing which human-influenced waters are still ecologically significant is to assume away too much of the reality of lotic ecology (and of the Nation’s waters) today.

¹⁰³ WILCOVE, *supra* note 88, at 116-20. This fact alone has sobered the agencies in their pursuit of the integrity mandate. *See* Mank, *supra* note 7, at 886-89; *cf.* Memorandum from Ann R. Klee, General Counsel, to Regional Administrators, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers, U.S. EPA (Aug. 5, 2005) at 3-4 (hereafter “Klee Memorandum”) (“Many large cities in the west and the east would not have adequate sources of water for their citizens were it not for the continuous redirection of water from outside basins.”).

¹⁰⁴ Meyer *et al.*, *supra* note 23, at 16-21; COOKE & REEVES, *supra* note 62, at 5-15.

¹⁰⁵ *See, e.g.*, Klee Memorandum, *supra* note 103, at 2-3 & n.5 (acknowledging agency inconsistency).

There is, however, good reason to believe that the ordinary concept of a “tributary” masks a great deal of natural variability in fact that, if better described and understood, might dissolve at least some of the issues now surrounding § 502(7). *See* Meyer *et al.*, *supra* note 23, at 6-7.

could, under the right facts, be “point sources.”¹⁰⁶ Thirty years later, in taking a “holistic approach” to the statute, EPA quite incredibly concluded the exact opposite.¹⁰⁷

According to EPA now, engineered transfers are *never* point sources and ought not be regulated by the CWA.¹⁰⁸ Yet, given the statute’s integrity objective, this just sets up the dilemma of whether some actual canal, ditch, slough, channel, *etc.*, conveying water is, instead, a “tributary” within the meaning of § 502(7) and its regulations.¹⁰⁹

Before *Rapanos* and *SWANCC*, courts *usually*—in deference to the agencies—did not distinguish between natural and artificial waters, wetlands, and tributaries.¹¹⁰ Of

¹⁰⁶ See *In re Riverside Irrigation Dist., Ltd. and 17 Others*, Decision of the General Counsel No. 21 (June 27, 1975) (hereafter “*Riverside Opinion*”). Point sources are prohibited from discharging without a permit. 33 U.S.C. § 1311. Shortly after the *Riverside Opinion*, a district court held EPA lacked authority to exempt such discharges from the regulatory definition of point source, see *Natural Resources Defense Council, Inc. v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), and shortly after that the 1977 amendments changed § 502 to exclude “agricultural stormwater discharges and return flows from irrigated agriculture.” 33 U.S.C. § 1362(14). Questions often arise, though, over the scope and meaning of that exclusion. See, e.g., *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994).

¹⁰⁷ See Klee Memorandum, *supra* note 103, at 5. Oddly, in its “holistic approach” the Klee Memo misstates that “[t]he purpose of the CWA is to protect water quality.” *Id.* The Memo was directed at regional personnel, ordering them to resist several circuit court precedents to the opposite effect in preparation for the *Miccosukee Tribe* case’s return to the Supreme Court. *Id.* at 2-3. The agency has since begun an informal rulemaking process to formalize its interpretation of “point source.” See EPA, National Pollution Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32887 (2006).

¹⁰⁸ See Klee Memorandum, *supra* note 103, at 5 (“The [CWA] expresses the understanding that, as a general matter, water control facilities that merely transport “the waters of the United States” to where they can be most beneficially used are not subject to the NPDES regime.”); *cf.* Proposed Rule, 71 Fed. Reg. at 32890 (“Water transfers are an essential part of the nation’s infrastructure for delivering water that users are entitled to receive under State law.”).

¹⁰⁹ *But cf.* *Rapanos*, 126 S. Ct. at 2223 n.7 (Scalia, J., joined by Roberts, C.J., Thomas, Alito, JJ.) (“It is also true that highly artificial, manufactured, enclosed conveyance systems . . . likely do not qualify as “waters of the United States,” despite the fact that they may contain continuous flows of water.”). If that is true, it is unclear how. See, e.g., *P.F.Z. Properties, Inc. v. Train*, 393 F.Supp. 1370 (D.D.C. 1975) (wetlands adjacent to canals not used in navigation for many years held to be within the scope of § 502(7)). Neither EPA nor the Corps has ever taken the position that the inclusion of “tributaries” within 40 C.F.R. § 122.2 and 33 C.F.R. § 328.3 implicitly or otherwise excluded artificial tributaries such as canals, ditches, swales, *etc.* See *United States v. Tull*, 769 F.2d 182, 185-86 (4th Cir. 1985), *rev’d on other grounds*, *Tull v. United States*, 481 U.S. 412 (1987) (dredge and fill case involving wetlands adjacent to man-made drainage ditch that had been, at one time, subject to the ebb and flow of the tide).

