

Rapanos v. United States: Evaluating the Efficacy of Textualism in Interpreting Environmental Laws

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Rapanos v. United States is the third in a series of important cases addressing the extent to which the U.S. Army Corps of Engineers may regulate wetland areas under the Clean Water Act. Although no opinion commanded a majority of the Court, the decision revealed deep divisions among the justices regarding approaches to statutory interpretation. Justice Scalia's text-based approach contrasts sharply with the more traditional techniques applied by Justices Kennedy and Stevens. Justice Scalia's application of textualism, however, serves to constrain the Clean Water Act in a manner that undermines its purpose. The Rapanos decision, therefore, exemplifies the way in which comprehensive environmental laws are particularly susceptible to hamstringing if subjected to a purely textualist interpretive approach.

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INTRODUCTION

In *Rapanos v. United States* (*Rapanos*), the Supreme Court considered the interpretation of Clean Water Act (CWA or Act) provisions that grant the U.S. Army Corps of Engineers (Corps) jurisdiction over wetland areas.¹ The Court focused its analysis on the extent to which the term “navigable waters,” as defined by the CWA and the Corps’ regulations, includes wetlands.² The case had broad implications for wetlands conservation, as a narrow reading of the statutory language would significantly curtail the Corps’ authority to regulate, and thereby restrict, the practice of filling wetlands to make way for other land uses.

The case arrived at the Supreme Court as two separate actions from the Sixth Circuit. The first action involved civil and criminal enforcement proceedings initiated by the Corps against a Michigan landowner who had backfilled wetlands on his property without obtaining a Corps permit as required by the CWA.³ The landowner contended that the Corps did not have jurisdiction over his property because the filled wetlands were not adjacent to “navigable” waters.⁴ Another Michigan landowner brought the second action against the Corps after the agency denied her request for a permit to fill in a wetland that was separated from a drainage channel by a man-made berm.⁵ The Sixth Circuit upheld the Corps’ jurisdiction over the contested wetlands in both cases, affirming that the agency had exercised its CWA authority properly.⁶ The Supreme Court granted certiorari and consolidated the cases.⁷

The decision handed down by the Supreme Court in June 2006, however, presents a puzzle to those seeking guidance regarding the limits of the Corps’ CWA jurisdiction over wetlands. None of the five opinions

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

2. *Id.*

3. *Id.* at 2238–39.

4. *Id.* at 2236.

5. *Id.* at 2211.

6. *Id.*

7. *Id.*

filed⁸ commands a majority of the court, although five justices concurred in remanding the case for reconsideration.⁹ Three main views dominate the decision. Justice Scalia writes for a plurality of four (Justices Alito, Thomas, and Roberts joining in the opinion), proposing that the Corps lacks jurisdiction over the wetlands in these cases and recommending remand to the Sixth Circuit for consistent proceedings.¹⁰ Justice Stevens' dissenting opinion, in which three of his colleagues join (Souter, Ginsburg, and Breyer), argues for upholding the ruling of the Sixth Circuit and affirming the Corps' jurisdiction over the wetlands at issue.¹¹ Justice Kennedy writes the third main opinion, a concurrence in which he supports remand to the Sixth Circuit, but according to reasoning that diverges totally from Justice Scalia's.¹² While he joins Justice Scalia in remanding the case to the Sixth Circuit, Justice Kennedy's interpretive methodology aligns with Justice Stevens' minority opinion. Because Justice Kennedy's reasoning differs markedly from that advocated by Justice Scalia's opinion, it is unclear precisely what analysis the Sixth Circuit will undertake on remand.

The *Rapanos* opinions rely on divergent techniques of statutory interpretation and arrive at very different outcomes. Justices Kennedy and Stevens employ a broad range of interpretive techniques to determine Congress' intended meaning. They consider legislative history, and the expressed purpose of the statute, in addition to a close reading of the text. Justice Scalia, by contrast, applies a stringent form of textualism in order to interpret the legislative language at issue, relying on the text itself as evidence of the statute's meaning. This "plain meaning" methodology improperly frustrates the objectives of the CWA. When interpreting a comprehensive environmental law, such as the CWA, statutory purpose and legislative intent analysis are essential to properly understand the meaning of the law. The Court's power to constrain comprehensive environmental legislation through seemingly innocuous interpretive techniques is vividly illustrated by the *Rapanos* opinions.

This Note will explore the reasons why textualism alone fails as a satisfactory technique for the interpretation of broad environmental statutes like the Clean Water Act. First, the statute's inherently aspirational purpose, which draws heavily upon abstract concepts of environmental values, is largely lost when distilled into literal, "plain

8. Five opinions were filed in the case: Scalia, J., joined by Roberts, C.J., Alito, J., and Thomas, J.; Roberts, C.J., concurring; Kennedy, J., concurring; Stevens, J., dissenting, joined by Ginsburg, J., Souter J., and Breyer J.; Breyer J., dissenting.

9. *Rapanos v. United States*, 126 S. Ct. 2208, 2211-14 (2006).

10. *Id.* at 2235.

11. *Id.* at 2265.

