

WATERS OF THE UNITED STATES:
THEORY, PRACTICE, AND INTEGRITY AT THE
SUPREME COURT

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I. INTRODUCTION

In the Supreme Court’s two wetlands cases in the 2005 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)¹—has now provided three separate occasions for the Justices to confront (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 Article, I argue that the way the Court went about resolving its differences is, unfortunately, not just instructive to environmental lawyers. It is illustrative of the Court’s failed minimalism, disregard for its own precedents, and tired use of semantics where truly substantive problems are confronting our society.

II. USING OLD CONCEPTS IN NEW LAWS

It is perhaps fitting that all three branches of government have embarrassed themselves trying to define a concept central to American environmental law. In 1972, 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.”² That, of course, never

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1. 33 U.S.C. §§ 1251-1387 (2000).

2. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 816 (codified at 33 U.S.C. § 1251(a)(1) (2000)). It was *Congress’s* declaration be-

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”³ became, virtually by default, the most definite end to which the Environmental Protection Agency (EPA) and the Corps of Engineers (Corps) 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 (section 502 (7) of the CWA defines its subject, “navigable waters,” as roughly “waters of the United States”⁴) and partly because the courts have been so equivocal about the statute’s *meaning* under our Constitution and practices of statutory construction.⁵ Great hopes had formed around *Rapanos v. United States* and *Carabell v. U.S. Corps of Engineers*, the two wetlands cases on certiorari in the 2005 Term. But those hopes were dashed in a 4-1-4 split at the Court that today threatens to make restoring the chemical, physical, and biological integrity of the nation’s waters even harder.⁶

When the Supreme Court decided *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers (SWANCC)*,⁷ environmental lawyers were sure the Court would have to return to the scene to clarify what it had done.⁸ In *SWANCC*, the Court rejected the Corps’ interpretation of section 502(7)⁹ extending it to certain “nonnaviga-

cause Nixon vetoed Pub. L. No. 92-500, but was immediately overridden. See 86 Stat. at 903-04.

3. 33 U.S.C. § 1251(a) (2000).

4. *Id.* § 1362(7). The term “waters of the United States” is defined by both the Army Corps of Engineers at 33 C.F.R. § 328.3(a) (2006) and by the EPA at 40 C.F.R. § 230.3(s) (2006). 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 (2006). 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 of their different institutional cultures. See Mark A. Chertok & Kate Sinding, *Federal Jurisdiction over Wetlands: “Waters of the United States,”* in WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404, 59, 60-61 (Kim Diana Connolly et al. eds., 2005). 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.

5. This Article leaves aside the Corps’ own significant institutional ambivalence toward section 101(a) of the CWA. The history has yet to be written fully 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 MICHAEL GRUNWALD, *THE SWAMP: THE EVERGLADES, FLORIDA, AND THE POLITICS OF PARADISE* (2006); ARTHUR E. MORGAN, *DAMS AND OTHER DISASTERS: A CENTURY OF THE ARMY CORPS OF ENGINEERS IN CIVIL WORKS* (1971).

6. See *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

7. 531 U.S. 159 (2001).

8. 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).

9. The Corps interpreted sections 404 and 502(7) of the CWA (respectively codified at 33 U.S.C. §§ 1344 and 1362(7)) as including “waters” having principally biological—as op-

ble, isolated, intrastate waters.”¹⁰ The Court held the waters were beyond the reach of the CWA as legislated in 1972 and as amended in 1977 and again in 1987.¹¹ In reversing the Corps so bluntly, the *SWANCC* majority advanced a view of regulatory federalism distinctly contrary to the one the agency had practiced. Indeed, the majority seemed to take jurisdictional geography far more seriously than had the Executive—going so far as to reject a call for deference that it might ordinarily have answered.¹² By doing so, the Court also showcased a view of its own authority that is at least in tension with, if not flatly contrary to, 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.¹³

The *SWANCC* opinion left its legal geography mostly uncharted, though, especially with respect to wetlands as “waters of the United States.”¹⁴ Some wetlands are far removed—even completely detached

posed to hydrological—connections to traditional navigable-in-fact waters. See Mank, *supra* note 8, at 842-43.

10. *SWANCC*, 531 U.S. at 165-66, 174.

11. See *id.* The Federal Water Pollution Control Act (FWPCA) took its modern, recognizable form through the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (2000)). It was the 1977 amendments that changed the statute’s official name to the “Clean Water Act,” Clean Water Act of 1977, Pub. L. No. 95-217, § 2, 91 Stat. 1566, 1566, although it is still denominated FWPCA in the U.S. Code. The Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987), was enacted less than a year after EPA and the Corps issued the definition of “waters of the United States” challenged in *SWANCC*, doing nothing to alter those definitions. See Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (1986) (codified at 33 C.F.R. §§ 320-30 (2006)).

12. See *SWANCC*, 531 U.S. at 172-74. 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 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

13. 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 embraced a view broader than that “classical understanding” for more than twenty-five years.

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

14. 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. See *SWANCC*, 531 U.S. at 167, 170.

at long intervals¹⁵—from the “navigable waters” into which they eventually and/or occasionally flow.¹⁶ The SWANCC opinion said nothing about delineating federal as opposed to state jurisdiction there.¹⁷ Not that this was especially novel: various navigation acts have referenced “navigable waters” and their “tributaries” going back decades, implying the existence of a set the courts have long struggled to identify.¹⁸

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 directly with the Court’s recent federalism precedents. Hydrographic modifications are so common today and the building of infrastructure that is impervious to precipitation is so widespread that wetlands protection and runoff regulation have become hot button social issues.¹⁹ Yet the natural capital that functioning wetlands represent makes the test for Commerce Clause authority articulated in *United States v. Lopez*²⁰ and elsewhere²¹ no test at all. Destroying this resource is easily among

15. Dennis W. Magee, *A Primer on Wetlands Ecology*, in WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404 27, 28-32 (Kim Diana Connolly et al. eds., 2005).