¹¹⁰ Compare *In re Boyer*, 109 U.S. 629 (1884) (federal navigation power extends to man-made canals) with *Kaiser Aetna v. United States*, 444 U.S. 164, 176 n.3 (1979) (privately owned artificial inlet hydrologically connected to Pacific Ocean is itself navigable waters within the meaning of the Rivers and Harbors Act of 1899). Wetlands cases involving artificial influences and/or connections include *United States v. Tull*, 769 F.2d 182, 185-86 (4th Cir. 1985); *United States v. DeFelice*, 641 F.2d 1169 (5th Cir. 1981); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974). One case, *United States v. City of Fort Pierre*, 747

course, neither agency has ever explained or given general reasons for its approach. The agencies had found, it seems, that generalizations on what is a “tributary” were premature at best.¹¹¹ And forbearance of the kind is well known in administrative law. In fact, it has long been an adjunct of judicial respect for agency expertise.

Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.¹¹²

Yet, at least four Justices—two of whom had yet even to serve a full Term—thought that hubris explained the wetlands programs better than a deft touch taken to an especially hard problem of restoration ecology. Confronting the tradeoffs raised by the integrity ideal on a case-by-case basis cannot be the Executive run amok insulting the dignity of states. If anything, EPA and the Corps have avoided the very kind of narcissistic self-certainty the *Rapanos* plurality had too much of.¹¹³ For better or worse,

F.2d 464 (8th Cir. 1984), without explaining why, held that wetlands conditions created by the Corps’ own navigation projects in an adjacent river could not support the extension of federal jurisdiction. Two Seventh Circuit cases also observed that there were limits to the geographic scope of § 502(7). See *Hoffman Homes Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994).

¹¹¹ Cf. SCHAUER, *supra* note 73, at 43 (“To the extent that generalizations become entrenched, the inclusions of past generalizations facilitate dealing with the future when it is like the past, but the suppressions of past generalizations impede dealing with the future when that future departs from our prior expectations.”).

¹¹² *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

¹¹³ Justice Scalia’s confidence in his dictionary—at least one edition of his dictionary, see *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225-28 & n.3 (1994)—notwithstanding, H.L. Mencken was probably right when he said that for every complex problem there is a solution that is simple, neat and wrong. Whatever the possibilities for a semantics of “waters” or, derivatively, of “tributary,” “one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce “absurd” results less compatible with the reason or purpose of the statute. This, it seems to me, unquestionably involves judicial consideration and evaluation of competing policies, and for precisely the same purpose for which . . . agencies consider and evaluate them—to determine which one will best

the agencies have sought to preserve the geographic scope of § 502(7)—often just leaving a vacuum where they had implied they would serve as a regulatory check¹¹⁴—for the simple reason that, in our legal culture, it seems the only possible route to the statute’s end: the restoration of the chemical, physical, and biological integrity of the nation’s waters. Part V argues, nonetheless, that this has been their biggest failure.

V. INTERPRETING ADMINISTRATIVE AUTHORITY: LAW’S INTEGRITY AND NATURE’S

Given its simultaneous ubiquity and ambiguity in regulatory practice today, *Chevron* was surely the ‘known unknown’ in the *Rapanos* litigation.¹¹⁵ *Chevron*’s tenure at the Supreme Court has been tumultuous, a function of its own internally conflicted justification.¹¹⁶ Today, despite its importance, it is a mangled wreckage of doctrine,¹¹⁷ not least because the *Chevron* opinion could not possibly have meant what it seemed to

effectuate the statutory purposes.” Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515.

¹¹⁴ See Adler, *supra* note 25, at 66-70; see also William E. Taylor & Kate L. Geoffroy, *General and Nationwide Permits*, in WETLANDS LAW AND POLICY, *supra* note 3, at 151.

¹¹⁵ See *supra* note 12 and accompanying text. In *Rapanos*, both the dissents and Justice Kennedy pointedly mention *Chevron*’s role in *Riverside Bayview*. See *Rapanos*, 126 S. Ct. at 2240 (Kennedy, J., concurring); *id.* at 2252-53, 2259 n.8 (Stevens, J., dissenting); *id.* at 2266 (Breyer, J., dissenting). Interestingly, though, Justice Kennedy does not rely on *Chevron* in his own opinion in *Rapanos* in any way.