12. *Id.* at 2252.

meaning,” dictionary definitions. Second, the complexity and uncertainty of the ecosystem science which the statute seeks to incorporate into its regulatory scheme is difficult, if not impossible, to attribute to a single moment of congressional action. It is unrealistic to expect that Congress will speak to the technical details of water quality science, and the complex character of the Act’s ecological subject matter makes it even more unreasonable to assume that when Congress does address the topic, it does so in language with a “plain meaning” accessible to ordinary speakers of English. Third, by insisting on a judicially-derived “plain meaning” of statutory text, textualism ignores or undermines alternative democratic process checks on policymaking.

I. THE CLEAN WATER ACT AND PRIOR CASE LAW

The *Rapanos* decision is the third major Supreme Court case to address the proper extent of wetlands jurisdiction under the CWA. A brief discussion of the CWA’s history and the two prior decisions is therefore helpful in order to fully understand the implications of *Rapanos*.

A. *The Clean Water Act*

The Clean Water Act is one of the seminal pieces of environmental legislation to emerge from the upwelling of environmental consciousness during the 1960s and 70s.¹³ As such, it shares a number of unique qualities with other far-reaching environmental laws that distinguish them from most other types of legislation.¹⁴ First, it promotes a broad, aspirational purpose that places heavy emphasis on abstract environmental values.¹⁵ The CWA is inherently aspirational because it seeks to achieve an ideal standard of environmental quality; in aspiring to an ideal—restoring and maintaining “the chemical, physical, and biological integrity of the Nation’s waters”—the statute invokes abstract notions of environmental values that are necessarily subjective and indefinable.¹⁶ Second, it charges a number of administrative agencies with implementing specialized, technical components of the statutory scheme. Third, it attempts to address ecological problems which are inherently complex and scientifically uncertain. Though these are by no means the only characteristics that distinguish broad environmental statutes like the

13. ROBERT W. ADLER, JESSICA C. LANDMAN & DIANE M. CAMERON, *THE CLEAN WATER ACT 20 YEARS LATER* 5–12 (1993).

14. Similar analysis may apply to other “aspirational” legislation, such as the Civil Rights Act. However these statutes are outside the scope of this paper.

15. ADLER ET AL., *supra* note 13, at 5–12.

16. 33 U.S.C. §§ 1251–1387 (2006).

Clean Water Act, they are particularly relevant to the *Rapanos* decision in that they come very much into play in the realm of statutory interpretation.

Enacted in 1972 as a series of amendments to the Federal Water Pollution Control Act (FWPCA), the legislation now known as the Clean Water Act represented a fundamental shift in the nation's approach to regulating water quality.¹⁷ The Act reflects widespread concern regarding the deterioration of the health of the nation's waters, an issue brought dramatically to the public spotlight by the burning of the polluted Cuyahoga River in Cleveland, Ohio.¹⁸ Recognizing that previous legislative measures had failed to prevent the widespread decline in water quality, Congress adopted a new strategy in the 1972 amendments.¹⁹

The 1972 CWA created a substantially revised regulatory system, implemented by both state and federal agencies.²⁰ Under one of these regulatory schemes, section 404 of the CWA authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites."²¹ While section 404 applies to all "navigable waters" regulated under the CWA, this provision has generated significant controversy over the extent to which it includes wetlands.²² Section 502(7) of the Act defines navigable waters as: "the waters of the United States, including the territorial seas."²³ The extent of the Corps' regulatory jurisdiction turns on the meaning of "the waters of the United States." However, the definition of "waters" provided in the statute is just as vague as the definition of "navigable waters." Administrative regulations promulgated by the Corps have interpreted this language broadly to include not only waters that can actually be used in interstate commerce, but also tributaries of those waters and wetlands that are adjacent to those waters or their tributaries.²⁴ The *Rapanos*

17. ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT* 9 (2004).

18. ADLER ET AL., *supra* note 13, at 5–12.

19. *Id.* at 10–22 (discussing the evolution of water quality legislation in the U.S. Congress; previous laws, including the Rivers and Harbors Act of 1899, the Federal Water Pollution Control Act of 1948, and the Water Quality Act of 1965, were primarily directed at enabling states to implement water quality improvement measures locally. The federal approach of the 1972 CWA stands in contrast with these preceding statutes.)

20. *Id.*

21. Clean Water Act § 404(a), 33 U.S.C. § 1344(a) (2006).

22. ADLER ET AL., *supra* note 13, at 206.

23. Clean Water Act § 502(7), 33 U.S.C. § 1362(7) (2006).

24. See 33 C.F.R. § 328.3 (2006).

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are

decision debates whether the Corps' interpretation and application of the statute are consistent with the provisions of the CWA.

B. *Prior Case Law*

The Supreme Court has considered the meaning of the term "navigable waters" with regard to wetlands protection under the CWA twice before. An exploration of the statutory techniques utilized in both decisions reveals that the particular techniques the Justices choose to apply may change the ultimate outcome of the case.

1. *United States v. Riverside Bayview Homes, Inc.*

In the seminal case *United States v. Riverside Bayview Homes, Inc. (Riverside Bayview)*,²⁵ a unanimous Court determined that the Corps had properly asserted jurisdiction over a wetland that lay adjacent to a body of water that was "navigable in fact."²⁶ In upholding the Corps' decision to preserve the adjacent wetlands in *Riverside Bayview*, the Court

subject to the ebb and flow of the tide; (2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)–(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)–(6) of this section . . .