16. See, e.g., *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 805 (7th Cir. 2005) (describing a long, attenuated path connecting the wetlands at issue to waters that were navigable in fact), *cert. granted and vacated*, 126 S. Ct. 2964 (2006), *remanded to 464 F.3d 723* (7th Cir. 2006). “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. § 328.3(b) (2005). But this definition encompasses swamp and cornfield alike. See *United States v. Rapanos*, 376 F.3d 629, 642-43 (6th Cir. 2004).

17. 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, 553 (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 v. United States*, 126 S. Ct. 2208, 2214-19 (2006).

18. See, e.g., *Leovy v. United States*, 177 U.S. 621, 633 (1900) (arguing that tributaries of “navigable in fact” waters cannot be “navigable waters of the United States” because if they were “there is scarcely a creek or stream in the entire country which is not a navigable water of the United States”).

19. 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).

20. 514 U.S. 549 (1995).

21. 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*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); and *Gonzales v. Raich*, 545 U.S. 1 (2005). These 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 UCLA L. REV. 217, 221-23 (2004).

that “ ‘class of activities’ that have a substantial effect on interstate commerce.”²² Even “isolated” wetlands and their destruction most certainly do “substantially affect” interstate commerce.²³ 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 was a question more interesting and complex than any equivalent constitutional question, though, because it straddled 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, known to conservation scientists as the places “where rivers are born,”²⁴ are integral to accomplishing the CWA’s restorative objective.²⁵ But their range across North America²⁶

22. *Raich*, 545 U.S. at 17; *cf. id.* (“When Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.”) (citation omitted). 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 558-59. Some courts have expressly analyzed the Commerce Clause issues raised by section 502(7) in terms of the protection of the “channels” of interstate commerce. *See, e.g., United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *United States v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001). 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).

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

24. JUDY L. MEYER ET AL., WHERE RIVERS ARE BORN: THE SCIENTIFIC IMPERATIVE FOR DEFENDING SMALL STREAMS AND WETLANDS 5 (2003), available at http://www.americanrivers.org/site/pageserver?pagename=AMR_publications#clean (follow “Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands” hyperlink).

25. Magee, *supra* note 15, 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 Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act*, 43 Op. Att’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 the statement in section 101(b) of the CWA that “[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution.” *Rapanos v. United States*, 126 S. Ct. 2208, 2215, 2223 (2006). No statute can intelligibly have as its goal some end that would be better served by its nonexistence, though. Section 101(b) of the CWA is rather a *proviso* to the Executive in how it goes about implementing the CWA. *See infra* notes 109-14 and accompanying text.

26. *See supra* note 19.

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).²⁷ Such a mandate could, on the courts’ understanding of the problem, swallow that most local of prerogatives, the “primary power over land . . . use.”²⁸ Whatever its particular priorities, though, Congress has never asserted *exclusive* federal authority over natural resources²⁹—direct testimony to the political safeguards of “our federalism.”³⁰ The question presented to the Court in *Rapanos* and *Carabell* was therefore two-fold: how geographically extensive is the CWA’s reach and who has the legal authority to say?

III. “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.³¹ Indeed, just like the Endangered Species Act,³² the CWA employs a critical, jurisdiction-defining term with an extraordinarily muddled legal pedigree.³³ It has, one might even say, *invited* such challenges from anyone with enough to lose to motivate them into court. In 1972, Congress amended the Federal Water Pollution Control Act, a statute it had first legislated in 1948, to make it into a more comprehensive, prescriptive, “federalizing”

27. See Jonathan H. 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).

28. SWANCC, 521 U.S. 159, 174 (2001) (“[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)).

29. See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L. J. 179, 183-84 (2005).

30. 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).

31. 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).

32. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 84 (1973) (codified as amended in 7 U.S.C. § 136 and scattered sections of 16 U.S.C.).

33. 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) (2000). The agencies’ regulatory definitions 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., *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996); *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995); *Nat’l Wildlife Fed’n v. Burlington N. R.R.*, 23 F.3d 1508 (9th Cir. 1994).

statute.³⁴ Cryptically, it took a program that had previously and variously denoted its subject as “interstate waters,”³⁵ “interstate or navigable waters,”³⁶ and “navigable waters of the United States,”³⁷ and, in section 502(7), redefined its subject as “waters of the United States, including the territorial seas.”³⁸ For over thirty years now this demarcation of federal authority has taxed the legal system’s collective wits³⁹ for the simple reason that the dignity afforded states in “our federalism” colors statutes like the CWA exceptional, subjecting

34. 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).

35. 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. 1155, 1161 (1948). This extension of federal prescriptive authority was certainly narrower than the Congress’s Article I authority as then interpreted by the courts. See, e.g., *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 569 (1939) (“Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them.”).

36. 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.

Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, § 7, 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.

37. 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.” Clean Water Restoration Act of 1966, Pub. L. No. 89-753, § 211, 80 Stat. 1246, 1252-53 (1966). It was this set of waters in the FWPCA that was referenced by the Court in *Illinois v. City of Milwaukee (Illinois v. Milwaukee I)*, 406 U.S. 91 (1972), the Court’s famous interstate common law nuisance case over the sewage discharges to Lake Michigan. See *id.* at 102 (“[T]he [FWPCA] makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters.”).

38. Pub. L. No. 92-500, § 502(7), 86 Stat. 816, 885. 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 § 502(8). In more than thirty years, Congress has never seen fit to clarify the definition of “navigable waters” and, in fact, has actually incorporated it into other statutes. See *Rice v. Harken Exploration Co.*, 250 F.3d 264, 267-68 (5th Cir. 2001) (finding that section 1001(21) of the Oil Pollution Act of 1990 was an intentional congressional adoption of section 502(7) of the CWA, including conflicting judicial interpretations). As Professor Mank has argued, it is still unlikely a congressional majority will materialize to change the statute’s definition. See Bradford R. Mank, *Implementing Rapanos—Will Justice Kennedy’s Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?*, 40 IND. L. REV. 291, 346-47 (2007).