¹¹⁶ *Chevron* articulates at least three distinct reasons for the judiciary to defer to administrative agencies’ interpretations of statutes, including congressional intent, the relative expertise of agencies compared to courts, and the relative political accountability of agencies compared to courts. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-65 (1984). The last of these, political accountability, broke from prior precedent and is, in many ways, inconsistent with the other two. See Thomas A. Merrill, *The Story of Chevron: The Making of An Accidental Landmark*, in ADMINISTRATIVE LAW STORIES at 399, 413-414 (Peter L. Strauss ed., 2006) (describing Paul Bator’s role as the first “political” Solicitor General and his argument in *Chevron* that the reason courts ought to defer to agency interpretations of law is because the President supervises agencies and they are, therefore, politically accountable).

¹¹⁷ To trace its evolution, see, for example, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *NLRB v. United Food & Commercial Workers, Union, Local 23, AFL-CIO*, 484 U.S. 112 (1987); *K Mart Corp. v. Cartier*, 486 U.S. 281 (1988); *National Federation of Federal Employees, Local 1309 v. Dept. of the Interior*, 526 U.S. 86 (1999); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000); *Christensen v. Harris County*, 529 U.S. 576 (2000); *United States v. Mead*, 533 U.S. 218 (2001); *Edelman v. Lynchburg College*, 535 U.S. 106 (2002); *Barnhart v. Walton*, 535 U.S. 212 (2002); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003); *National Cable & Telecomm. Assoc. v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

say.¹¹⁸ In Dworkin’s terms, it seemed to picture the judicial role as one where courts ensure that an agency’s statutory interpretation “fits,” but not necessarily that it be justified.¹¹⁹ And that seemed like a rather denatured role for courts in our system. Empirical analysis to date (mostly) confirms that the lower courts have afforded greater deference to agency interpretations more often when they apply *Chevron*.¹²⁰ Given our judicial hierarchy, it is probably unremarkable that lower courts “seem to take *Chevron* more seriously than does the Supreme Court.”¹²¹ But *Rapanos* well demonstrates how the Supreme Court itself applies *Chevron* in deep statutory conflicts like the ones provoked by § 502(7): capriciously.¹²² In fact, it is shocking how little force the case seems to exert on the one bench so obviously positioned to make big mistakes often.

In the famous Hart/Dworkin debate about how often law’s “open texture” confers a kind of generative discretion on interpreters,¹²³ *Chevron*’s most recent appearances at the Court are chilling. The empirical evidence may not explicitly confirm the attitudinal

¹¹⁸ Cf. Thomas A. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 969-70 (1991) (“[R]ead for all it is worth, [*Chevron*] would make administrative actors the primary interpreters of federal statutes and relegate courts to the largely inert role of enforcing unambiguous statutory terms.”); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 46 (1998) (noting how drastically *Chevron* seems to truncate the judiciary’s traditional role in reviewing agency interpretations of law).

¹¹⁹ Compare DWORKIN, *LAW’S EMPIRE*, supra note 69, at 285 (“A successful interpretation must not only fit but also justify the practice it interprets.”) with *Chevron*, 467 U.S. at 842-43 (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [However] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

¹²⁰ See Aaron P. Avila, *Application of the Chevron Doctrine in the D.C. Circuit*, 8 N.Y.U. ENVTL. L.J. 398, 429 (2000); Kerr, supra note 118; Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1058-59. Merrill argued to the contrary. See Merrill, supra note 118, at 980-85.

¹²¹ RICHARD J. PIERCE ET AL., *ADMINISTRATIVE LAW AND PROCESS* 387 (4th ed. 2004)

¹²² See, e.g., Note, “How Clear is Clear” in *Chevron’s Step One?*, 118 HARV. L. REV. 1687 (2005) (it depends).

¹²³ See supra notes 71-76 and accompanying text.

hypothesis,¹²⁴ but neither does it refute one. Indeed, Hart’s faith in an interstitial picture of discretion bounded by precedent lacks credibility if the *Chevron* doctrine is the focus. Yet if there is some true meaning to *Chevron*, some best way it hangs together with the rest of administrative law the justices are trying to find, it is so far lost on the rest of us. At the very least the justices have shown that the authority of administrative agencies is, for them, an “interpretive concept.”¹²⁵ And that should be reason enough to demand more from the Court than *Rapanos* gives, both as to *Chevron* and as to its interpretation of the CWA. For all their supposed hubris, the agencies had gone out of their way to respect state sovereignty, to balance CWA §§ 101(a) and 101(b)—as any practitioner of water law knows. Indeed, if there is a move in this story demanding better justification from the agencies, it is EPA’s “reinterpretation” of engineered transfers now underway.¹²⁶