(b) The term "wetlands" means those areas 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. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

25. 474 U.S. 121 (1985).

26. *Id.*

deferred to Corps' promulgated regulations.²⁷ These regulations recognized the important ecological functions performed by wetlands, including water purification, flood control, and erosion prevention.²⁸ Additionally, wetlands provide critical habitat for many species.²⁹ The Court concluded that the Corps' regulations were consistent with the CWA in light of the broad purpose Congress ascribed to the statute:

[T]he evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined.³⁰

The Court's willingness to look to congressional intent to support a broad reading of the Corps' jurisdiction is characteristic of the traditional approach to statutory interpretation, which utilizes a range of interpretive aids in addition to the text.

Finally, the Court acknowledged "the inherent difficulties of defining precise bounds to regulable waters," and found that "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."³¹ This deference to agency expertise and decisionmaking is also a hallmark of a traditional, nontextualist approach to statutory interpretation.

2. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers

The Court considered the issue again in 2001, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*.³² In *SWANCC*, a five-justice majority (Rehnquist, O'Connor, Scalia, Kennedy and Thomas) struck down the Corps' CWA jurisdiction over several man-made ponds and mudflats at an abandoned gravel mine.³³ The Court read its prior holding in *Riverside Bayview* narrowly, restricting it to cases involving wetlands adjacent to navigable waters and emphasizing that the "significant nexus" between the wetlands and "navigable waters" had been central to its decision. The ponds at issue in *SWANCC* were unconnected to other waters covered by

27. *Id.* at 134–35.

28. *Id.*

29. *Id.*

30. *Id.* at 133.

31. *Id.* at 134.

32. 531 U.S. 159 (2001).

33. *Id.* at 167–71.

the CWA, and the Court was unwilling to extend the Corps' jurisdiction to areas not adjacent to "traditionally navigable waters."³⁴

The majority opinion in *SWANCC* gave little interpretive weight to the CWA's broad remedial purpose, possibly reflecting the Court's altered composition since its decision in *Riverside Bayview*.³⁵ Further, the majority was not swayed by the ecological benefits offered by the isolated waters at issue. The Corps argued that its jurisdiction was supported by the fact that approximately 121 bird species, some migratory, had been observed at the ponds.³⁶ Chief Justice Rehnquist's opinion rejected this "Migratory Bird Rule," declining to hold that the Corps may assert jurisdiction over the ponds because they provide habitat for migratory birds.³⁷

Three justices (Souter, Ginsburg and Breyer) joined a dissenting opinion authored by Justice Stevens.³⁸ Relying on statutory purpose, legislative history and ecological benefits of the ponds, Justice Stevens argued that the Court should follow *Riverside Bayview* in deferring to the Corps' interpretation of its jurisdiction under the CWA.³⁹ In a spirit similar to that in his dissenting opinion in *Rapanos*, Stevens' dissent opened with an emotive narrative recounting how the burning of the Cuyahoga River in 1969 prompted Congress to enact the first incarnation of the CWA in 1972.⁴⁰ Under the CWA, Stevens argued, Congress expanded the Corps' mission to include promoting water quality for esthetic, health, recreational and environmental uses.⁴¹ Congress broadened the agency's jurisdiction in order to enable it to fulfill these new duties by giving "navigable waters" an expansive definition: "the

34. *Rapanos v. United States*, 126 S. Ct. 2208, 2256 (2006) (citing *SWANCC*, 531 U.S. at 162).

35. *SWANCC*, 531 U.S. at 166–67 ("Congress passed the CWA for the stated purpose of 'restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a). In doing so, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources").

36. *Id.* at 164–65.

37. *Id.* at 174. For more on the rejection of the Migratory Bird Rule, see Jeff Brax, In Brief, *Supreme Court Guts Clean Water Act Protection of Isolated Wetlands Used by Migratory Birds*, 28 *ECOLOGY L.Q.* 543 (2001).

38. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

39. *Id.* at 180–91.

40. *Id.* at 174–75 ("In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded to that dramatic event, and to others like it, by enacting the Federal Water Pollution Control Act Amendments of 1972 . . . commonly known as the Clean Water Act. . . .").

41. *Id.* at 175 (Stevens, J., dissenting).

waters of the United States, including the territorial seas.”⁴² Stevens found support for his argument in the legislative history of CWA section 404, observing that while the phrase “navigable waters” had been borrowed from the existing Rivers and Harbors Act, Congress deliberately amended the definition of the phrase to expand the Corps’ authority.⁴³ Stevens noted also that the Senate conference report explained the drafters’ intention that the amended definition “‘be given the broadest possible constitutional interpretation.’”⁴⁴ Finally, Stevens argued that in 1977, after the Corps had promulgated regulations expansively interpreting its CWA jurisdiction, Congress considered, but ultimately rejected, enacting legislation that would have limited the Corps’ authority.⁴⁵ In light of these debates regarding the Corps’ regulations and the Court’s broad interpretation in *Riverside Bayview*, Stevens claimed that the majority wrongfully overruled ample evidence of congressional acquiescence to expansive Corps jurisdiction.⁴⁶