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

them to constant judicial scrutiny.⁴⁰ 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 prevent, reduce, and eliminate pollution.”⁴¹ Thus, the semantics of section 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 a 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.⁴² And as to regulated activities, federal authority had extended beyond just the licensing of vessel traffic⁴³ to the building of wharves, piers, and other infrastructure;⁴⁴ dredging and manipulating channels;⁴⁵ and even to the complete destruction of the water’s navigability.⁴⁶ But the legal concept of “navigable waters” runs even deeper than just ju-

40. 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.”).

41. 33 U.S.C. § 1251(b) (2000). This “policy” traces, in slightly different language, to the 1956 version of the Water Pollution Control Act, Pub. L. No. 84-660, § 1(a), 70 Stat. 498, 498.

42. 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.” See, e.g., *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 565 (1870). 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).

43. 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 [C]onstitution, then, comprehends, and has been always 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.’”).

44. 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).

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

46. By design, a dam may enable navigation between points *A* and *B* while precluding it between *AB* and *C*. See, e.g., *Ashwander v. Tenn. 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. City of Philadelphia*, 70 U.S. 713, 724-25 (1865)).

risdiction to prescribe. In fact, the phrase is perhaps a uniquely rich artifact for historians of our federalism, also serving as a predicate for federal court admiralty jurisdiction⁴⁷ and as the (evolving) demarcation between federal and state public trust land and “servitude” ownership.⁴⁸ Against this backdrop, section 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 section 502(7),⁴⁹ the Executive had proposed to amend its definition to curb section 502(7)’s scope and then changed its mind,⁵⁰ and property rights advocates had become convinced that the Executive agencies had run amok.⁵¹ Congress hardly even considered acting. And instead of resolving any of this mess with *Rapanos* and *Carabell* (as many lawyers had, since *SWANCC*, hoped it would), 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” in any traditional sense, more than just “transitory puddles or ephemeral flows of water.”⁵² In contrast to this emphasis on “permanence” and prox-

47. See *The Daniel Ball*, 77 U.S. (10 Wall.) at 563 (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”).

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

49. *FD & P Enters. v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 2d 509, 513-16 (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., *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005); *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004); *Treacy v. Newdunn Assoc.*, 344 F.3d 407 (4th Cir. 2003); *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001). 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 Fourth Circuit held that 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 *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), setting up the circuit split the Court addressed in *Rapanos* and *Carabell*.

50. See Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991 (proposed Jan. 15, 2003).

51. See, e.g., Brief of Amici Curiae Washington Legal Foundation et al. in Support of Petitioners, *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (No. 04-1034).

52. *Rapanos v. United States*, 126 S. Ct. 2208, 2220-21 (2006) (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.

imity 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.'"⁵³ What is so extraordinary about these opinions, though, is that Justice Kennedy's arguments had more in common with the dissent⁵⁴ than

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. *See, e.g., id.* at 2242 (Kennedy, J., concurring in the judgment) (expressly rejecting that limitation on federal authority over wetlands that otherwise possess a "significant nexus" to traditional "navigable waters"). But Justice Kennedy would also require proof of a "substantial nexus" in waters and wetlands to which Justice Scalia's opinion would extend the Act presumptively. *See id.* at 2248.

In guidance issued in June 2007, the Corps and EPA jointly declared that they will apply *Rapanos* to assert jurisdiction if the wetlands or tributaries meet either Justice Kennedy's or Justice Scalia's standards. *See* Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (June 5, 2007), available at <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf> (hereinafter *Rapanos* Guidance). But it is at best unclear how a statutory interpretation case where there was no majority ought to append two separate definitions to a statute that is administered by an agency. 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.)). And the *Rapanos* Guidance expressly invokes *Marks*. *See Rapanos* Guidance, *supra*, at 3. But even putting aside concerns that *Marks* is unworkable in practice, *Marks* was a constitutional case, not the interpretation of a statute administered by an agency. Where the (prospective) meaning of such a statute divides the court evenly, it stands to reason—at least as well as *Marks*'s reasoning—that no authoritative precedent exists because combining disparate rationales to comprise a holding conflates the law of a case with the prospective aspect of precedent. Examples of this confusion have already arisen. *See, e.g., United States v. Cundiff*, 480 F. Supp. 2d 940 (W.D. Ky. 2007) (constructing the "controlling standard" for reading CWA section 502(7) from both the Kennedy and Scalia opinions). In *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005), a case that was vacated for further proceedings in light of *Rapanos*, Gerke Excavating, Inc. v. United States, 126 S. Ct. 2964, 2964 (2006), the Seventh Circuit invoked *Marks* to interpret *Rapanos* on remand before the *Rapanos* Guidance was issued. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006). But the Seventh Circuit did so to combine Justice Kennedy's test with that of the *dissent* as well as that of the "plurality" alternatively, essentially triangulating Justice Kennedy's opinion into the opinion of the Court on the meaning of section 502(7). *Id.* at 724-25. The oddity of investing such authority in the opinion of a single Justice has not been lost on all courts. *See, e.g., United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (refusing to find any opinion in *Rapanos* controlling).

53. *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring in the judgment).

54. The dissent argued that the extension of section 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, J., 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. *See id.* at 2264.

with the so-called plurality, and the five Justices in the plurality agreed on virtually no rationale for the result.