Recall that the most significant distinction of Dworkin’s jurisprudence from the more conventional accounts of positivism is his metaphysical realism, what is called his right answer thesis.¹²⁷ Judges subscribing to this philosophy view their own authority quite expansively. For all its confidence in *Rapanos*, though, the plurality did nothing to advance Dworkin’s thesis. It did not at all explain its fear for the dignity of states within

¹²⁴ The attitudinal hypothesis is that Supreme Court justices seek to effectuate their own favored policy outcomes by requiring deference when agencies are ideologically similar to themselves and by discouraging it when agencies are not. See Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and An Empirical Test*, 69 S. CAL. L. REV. 431 (1996). Recent data neither confirm nor refute the hypothesis. See Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN. L. REV. 657 (2004). All jurisprudents, Hart and Dworkin included, reject such hypotheses, if on different grounds.

¹²⁵ Compare Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002) (detailing the meandering evolution of Supreme Court doctrine on agency lawmaking authority) with DWORKIN, JUSTICE IN ROBES, supra note 71, at 12 (“A useful theory of an interpretive concept must itself be an interpretation, which is very likely to be controversial, of the practice in which the concept figures.”).

¹²⁶ See supra notes 103-08 and accompanying text.

¹²⁷ See supra notes 71-73 and accompanying text.

statutes like the CWA. The obsession with § 502(7)'s *geography* cannot really be about the intelligibility of denoting lands as 'waters.'¹²⁸ But, of course, when it comes to states' dignity, this Court has a history of raising Damocles swords, imminent storm clouds of constitutional trouble unnamed and formless, that it says are threatening but which it will avoid by its interpretive genius.¹²⁹ Yet no rationale for the result in *Rapanos* seemed shallow or narrow enough for five votes. And in its "modesty," the plurality shirked its responsibility to justify a finding of, or even to explain what *precisely* had been, the agencies' abuse of their authority. Given CWA § 101(a)'s text and what the agencies have learned about aquatic ecosystems, this seems a terrible oversight on the plurality's part. Whatever it is, it is not modesty. It is much closer to caprice and the disregard of the obligation to render a transparent judgment.¹³⁰

Ecologists have long insisted that two things still tightly coupled in the legal imagination must be decoupled before we can pursue seriously the restoration of nature's integrity: geography and sovereignty. That is, a truly expert approach to the CWA's integrity mandate and, thus, to the concept of "waters of the United States," would little resemble even what the *Rapanos* dissent envisioned. For it would surely have abandoned the strictly *geographic* interpretation of "waters of the United States" and, by extension,

¹²⁸ The concept of navigable waters has long extended upland to a mean high water/tide line, *see, e.g., Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 15-27 (1935), which, depending on its calculation, can mean a lot of "fast" land—including the most valuable shore land. *See, e.g., Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753 (9th Cir. 1978) (holding that "in tidal areas, "navigable waters of the United States," as used in the Rivers and Harbors Act, extend to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed natural state."); *see also* 43 U.S.C. § 1301 *et. seq.* (the Submerged Lands Act). *But cf. Rapanos*, 126 S. Ct. 2225 ("The plain language of the statute simply does not authorize [the] "Land is Waters" approach to federal jurisdiction.").

¹²⁹ *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 456-70 (1991).

¹³⁰ *See* DWORKIN, JUSTICE IN ROBES, *supra* note 71, at 73 ("We are modest, not when we turn our back on difficult theoretical issues about our roles and responsibilities as people, citizens, and officials, but when we confront those issues with an energy and courage forged in a vivid sense of our fallibility.").

of sovereignty, by now. With its deference to resource-starved federal bureaucracies¹³¹ that have pinioned themselves into trying to govern massive territories comprising America's major watersheds, even Justice Stevens' opinion blunted the sharpest point of the integrity objective. Where nature is concerned, traditional conceptions of sovereignty are embarrassed by geographic boundaries. Too many lawyers remain blind to this basic truth, though, and that is a mushrooming failure of both theory and practice, showcased in the wetlands cases of this past Term.¹³² But unless they just have some unstated agenda at odds with congressional objectives like CWA § 101(a), the justices need a better institutional imagination at least. As matters stand, the Roberts Court is compromising our law's integrity as society experiments with ways to restore and protect nature's.

¹³¹ Cf. *Rapanos*, 126 S. Ct. at 2259 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting) (“In the final analysis . . . [w]hether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges.”). The first case the dissent cites is *Chevron*, id. at 2252-53, and deference is the key theme of the opinion.

¹³² Cf. Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U.L. REV. 875, 932 (2003) (“What [most twentieth century legal theory] did not contemplate was the possibility of new sorts of public institutions whose job it would be, not to resolve legal ambiguity, but to foster continual deliberation and experimentation.”).