Stevens’ willingness to consider congressional purpose and intent allowed him to conclude that an interpretation of the Corps’ jurisdiction that covers the ponds at issue in *SWANCC* is consistent with the CWA. Because Congress expressed intent that the CWA protect not only water quality but aquatic ecosystems as well, Stevens argued that the wetlands’ “role as habitat for migratory birds . . . suggests that—ecologically speaking—the waters at issue in this case are anything but isolated.”⁴⁷ Stevens, therefore, would uphold the Migratory Bird Rule as a reasonable interpretation based on the ecological functions of wetlands.⁴⁸

C. *The Rapanos Decision*

Both *SWANCC* and *Riverside Bayview* receive significant analysis by each of the contributing justices in *Rapanos*, although the decision reveals much disagreement about the proper interpretations of the two prior cases. While *Riverside Bayview* provided a basis for an expansive reading of the Corps’ CWA jurisdiction, *SWANCC* attempted to reign in

42. *Id.*

43. *Id.* at 180–81 (“Thus, although Congress opted to carry over the traditional jurisdictional term ‘navigable waters’ from the [Rivers and Harbors Appropriation Act] and prior versions of the FWPCA, it broadened the *definition* of that term to encompass all ‘waters of the United States.’ Indeed, the 1972 conferees arrived at the final formulation by specifically deleting the word ‘navigable’ from the definition that had originally appeared in the House version of the Act.” (internal citation omitted)).

44. *Id.* at 181 (quoting S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.)).

45. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 185 (2001).

46. *Id.* at 185–87.

47. *Id.* at 176 n.2.

48. *Id.* at 196–97.

the agency's authority by limiting the *Riverside Bayview* holding to wetlands adjacent to navigable waters. *Rapanos* continues to explore the limits of the Corps' jurisdiction over wetlands that are not adjacent to traditionally navigable waters.

1. *Justice Scalia*

If given full effect, Justice Scalia's plurality opinion would severely curtail the Corps' authority to enforce wetlands protection. Justice Scalia begins his opinion with the claim that the Clean Water Act gives the Corps authority only over "waters."⁴⁹ Applying a textualist analysis that relies primarily on a dictionary definition of "waters," Justice Scalia concludes that "'the waters of the United States' include only relatively permanent, standing or flowing bodies of water," and thus exclude "transitory puddles or ephemeral flows."⁵⁰ As a result, he finds the agency's assertion of jurisdiction over wetlands which are connected to traditionally navigable waters by way of intermittent or ephemeral streams to be an unreasonable interpretation of the statutory language.⁵¹

Justice Scalia next addresses the question "whether a wetland may be considered 'adjacent to' remote 'waters of the United States,' because of a mere hydrologic connection to them."⁵² Relying on *SWANCC*'s holding that isolated ponds were not "waters of the United States" for the purposes of the Corps' jurisdiction under the Clean Water Act, Scalia concludes that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right . . . are 'adjacent to' such waters and covered by the Act."⁵³ Justice Scalia would require that a wetland demonstrate this "continuous surface connection" with a navigable water in order to fall under the Corps' jurisdiction.

In sum, the plurality opinion would impose two limitations on the Corps' jurisdiction under the CWA. First, the term "navigable waters" would allow the agency to regulate only "relatively permanent, standing or flowing bodies of water."⁵⁴ Second, the CWA would apply to wetlands only if they are continuously connected to a body that qualifies as "navigable water," i.e., waters that satisfy the plurality's first requirement of permanent flow.⁵⁵

49. *Rapanos v. United States*, 126 S. Ct. 2208, 2220 (2006).

50. *Id.* at 2221.

51. *Id.* at 2222.

52. *Id.* at 2225.

53. *Id.* at 2226.

54. *Id.* at 2221.

55. *Id.* at 2226-27.

2. *Justice Kennedy*

Justice Kennedy rejects the plurality's analysis and conclusions; however, he also relies on the *SWANCC* decision for guidance. The *SWANCC* Court held that because the isolated ponds at issue were not adjacent to navigable-in-fact waters, the Corps could not assert jurisdiction over them.⁵⁶ Referring to language in *SWANCC* that "it was the significant nexus that informed [the Court's] reading of the CWA in *Riverside Bayview*," Justice Kennedy concludes that this "significant nexus" requirement should have been the focus of the Corps' analysis in the *Rapanos* matter:

When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.⁵⁷

Because the Sixth Circuit did not apply this "significant nexus" test to the wetlands at issue in the case, neither of which were adjacent to navigable-in-fact waters, Justice Kennedy supports remand to the lower court for further consideration.