IV. MEANING AND REFERENCE: THE TRUTH ABOUT “WATERS OF THE UNITED STATES”

*United States v. Riverside Bayview Homes, Inc.*⁵⁵ and *SWANCC* were both, in a sense, predictable. The CWA’s cryptic text was undoubtedly a congressional punt,⁵⁶ although it remains unclear at whom it was aimed: a judiciary increasingly mindful of state dignity or the administrative agencies?⁵⁷ It makes a fair amount of sense, though, that wetlands adjacent to navigable-in-fact waters would be covered and some waters inherently local in scale would not. After all, if section 502(7) meant the agencies were empowered to regulate the wholly intrastate, isolated, man-made ponds that were at issue in northern Cook County,⁵⁸ where would Executive power end? Having recourse to some general theory in answering such basic questions would surely be useful. 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 produce very disparate results just by way of the canons of statutory construction,⁵⁹ even before academic jurisprudence and/or theories of language are involved.⁶⁰ Legal theory today is enmeshed in the philosophy of language, much as it

55. 474 U.S. 121 (1985).

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

57. 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 section 502(7).

58. 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 decision, *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.

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

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

has been for forty years, because its practitioners all acknowledge law's eternal flirtation with indeterminacy.⁶¹ Yet contemporary theories of language bring a measure of clarity to one thing about section 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.'⁶² Several 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 causal fact.⁶³ "Waters" of the United States might just mean whatever in the world an expert would find was a water body.⁶⁴ 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 clarity and as the *Rapanos* Court was painfully aware.⁶⁵ In short, as a physical (and as a spatio-temporal) reference, "waters" is actually pretty vague.⁶⁶

61. 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).

62. 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.

63. See, e.g., SAUL A. KRIPKE, *NAMING AND NECESSITY* (1980); Hilary Putnam, *The Meaning of 'Meaning,' in MIND, LANGUAGE AND REALITY: PHILOSOPHICAL PAPERS VOLUME 2*, 215 (1975).

64. PUTNAM, *supra* note 63, 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 Publ'ns, 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).

65. 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 v. United States*, 126 S. Ct. 2208, 2221 n.5 (2006) (Scalia, J., joined by Roberts, C.J., and Thomas, Alito, J.) (admitting that line-drawing between "waters" and land is inherently contingent on the purposes for which the lines are being drawn).

66. *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, thus creating significant ambiguities in reference).

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 resorting to the conventions of speech observed by competent speakers, in essence allowing usage to determine meaning instead of reference.⁶⁷ 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 has established how many different credible usages of the concept there are.⁶⁸ Even within the *Rapanos* plurality there seemed to be significant variation in what the Justices thought practice had brought to the term.⁶⁹ And all this is before we bring in the messy social institutions invoked by the expression: some theory of our federalism, after all, must settle what “of the United States” truly means.⁷⁰ To parse apart the possible congressional intentions within that set of issues is to broaden the inquiry perhaps indefinitely.

Thus, it cannot be doubted that section 502(7) is an exemplar of what legal theorists see as law’s areas of “open texture.”⁷¹ The gener-

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

68. 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”).

69. Justice Scalia’s opinion argued that it is “beyond parody” that section 502(7) had been extended to storm sewers, drainage ditches, and “[dry] arroyos in the middle of the desert.” *Rapanos*, 126 S. Ct. at 2222 (Scalia, J., joined by Roberts, C.J., and Thomas, Alito, JJ.). He further noted that “[t]hese judicial constructions . . . are not outliers. Rather, they reflect the breadth of the Corps’ determinations in the field.” *Id.* at 2218. This was in keeping with his conclusion that the only wetlands and tributaries properly subject to federal jurisdiction were those “with a continuous surface connection” to “permanent” water courses, such “that there is no clear demarcation between ‘waters’ and ‘wetlands.’” *Id.* at 2226-27. 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. *Id.* at 2235-36, (Roberts, C.J., concurring). Justice Kennedy’s opinion takes pointed and specific issue with Justice Scalia’s disbelief that “waters” could include arroyos. *Id.* at 2242-47 (Kennedy, J., concurring in the judgment). That is an argument Justice Kennedy seems to have the better of. See COOKE & REEVES, *supra* note 65.

70. Cf. *Vill. 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.)”).

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

ality 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),⁷² 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.⁷³ American 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.⁷⁴

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 preexisting norms to present particulars, Dworkin views the judiciary as the agency of justice, always working to earn law’s authority on its behalf.⁷⁵ Dworkin has long argued that justice requires that adjudicators no less than other officials find the one best interpretation of the law—what the law *really* requires. Yet where Dworkin and others expect that (legal) truth might “exceed its demonstrability”⁷⁶ and thereby require a thick, constitutive function in application, modern positivism responds that texts like section 502(7) have no more than a core of settled meaning, surrounded by a (potentially vast) “penumbra” of *plausible interpretations*.⁷⁷ Thus, the dispute—what to do about legal

72. See *id.*

73. 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) [hereinafter DWORIN, *LAW’S EMPIRE*] (“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.

74. Cf. BIX, *supra* note 60, 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 the necessities that it function according to plan.

75. See RONALD DWORIN, *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).

76. STEPHEN GUEST, *RONALD DWORIN* 6 (1991).

77. HART, *supra* note 67, at 141-47; Jules Coleman, *Incorporationism, Conventional-ity, 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 HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 355 (Jules Coleman ed., 2001). Hart himself always believed that the areas of “open texture” were relatively few and that, as an empirical matter, judicial discretion was quite interstitial. HART, *supra* note 67, at 154,

indeterminacy and its resultant discretion—can keep going right into the heart of law’s practical normativity.⁷⁸

Yet, while both had a picture of meaning at the base of their theory of law, neither convinced the practitioners of law or 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 that it went nowhere, that it was a theory of law without its most central element: its obligations to justice. What the American legal academy has been left with are two theories of law that differ in many of the same ways semantic realism differs from antirealism. 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 expositive accounts, each is quite plausible—even elegant.

Of course, if both of these theories fail to authoritatively fix 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*⁷⁹ (or

274. He gave no support for this, though, and some later positivists shy from the same claim. See, e.g., BIX, *supra* note 60, at 36-62; FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 191-96 (1991).

78. Positivism conceives of a norm’s (intersubjective) preexistence as integral to the judge’s authority to apply it, indeed, to the judiciary’s claim to authoritative decisionmaking. See HART, *supra* note 67, at 100-17. But, to be clear, I am not implying that Hart was one of those who viewed discretion as a bad thing, necessarily. Hart actually maintained 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. *Id.* at 125-26. Dworkin, in contrast, maintains that law’s normativity depends on the overall justification in its applications as much as its fit with past practice. DWORKIN, LAW’S EMPIRE, *supra* note 73, 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, *supra* note 75, 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.”).

79. 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 62, at 18 (arguing that both people who believe reference determines meaning (“realists”) and people who believe usage determines meaning (“antirealists”) “believe that

“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.⁸⁰

It was clear before *SWANCC* and *Rapanos* that section 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.⁸¹ Indeed, if anything, *SWANCC* just intensified the federal judiciary’s vigilance toward the statute’s tensions with recent federalism precedents.⁸² And, on first inspection, Dworkin’s theory of judging gathers some confirmation from the 99+ pages of slip opinion in *Rapanos*. But that 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.”⁸³

the truth of propositions of law is a matter of truth conditions” that are independent of the speaker/proposition itself).

80. Compare DWORKIN, *supra* note 75, 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 all lawyers), with Cross, *supra* note 61, 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.”).

81. 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. *Id.* at 901-02. 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.* 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 905-06. 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 910-14, but it did so quite aware of the ramifications for the CWA’s geographic scope. *Id.* at 914-18.

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

83. Dworkin’s concept of integrity in law is, for him, what unites legality with justice. See DWORKIN, *LAW’S EMPIRE*, *supra* note 73, 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.”).

V. 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”⁸⁴ without reinventing American civilization as we know it.⁸⁵ It has been said that the agencies more or less accidentally ignored this mandate’s biological and physical prongs, but that is not quite true. Shortly after the Act’s passage, EPA held a national symposium on CWA section 101(a) “integrity” and what its restoration would entail.⁸⁶ It was a national meeting of minds, but it failed to settle very much about the mission.⁸⁷ All the same, the agencies issued rules defining “waters of the United States” in 1975, 1977, and again in 1986,⁸⁸ eventually deciding to broaden their definitions to include most tributaries, headwaters, wetlands, and other attenuated elements of a lotic system.⁸⁹ This Part explains how two relatively conservative administrative agencies gradually decided, in six different Presidential administrations, to expand federal jurisdiction as dramatically 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

84. 33 U.S.C. § 1251(a) (2000).

85. See, e.g., *In re Operation of the Mo. River Sys. Litig.*, 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 has dominated agency and public attention to the exclusion of the other two. See generally Adler, *supra* note 19. 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 31, 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 19, at 50.

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

87. *Id.*

88. See Corps of Engineers, Notice of Interim Final Rule, 40 Fed. Reg. 31,320 (1975); Corps of Engineers, Notice of Final Rulemaking, 42 Fed. Reg. 37,122 (1977); Corps of Engineers, Notice of Final Rulemaking, 51 Fed. Reg. 41,206 (1986).

89. 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, and the like, 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. 31,320 at 31,324-325. 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.

government, are the parts of the 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.⁹⁰ For thirty years the agencies have struggled to draw lines around the parts of aquatic ecosystems they should govern.⁹¹ 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.⁹² 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 state.⁹³ 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.⁹⁴

While the Corps and EPA initially tried to focus only on the principal surface waters and their immediate threats, this strategy quickly became untenable.⁹⁵ Soon enough, the agencies learned that

90. 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 v. United States*, 126 S. Ct. 2208, 2248-50 (2006). The little rigorous taxonomic work that has been done on stream magnitude—the most intuitive method for doing so—is still 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 24, at 6 (differentiating perennial, intermittent, and ephemeral streams).

91. Cf. 42 Fed. Reg. at 37,129 ("[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 section 502(7)'s scope necessarily, but rather to manage personnel resources and to say where Corps permitting authority ended as a presumption. See *id.* Not surprisingly, the rulemaking was taken up into congressional debates as reason to clarify section 502(7), although the 1977 amendments ultimately made no such change. See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 914-16 (5th Cir. 1983). This would later become one of the majority's arguments supporting section 502(7)'s extension to adjacent wetlands in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135-39 (1985).

92. See P. COMER ET AL., BIODIVERSITY VALUES OF GEOGRAPHICALLY ISOLATED WETLANDS IN THE UNITED STATES (2005), available at http://www.natureserve.org/library/isolated_wetlands_05/isolated_wetlands.pdf.

93. See, e.g., Unified Federal Policy for a Watershed Approach to Federal Land and Resource Management, 65 Fed. Reg. 62,566 (2000); Andreen, *supra* note 17, at 591-93.

94. See ADLER ET AL., *supra* note 31, at 61-85; DAVID S. WILCOVE, *THE CONDOR'S SHADOW: THE LOSS AND RECOVERY OF WILDLIFE IN AMERICA* 105-37 (1999).

95. See ADLER ET AL., *supra* note 31, 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

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.⁹⁶ Though at least six Justices between *SWANCC* and *Rapanos* have viewed this as mission creep⁹⁷—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 still dominate the legal analysis, and it is the courts that are threatening to undo ongoing, directly deliberative regulatory work by way of an empty, yet paradoxically prescriptive, legal semantics.

times. See, e.g., *United States v. DeFelice*, 641 F.2d 1169 (5th Cir. 1981) (privately owned canal); *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979) (wetlands adjacent to intrastate lake); *United States v. Earth Scis., Inc.*, 599 F.2d 368 (10th Cir. 1979) (intrastate stream never used for commercial navigation, terminating in two intrastate reservoirs); *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). In only one of the cases I was able to find did a court reject the Corps’ interpretation of its jurisdiction. See *United States v. City of Fort Pierre*, 747 F.2d 464, 466-67 (8th Cir. 1984) (holding there was no jurisdiction over a man-made slough with a hydrological connection to navigable waters that was caused by Corps activities).