3. *Justice Stevens*

Applying highly purposive reasoning that contrasts sharply with Justice Scalia's textual analysis, Justice Stevens would defer to the Corps' construction of the Clean Water Act language as reflected in its administrative regulations.⁵⁸ Justice Stevens considers the Corps' determination that it may regulate wetlands adjacent to tributaries of navigable waters a reasonable interpretation that is consistent with the congressional purpose behind the statute.⁵⁹ According to Justice Stevens, the fact that wetlands often serve important ecological functions that improve water quality makes the Corps' assertion of jurisdiction over nonisolated wetlands reasonable.⁶⁰ Reminiscent of his dissent in *SWANCC*, Justice Stevens' support of Congress' intent to include ecosystem protection in the CWA's requirements distinguishes his opinion from Justice Scalia's. Justice Stevens then takes his analysis one step further, arguing that proof of actual performance of these water quality functions is not required in order for the Corps to regulate a

56. *Id.* at 2247–48 (citing *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001)).

57. *Id.* at 2249.

58. *Id.* at 2252.

59. *Id.*

60. *Id.* at 2257.

nonisolated wetland: “Instead, it is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed’s water quality.”⁶¹

Justice Stevens criticizes Justice Kennedy’s “significant nexus” test as “judicially crafted” and an unnecessary replacement of the Corps’ longstanding regulatory standards.⁶² Nevertheless, he predicts that because wetlands adjacent to tributaries of navigable waters “generally have a ‘significant nexus’ with the traditionally navigable waters downstream . . . Justice Kennedy’s ‘significant nexus’ test will probably not do much to diminish the number of wetlands covered by the Act in the long run.”⁶³ With an eye toward providing guidance to the lower court on remand, Justice Stevens notes that the four dissenting Justices would uphold the Corps’ jurisdiction in all cases that satisfy either the plurality’s or Justice Kennedy’s test.⁶⁴ Justice Stevens maintains that as a result, “on remand each of these judgments should be reinstated if either of those tests is met.”⁶⁵

II. DISCUSSION: THE *RAPANOS* DECISION ILLUSTRATES HOW, STANDING ALONE, TEXTUALISM FAILS AS AN INTERPRETIVE TOOL FOR ENVIRONMENTAL LAWS

The contrasting opinions in the *Rapanos* decision showcase disparate approaches to statutory interpretation, providing an opportunity for analysis of the efficacy of the various techniques as applied to the CWA. Comparison of the three main opinions reveals that a textualist approach alone is inadequate to properly interpret complex environmental laws like the CWA. A broader range of interpretive aids is necessary in order to avoid inappropriately constraining the CWA.

A. *Overview of Statutory Interpretation Techniques*

The exercise of statutory interpretation can take a variety of different forms. Each interpretive approach reflects particular views about the proper respective roles of the judiciary, the legislature, and even the executive branch. The historical evolution of these interpretive techniques has been driven by changing perspectives on these governmental roles.

61. *Id.* at 2258.

62. *Id.* at 2264.

63. *Id.* at 2264.

64. *Id.* at 2265.

65. *Id.*

1. *The Traditional Approach: Discerning Legislative Intent and Purpose*

Traditionally, the Court has conducted statutory interpretation with the goal of executing the intent held by Congress when it enacted the legislation.⁶⁶ This intentionalist approach characterizes the Court as the “honest agent” of congressional will, and thus the primary inquiry of a court engaged in statutory interpretation is discerning congressional intent or purpose.⁶⁷ Within this framework, statutory text serves as the best evidence of congressional intent.⁶⁸

Under this traditional approach, however, the interpretive process typically does not end with consideration of the text.⁶⁹ Other evidence of congressional intent, primarily legislative history, often receives consideration. According to the “soft” plain meaning rule,” even statutory text whose meaning is unambiguous can be discounted in the face of contradictory legislative history.⁷⁰ Courts applying the traditional approach also give weight to purposive, precatory language that often appears in the introductory sections of statutes as evidence of Congress’ broader purpose in enacting the law.⁷¹

Scholars in the legal process field have proposed a shift in the intentionalist approach, introducing an approach known as “purposivism.” In contrast to intentionalism, a purposive approach seeks to provide “creative elaboration of the principles and policies initially formulated in the statute.”⁷² Rather than a conception of the court as a “faithful agent” of the legislature, enacting direct expressions of congressional will, purposivism envisions a more active role for the court.⁷³ A purposive interpretive analysis focuses first on the purpose or purposes of the statute, which may be discerned using sources similar to those consulted under an intentionalist approach—legislative history, precatory language, and other sections of the statute.⁷⁴ Next, the court should interpret the words of the statute in a manner consistent with its purpose while avoiding meanings that the language cannot bear.⁷⁵

66. William Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 626–27.

71. Albert C. Lin., *Erosive Interpretation of Environmental Law in the Supreme Court’s 2003–04 Term*, 42 HOUS. L. REV. 565, 573–74 (2005).