96. Much has been done to publicize the shift to a watershed approach. See OFFICE OF WATER, ENVTL. PROT. AGENCY, A REVIEW OF STATEWIDE WATERSHED MANAGEMENT APPROACHES (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. REP. 10247 (2004).

97. Chief Justices Rehnquist and Roberts and Justices O’Connor, Scalia, Thomas, and Alito all voted against the assertion of jurisdiction in *SWANCC* or *Rapanos* or both. Justice Kennedy, however, seems to have become attached to the “significant nexus” test in *SWANCC*, even where it may support broad federal jurisdiction. 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 section 502(7)’s geographic scope. See Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,216-17 (Nov. 13, 1986). 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.* at 41,217. And the *Rapanos* Guidance seems to capitalize in a similar way, this time stating that agency staff should heed “Justice Kennedy’s instruction” to “apply the significant nexus standard in a manner that restores and maintains [the chemical, physical, and biological integrity] of traditional navigable waters.” *Rapanos* Guidance, *supra* note 52, at 9 n.32.

B. “What Is a Tributary?”⁹⁸: *Judicial Hubris and the Irrelevance of Agency Learning*

Once the Court found that wetlands “adjacent” to navigable waters and their tributaries are within the scope of section 502(7)⁹⁹—and then found that “isolated” waters are outside it¹⁰⁰—the distinguishing features of a real “tributary” became the central issue.¹⁰¹ The agencies have never defined a tributary by rule, and for good reason: every general definition formulated as such runs square into either (1) the diversity of hydrographic features in North America or (2) the enormity of the restorative project, biologically. A regulatory definition of tributary “clarifying” the scope of section 502(7), in short, would bring troubles both of political morality and of practicality. Yet five Justices—Justices Kennedy and Scalia and those joining Justice Scalia’s opinion—seemed convinced that the agencies’ refusal to dive into this breach was some kind of failure on their part.¹⁰²

Whose is the bigger failure, though? So-called engineered transfers¹⁰³ are shaping up to be one of the major “integrity” issues to

98. Linda Greenhouse, *In the Roberts Court, There’s More Room for Argument*, N.Y. TIMES, May 3, 2006, at A1 (attributing this question to Chief Justice Roberts in the *Rapanos* and *Carabell* oral argument). Interestingly, the agencies now maintain that a tributary “includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water.” *Rapanos Guidance*, *supra* note 52, at 5 n.21. They even specify—in guidance only—that “a tributary . . . is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream).” *Id.* In a nod to the Chief Justice, *see supra* note 69, the *Rapanos* Guidance at least includes the dictum that the “agencies intend to more broadly consider jurisdictional issues, including clarification and definition of key terminology, through rulemaking or other appropriate policy process.” *Id.* at 3.

99. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138-39 (1985).

100. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 171-72 (2001). The Court took care in 1985 to note that the provisions of the regulatory definition covering nonadjacent wetlands were not at issue. *Riverside Bayview*, 474 U.S. at 124 n.2. The Court also took care to reference what the subject wetlands were adjacent to: a “navigable waterway.” *See id.* at 131 n.8 (assuming adjacency is to “bodies of open water”).

101. *See Rapanos v. United States*, 126 S. Ct. 2208, 2217-19 (2006). Courts have put tributaries of navigable-in-fact waters within section 502(7)’s scope since the early 1970s, even prior to the agencies’ first rulemakings. *See, e.g.*, *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974); *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974).

102. *Compare Rapanos*, 126 S. Ct. at 2220-24 (Scalia, J., joined by Roberts, C.J., and Alito, Thomas, J.) (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 “[t]he 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).

103. *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 at 2-3 & n.1, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskills II)*, 451 F.3d 77 (2d Cir. 2006) (Nos. 03-7203(L), 03-7253 (XAP) [hereinafter *Western States Brief*,

day.¹⁰⁴ Are they “tributaries” or “point sources”? The statutory definition of “point source” includes “any discernable, confined and discrete conveyance” including ditches and channels¹⁰⁵—and that means that some engineered transfers could conceivably be either. Lame, indeterminate analogies are easy here. The harder, more meaningful question goes directly to the statute’s highest plateau: at what does the integrity objective aim, exactly? Are the agencies truly obligated to “restore” the physical integrity of, for example, the Connecticut River? Including its tributaries, the Connecticut River boasts over one thousand dams (a few of which are centuries old) and has, for almost a century, gone without tributary flow that now goes to Boston’s reservoirs.¹⁰⁶ If EPA and the Corps have no restorative obligations under the CWA growing out of that history, on what (implicit) grounds can that be shown? That it would be uneconomic?

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. They are questions our “minimalist” Supreme Court has, counting *Rapanos* and *Carabell*, ducked at least eleven times now¹⁰⁷ and which Congress and the agencies have been ducking since 1972. In an important sense, there is no “natural kind” differentiating real tributaries from other tributaries of “navigable

Catskills II] (“Since most 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.”).

104. See, e.g., *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002), *rev’d in part*, *S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York (Catskills I)*, 273 F.3d 481 (2d Cir. 2001), *aff’d in part, remanded in part, Catskills II*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003); *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273 (1st Cir. 1996).

105. 33 U.S.C. § 1362(14) (2000).

106. See *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *cf.* Western States Brief, *Catskills II*, *supra* note 103, 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.”).