72. *Id.*; see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1380 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

73. Lin, *supra* note 71, at 573–74.

74. *Id.*

75. *Id.*

The purposivist and intentionalist approaches offer significant advantages. First, they both recognize that the context in which a statute is enacted has significant bearing on its meaning. By consulting contextual sources, including legislative history and other statutory provisions, purposivism and intentionalism seek to ensure that relevant information about a statute's meaning is not excluded from the interpretive analysis. Second, these approaches are consistent with the theories and processes of legislative democracy.⁷⁶ Granting a certain amount of judicial deference to the intent and purpose of the legislative branch is in accordance with the constitutional allocation of lawmaking power to Congress, not the Court.⁷⁷

2. *Critiques of the Traditional Approach*

Despite their longstanding and widespread use, these traditional approaches have given rise to recent criticism among some scholars and judges. For the most part, the critiques take three forms.⁷⁸ First, legal realist critics argue that the notion of a true legislative intent is an improbable fiction.⁷⁹ Given the complexity and scope of the legislative process and the large number of legislators involved, each pursuing his or her own political goals, it is unrealistic to impart a collective, unified understanding of a particular statute's purpose to Congress.⁸⁰ Second, from a historical perspective, critics contend that present interpretation of statutes enacted in the past can never accurately discern the intent of the enacting Congress.⁸¹ Even if legislative intent is a sound notion, these historicists claim, a modern judge's perceptions cannot escape coloring by current context.⁸² According to this view, it is impossible to recreate historical legislative intent, and any attempt to do so will be fruitless and false.⁸³ Third, some critics argue that far from providing an interpretive method that adheres to democratic values, the purposivist and intentionalist approaches are inherently undemocratic because they allow the substitution of judicial discretion for legislative intent.⁸⁴

76. See Eskridge, *supra* note 66, at 641 ("Given our society's commitment to representative democracy, the legislative background of statutes seems like an acceptable source of context.").

77. *Id.*

78. *Id.* at 641-42.

79. *Id.*

80. *Id.* at 642.

81. *Id.* at 644.

82. *Id.*

83. *Id.*

84. *Id.* at 646-47.

3. *The Rise of Textualism*

In response to these critiques, a new movement in statutory interpretation has developed, termed the “New Textualism” by Professor Eskridge.⁸⁵ Led by Judge Frank Easterbrook and Justice Antonin Scalia, the New Textualists have succeeded in strongly influencing the practice of statutory interpretation by the Supreme Court.⁸⁶ Textualism assumes that the criticisms of the traditional approaches discussed above are valid, and thus holds that statutory interpretation should focus solely on the meaning of the statutory text itself.⁸⁷ Textualists argue the court should look to the words of the statute for their “plain meaning” as it would be understood by ordinary users of English.⁸⁸ In conducting this inquiry, textualists view extrinsic aids like legislative history as almost entirely irrelevant and thus generally decline to consult them.⁸⁹ Evidence of legislative purpose contained in introductory provisions of statutes also proves unhelpful to most textual interpretive analyses.⁹⁰ Textualists do not entirely eschew interpretive aids in determining plain meaning, however. They often consider the internal context and structure of the text, accepted interpretations of statutes other than the one in dispute, canons of statutory construction, and dictionary definitions.⁹¹

B. A Textual Analysis is Incompatible with the Complex Ecological Systems That Environmental Statutes Regulate

Environmental statutes like the Clean Water Act are distinctive in that they attempt to solve the extremely complicated problems associated with natural ecosystems. Ecosystem science is notoriously complex and continually fraught with uncertainty. Ecologists find the interactions between physical, chemical and biological ecosystem components extremely difficult to model, and thus the effect of even seemingly small changes to these components proves highly unpredictable.

85. *Id.* at 640.

86. Lin, *supra* note 71, at 576; *see also* Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 384–87 (1999).

87. Lin, *supra* note 71, at 574–75.

88. *See* Bradford M. Mank, *Is A Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better Than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1237–38 (1996).

89. *See id.* (“Many textualists believe that if a statute’s text has a plain meaning, it is unnecessary or improper for judges to examine either its legislative history or the legislature’s implicit purposes in enacting the measure.”).

90. *Id.*

91. Lin, *supra* note 71, at 575.

1. *The Technical Nature of Water Quality Science Means the Statute Does Not Have a Plain Meaning Directed at Ordinary People*

The Clean Water Act, in its attempt to improve national water quality, unavoidably delves into the thorny realm of ecosystem science. Abatement and clean up of pollution in natural water systems cannot be separated from the ecological processes through which pollutants travel. As the science of ecology expands knowledge about and predictability of these processes, it makes sense for water quality officials who implement the statute to modify their approaches to account for scientific advances. The CWA's legislative history reveals congressional awareness of the scientific uncertainty surrounding the issue of water quality. As representative Don Clausen observed during House debate on the Conference Committee report on the 1972 amendments, "[t]he complexity of the water pollution problems is such that any attempt to solve it is bound to have substantial and far-reaching repercussions."⁹² A discussion of the inclusion of the word "integrity" in a Senate report on draft legislation that would become the 1972 amendments reflects a recognition of the interrelated ecological systems that would be implicated by a comprehensive water quality statute:

Maintenance of such integrity requires that any changes in the environment resulting in a physical, chemical or biological change in a pristine water body be of a temporary nature, such that by natural processes, within a few hours, days or weeks, the aquatic ecosystem will return to a state functionally identical to the original. . . . Striving towards, and maintaining the pristine state is an objective which minimizes the burden to man in maintaining a healthy environment, and which will provide for a stable biosphere that is essential to the well-being of human society.⁹³

Wetlands protection under the Clean Water Act exemplifies this intersection between complex science and water quality policy. After over a century of exploitation, during which the vast majority of the nation's wetland areas were drained, filled, or otherwise degraded, many beneficial services provided by wetlands have been recognized.⁹⁴ Wetlands furnish innumerable ecosystem benefits that improve the quality of other waters, including pollution filtration, flood and erosion

92. S. COMM. ON PUBLIC WORKS, 92D CONG., 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 374-75 (Comm. Print 1971) [hereinafter LEGISLATIVE HISTORY].