107. “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 Supreme Court’s avoidance of the CWA’s “integrity” ideal strains that packaging at the very least. See, e.g., *S.D. Warren Co. v. Maine Dep’t of Evtntl. Prot.*, 126 S. Ct. 1843, 1852-53 (2006); *Miccosukee Tribe*, 541 U.S. at 102-12; *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 175-97 (2001) (Stevens, J., dissenting); *Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting from the denial of cert.); *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 707-22 (1994); *Arkansas v. Oklahoma*, 503 U.S. 91, 102-14 (1992); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-20 (1982); *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 32-33 (1981) (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part); *Costle v. Pac. Legal Found.*, 445 U.S. 198, 200-04 (1980).

waters.”¹⁰⁸ Too many of our aquatic ecosystems have become what they are today because of profound derangements of their watershed.¹⁰⁹ And many tributaries are ecologically integral without being permanent, significant, or particularly natural.¹¹⁰ Thus, unsurprisingly, the agencies have waffled on general propositions.¹¹¹

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 could, under the right circumstances, be point sources.¹¹² Thirty years later, in taking a “holistic approach” to the statute, EPA quite incredibly concluded the exact opposite.¹¹³ According to EPA now, engineered transfers are *never*

108. Even in 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 62, at 117, science has thus far failed to reveal 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 65, 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 integral and/or significant is to assume away too many of ecology’s realities today.

109. WILCOVE, *supra* note 94, at 116-20. This fact alone has sobered the agencies in their pursuit of the integrity mandate. See Mank, *supra* note 8, at 886-89; cf. Memorandum from Ann R. Klee, Gen. Counsel, U.S. Env’tl. Prot. Agency, to Regional Administrators, U.S. Env’tl. Prot. Agency, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers, 3-4 (Aug. 5, 2005) [hereinafter 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.”).

110. See MEYER ET AL., *supra* note 24, at 16-21; COOKE & REEVES, *supra* note 65, at 5-15. There is, however, good reason to believe that the ordinary concept of a “tributary” masks a great deal of natural variability that, if better described and understood, might dissolve at least some of the issues now surrounding section 502(7). See *id.* at 6-7.

111. See, e.g., Klee Memorandum, *supra* note 109, at 2-3 & n.5 (acknowledging agency inconsistency).

112. See *In re Riverside Irrigation Dist., Ltd. and 17 Others*, Decision of the General Counsel No. 21 (June 27, 1975) [hereinafter *Riverside* Opinion]. Point sources are prohibited from discharging without a permit. 33 U.S.C. § 1311 (2000). Shortly after the *Riverside* Opinion, a district court held that EPA lacked authority to exempt such discharges from the regulatory definition of point source. See *Natural Res. Def. Council, Inc. v. Train*, 396 F. Supp. 1393 (D.D.C. 1975). Shortly after that the 1977 amendments changed section 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 Env’t v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994).

113. See Klee Memorandum, *supra* note 109, at 5. Oddly, in its “holistic approach” the Klee Memorandum 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 holding that engineered transfers could be point sources. *Id.* at 2-3. The agency eventually began an informal rulemaking process to formalize its interpretation of “point source.” See National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32,887 (June 7, 2006) (to be codified at 40 C.F.R. pt. 122).

point sources and ought not be regulated by the CWA at all.¹¹⁴ Yet, given the statute's integrity objective, this just sets up the dilemma of whether some actual canal, ditch, slough, channel, or the like conveying water is, instead, a tributary within the meaning of section 502(7) and its regulations.¹¹⁵

Before *Rapanos* and *SWANCC*, courts *usually*—in deference to the agencies—did not distinguish between natural and artificial waters, wetlands, and tributaries.¹¹⁶ Of course, neither agency has ever explained or given general reasons for its approach. The agencies had found, it seems, that generalizations about tributaries were premature.¹¹⁷ And forbearance of this kind is well known in administrative

114. See Klee Memorandum, *supra* note 109, 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. 32,887, 32,890 (“Water transfers are an essential component of the nation’s infrastructure for delivering water that users are entitled to receive under State law.”).

115. *But cf.* *Rapanos v. United States*, 126 S. Ct. 2208, 2223 n.7 (2006) (Scalia, J., joined by Roberts, C.J., and Thomas, Alito, J.) (“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. Props., 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 section 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, and so on. See *United States v. Tull*, 769 F.2d 182, 184-85 (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).

116. Compare *In re Boyer*, 109 U.S. 629, 632 (1884) (federal navigation power extends to man-made canals), with *Kaiser Aetna v. United States*, 444 U.S. 164, 169 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 *Tull*, 769 F.2d at 184-85; *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 decision, *United States v. City of Fort Pierre*, 747 F.2d 464, 467 (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 section 502(7). See *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994); *Hoffman Homes, Inc. v. U.S. Envtl. Prot. Agency*, 999 F.2d 256 (7th Cir. 1993).

117. The agencies have maintained that anything with an “ordinary high water mark” may be a tributary. *Cf.* 33 C.F.R. § 328.4(c) (2006) (“In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark”); 51 Fed. Reg. 41,206, 41,217 (“[I]n the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible.”). Yet, given the lack of an interval in their definition of an ordinary high water mark, see 33 C.F.R. at § 328.3(e) (2006), this is less of a general definition than a delegation of discretion to the field officer—exactly what a rational agency should do if it lacks a preference on a general definition. *Cf.* SCHAUER, *supra* note 77, 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.”).

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.¹¹⁸

Yet at least four Justices—two of whom had yet to serve even a full Term—thought that hubris explained the wetlands programs better than a deft touch taken to an especially hard problem of restoration ecology. Nonetheless, 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 of which the *Rapanos* plurality had too much.¹¹⁹ For better or worse, the agencies have sought to preserve the geographic scope of section 502(7)—often just leaving a vacuum where they had implied they would serve as a regulatory check¹²⁰—for the simple reason that, in our legal culture, it seems the only possible path to the statute’s ends: the restoration of the chemical, physical, and biological integrity of the nation’s waters. Still, Part VI suggests that this has been their biggest mistake.

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

Given its ubiquity and ambiguity in regulatory practice today, *Chevron* was surely the “known unknown” in the *Rapanos* litiga-

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

119. Notwithstanding 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)), 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, or 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 effectuate the statutory purposes.