93. S. COMM. ON PUBLIC WORKS, 92D CONG., 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1494-95 (Comm. Print 1971).

94. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, DOC. NO. OTA-0-206, WETLANDS: THEIR USE AND REGULATION (1984), available at http://govinfo.library.unt.edu/ota/Ota_4/DATA/1984/8433.PDF.

control, and runoff storage.⁹⁵ The current knowledge of these wetland characteristics is the product of advances in ecological science, and it is likely that future discoveries will reveal additional benefits.⁹⁶ A comprehensive national water quality improvement policy would therefore be incomplete without consideration of the ecosystem services provided by wetlands.

The complexity and uncertainty inherent in on-the-ground ecosystem management has direct implications for judicial interpretation of environmental statutes like the CWA. Given the technical nature of water quality science, Congress directs the CWA not to ordinary citizens, but toward agency officials with a specialized understanding of the relevant science and policy.⁹⁷

This reality strongly undercuts the efficacy of a textual interpretation of the CWA.⁹⁸ Textualism, as applied by Justice Scalia in his *Rapanos* plurality opinion, relies on the assumption that the correct reading of the statute employs a “plain meaning” analysis—applying the meaning of the words that would be understood by ordinary users of English.⁹⁹ The CWA, however, like most environmental regulatory statutes, is not directed at ordinary users of English, but toward “a small community of lawyers, regulators, and people subject to [its] specific regulations.”¹⁰⁰ Scalia’s use of dictionary definitions and his appeal for a “commonsense understanding” of the phrase “navigable waters,” therefore, may result in an interpretation that is inconsistent with the statute’s “technical” meaning. A purely textual approach to the phrase “navigable waters” is therefore an insufficient analysis of the full implications of the Corps’ regulatory jurisdiction.

2. *Textualism Invites Judges to Substitute Their Own Scientific and Policy Judgments for Those of the Agency*

Textualism also fails as an interpretive approach to environmental legislation in that it invites the Court to substitute its own scientific and policy judgments for those of officials to whom the statute is directed. Justice Scalia does recognize the complexity of on-the-ground

95. *Id.*; see also *Rapanos v. United States*, 126 S. Ct. 2208, 2248 (2006) (Stevens, J., dissenting); 33 C.F.R. § 320.4(b)(2) (2006).

96. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 94, at 37.

97. Mank, *supra* note 88, at 1280–81.

98. *Id.* (“Textualism is based on the flawed premise that courts can use dictionary definitions and the understanding of ordinary users of the English language to interpret complex regulatory statutes.”).

99. See *id.*

100. *Id.* (quoting Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057, 1064–65 (1995)).

management decisions regarding wetlands, noting that “the transition from water to solid ground is not necessarily or even typically an abrupt one’ and that ‘the Corps must necessarily choose some point at which water ends and land begins.’”¹⁰¹ This acknowledged complexity and its resulting requirement of scientific expertise, however, does not lead Justice Scalia to conclude that deference to the agency’s technical experts is warranted.¹⁰²

Instead, with regard to the issue of whether the plurality’s narrow interpretation of the Corps’ jurisdiction would limit the enforceability of other CWA provisions, Justice Scalia comments freely on scientific evidence.¹⁰³ Rejecting the assertion that the addition of dredged or fill material could be analogized to an “addition [of a pollutant] . . . to navigable waters,” under section 404 (regulation of point sources),¹⁰⁴ Justice Scalia opines that “‘dredged or fill material,’ which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an ‘addition . . . to navigable waters’ when deposited into upstream isolated wetlands.”¹⁰⁵ In support of this assertion, Justice Scalia cites the amicus curiae briefs of the International Council of Shopping Centers, Pulte Homes, and the Foundation for Environmental and Economic Progress.¹⁰⁶ Justice Scalia’s textualist approach allows him to assume that because his ability to interpret the “plain meaning” of the CWA’s language equals that of the Corps, his skill in applying scientific knowledge is on par with the Corps’ as well. He selectively applies scientific evidence to support a particular view, and dismisses the dissent’s conflicting evidence (that deposit of fill material does affect downstream water quality) as a “philosophical approach to sediment erosion.”¹⁰⁷ Despite his enthusiastic foray into the science of dredge and fill material’s hydrologic movement, Justice Scalia declines to comment on the considerable evidence of the water quality benefits provided by wetlands. His use of textualism again provides cover

101. *Rapanos v. United States*, 126 S. Ct. 2208, 2216 (2006) (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985)).

102. *Id.* at 2222 (“In applying the definition . . . the Corps has stretched the term ‘waters of the United States’ beyond parody.”).

103. *Id.* at 2228.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 2228; *see also id.* at 2245 (Justice Kennedy pointing out the plurality’s judicial assertion of scientific fact: “It seems plausible that new or loose fill, not anchored by grass or roots from other vegetation, could travel downstream through waterways adjacent to a wetland; at the least this is a factual possibility that the Corps’ experts can better assess than can the plurality.”).

for decidedly nonobjective commentary on selectively chosen technical issues.