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515.

120. See Adler, *supra* note 27, at 66-70; see also William E. Taylor & Kate L. Geoffroy, *General and Nationwide Permits*, in *WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404*, 151 (Kim Diana Connolly et al. eds., 2005).

tion.¹²¹ *Chevron's* tenure at the Supreme Court has been tumultuous, a function of its own internally conflicted justification.¹²² Today, despite its importance, it is a mangled wreckage of barely reconcilable precedents,¹²³ at least in part because the *Chevron* opinion could not possibly have meant what it seemed to say.¹²⁴ 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.¹²⁵ And that seemed like a rather denatured role for courts in our system. Empirical analysis to date largely confirms that the lower courts have afforded greater deference to agency interpretations more often when they apply *Chevron*.¹²⁶ Given our judicial hi-

121. 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 v. United States*, 126 S. Ct. 2208, 2240 (2006) (Kennedy, J., concurring in the judgment); *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.

122. *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 Res. Def. 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 399, 413-14 (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).

123. See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688 (2005); *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440 (2003); *Barnhart v. Walton*, 535 U.S. 212 (2002); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002); *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Nat'l Fed'n of Fed. Employees, Local 1309 v. Dep't of the Interior*, 526 U.S. 86 (1999); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112 (1987); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987).

124. Cf. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 969-70 (1992) ("[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."); see 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, 44-47 (1998) (noting how drastically *Chevron* seems to truncate the judiciary's traditional role in reviewing agency interpretations of law).

125. Compare DWORKIN, LAW'S EMPIRE, *supra* note 73, 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.").

126. 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 124; Peter H. Schuck & E. Donald

erarchy, it is probably unremarkable that lower courts “seem to take *Chevron* more seriously than does the Supreme Court.”¹²⁷ But *Rapanos* well demonstrates how the Supreme Court itself applies *Chevron* in deep statutory conflicts like the ones provoked by section 502(7): capriciously.¹²⁸ 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,¹²⁹ *Chevron*’s most recent appearances at the Court are chilling. The empirical evidence may not explicitly confirm the attitudinal hypothesis,¹³⁰ 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.”¹³¹ And that should be reason enough to demand more from the Court than *Rapanos* yielded, 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 and to balance sections 101(a) and 101(b) of the CWA—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.¹³² How it squares with the CWA’s

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 124, at 980-85.

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

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

129. See *supra* notes 75-80 and accompanying text.

130. 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.

131. 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, *supra* note 75, 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.”).

132. See *supra* notes 109-14 and accompanying text.

integrity objective is a mystery. Like the guidance EPA and the Corps released to instruct their staffs in implementing *Rapanos*, it seems best characterized as bureaucratic senescence.¹³³

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.¹³⁴ 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 justify its fear for the dignity of states within statutes like the CWA. The obsession with section 502(7)'s *geography* cannot really be about the intelligibility of denoting lands as "waters."¹³⁵ Statutes do worse to the language all the time. But, of course, when it comes to states' dignity, this Supreme 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.¹³⁶ Genius has its limits: 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 section 101(a)'s text and what the agencies have learned about aquatic ecosystems, this seems like 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.¹³⁷

Ecologists insist 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,

133. See *Rapanos* Guidance, *supra* note 52. Putting all engineered transfers beyond the scope of the CWA makes their rehabilitation even more problematic, much as adopting Justice Kennedy's "significant nexus" test for headwaters and wetlands drives up the marginal costs of CWA section 404 regulation—a program that is already desperately underfunded. *But cf. id.* at 10-12.

134. See *supra* notes 75-77 and accompanying text.

135. The concept of navigable waters has long extended upland to a mean high water/tide line. See, e.g., *Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 15-27 (1935). Depending on its calculation, this 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 *Submerged Lands Act*, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301-15 (2000)). *But cf.* *Rapanos v. United States*, 126 S. Ct. 2208, 2222 (2006) ("The plain language of the statute simply does not authorize [the] 'Land is Waters' approach to federal jurisdiction.").

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

137. See DWORKIN, *supra* note 75, 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.").

a truly expert approach to the CWA's integrity mandate—and, thus, to the concept of “waters of the United States”—would little resemble what even the *Rapanos* dissent envisioned. For, by now, it would have abandoned the strictly *geographic* interpretation of “waters of the United States” and, by extension, sovereignty. With its deference to resource-starved federal agencies that have pinioned themselves into trying to govern massive territories comprising America's major watersheds,¹³⁸ even Justice Stevens' opinion dulled the sharpest point of the integrity objective. Interpreting “waters of the United States” to reach beyond geography and toward newer, cooperative models of the jurisdiction to prescribe would necessarily acknowledge the complexity and moral diversity that have engulfed the CWA's restorative agenda and highlight the need for institutions better fit for their challenges.¹³⁹

Where nature is concerned, traditional conceptions of sovereignty have been embarrassed by geographic boundaries time and again. Too many lawyers remain blind to this basic truth, though, and that mushrooming failure (of both theory and practice) was showcased in *Rapanos* and *Carabell*. Unless they just have some unstated agenda at odds with congressional objectives like CWA section 101(a), though, the Justices need a better institutional imagination at least.¹⁴⁰ As matters stand, the Roberts Court seems poised to keep compromising our law's integrity as society experiments with ways to restore and protect nature's.

138. *Cf. Rapanos*, 126 S. Ct. at 2259 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting) (“In 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.

139. *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.”).

140. It would, in other words, recast the concept “waters of the United States” as a catalyst for experimentation in the pursuit of the integrity ideal—not as a circular question of meaning dividing faction from faction. *See id.* at 972 (“To cooperate, of course, is not necessarily to agree, and it is precisely for that reason that experimentalism—by imagining law as a pathway to cooperative problem solving rather than as a tool for adjudicating conflicting claims—promises a path around the problem of moral diversity.”).