3. *Textualism Cannot Accommodate the Need for Adaptive Regulatory Approaches that Respond to Developments in Scientific Understanding*

As applied to the CWA in *Rapanos*, the textualist approach proves unworkably wooden in an area of law and policy that requires adaptation to rapidly changing scientific understanding. As Congress recognized, the science of water quality is complex and uncertain.¹⁰⁸ In order to effectively pursue the legislative goal of improving national water quality, the statutory scheme must be allowed to adjust according to scientific advances.

The discovery of the water quality and ecological benefits of wetlands provides a prime example of the need for such regulatory flexibility. Until the 1950's, most people considered wetlands to be undesirable, unhealthy "swamplands" that were put to their best use once drained and filled.¹⁰⁹ These attitudes have changed, however, largely as a result of a 1956 wetlands inventory conducted by the U.S. Fish and Wildlife Service that described the numerous ecosystem services wetlands provide.¹¹⁰ By 1977, the wide-ranging benefits of wetlands were widely recognized. In a statement accompanying an executive order to protect wetlands in the United States, President Carter observed:

The Nation's coastal and inland wetlands are vital natural resources of critical importance to the people of this country. Wetlands are areas of great natural productivity, hydrological utility, and environmental diversity, providing natural flood control, improved water quality, recharge of aquifers, flow stabilization of streams and rivers, and habitat for fish and wildlife resources.¹¹¹

As a developing area of science, however, wetland ecology retains a large degree of uncertainty. While knowledge about the ecosystem services of wetlands has increased, it is likely that additional benefits will be recognized in the future as ecologists continue to investigate.¹¹² The

108. LEGISLATIVE HISTORY, *supra* note 92, at 374-75.

109. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 94.

110. *Id.* (citing FISH AND WILDLIFE SERVICE, U.S. DEP'T OF THE INTERIOR, CIRCULAR 38, WETLANDS OF THE UNITED STATES: THEIR EXTENT AND THEIR VALUE TO WATERFOWL AND OTHER WILDLIFE (1956)).

111. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 94, at 37 (quoting Statement by the President of the United States accompanying Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (May 24, 1977)).

112. *See id.* ("As wetlands research continues, knowledge about the values of individual and different types of wetlands will, in all likelihood, improve. For example, some wetland services, such as ground water recharge, have been found to be less significant than once thought. On the

possibility of additional, as yet unknown wetland values suggests that caution should be exercised now in order to avoid destruction of such values.¹¹³

This inherent uncertainty drives a need for flexibility in agency decisionmaking—as the Corps itself has recognized, protecting wetlands has become a significant component of its mandate to improve water quality under section 404 of the CWA.¹¹⁴ Under the textualist approach applied by Justice Scalia in *Rapanos*, the ability of the Corps to engage in such adaptive decisionmaking would be severely curtailed. Scalia's strict insistence on an interpretation based on "plain meaning" cramps the agency's ability to apply a broader interpretation of "navigable waters" in order to remain consistent with the purposes of the CWA. As the scientific understanding of the water quality benefits provided by wetlands evolves, it is imperative that the Corps adjust its regulations in order to account for these developments. Under a "plain meaning" analysis, however, such regulatory changes are likely to be disfavored if they do not align with a literal meaning of the relevant statutory language.

Justice Scalia's treatment of the well-recognized water quality services of wetlands in his *Rapanos* opinion demonstrates this textualist barrier to agency adaptation. He declines to give any weight to the Corps' determination that regulating wetlands is necessary to a proper execution of its duties under the CWA. Instead, he is openly derisive of the dissent's incorporation of ecological considerations into its analysis, describing Justice Stevens' opinion as "policy-laden" and "long on praise of environmental protection and notably short on analysis of the statutory text and structure."¹¹⁵ Justice Scalia's rigid textualism is at odds with the Corps' need for flexibility in addressing the complex scientific issues of water quality and, if it prevails, could undermine the Corps' ability to fulfill its mandate under the CWA.

other hand, the ecological services of inland freshwater wetlands with the exception of wildlife habitat are not widely recognized by the general public. It is quite possible that some wetlands may provide ecological services that are as yet unknown or poorly documented. In addition, the overall significance of continuing, incremental losses of wetlands is well known only in a few cases.").

113. *Id.*

114. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) ("The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, see 33 CFR § 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see §§ 320.4(b)(2)(iv) and (v).").

115. *Rapanos v. United States*, 126 S. Ct. 2208, 2229 (2006).

4. *By Applying Traditional Methods of Statutory Interpretation, Justices Kennedy and Stevens Can Better Address the Issue of Complex Science.*

Justice Kennedy and Justice Stevens, by contrast, avoid Scalia's inflexibility because they do not limit themselves to a purely textual interpretive approach. By engaging the statute holistically, looking to both intent and purpose, Justices Kennedy and Stevens are able to harmonize an evolving understanding of the role of wetlands in improving water quality with the statutory language. As discussed above, both Justice Kennedy and Justice Stevens place significant weight on the broad purpose articulated by Congress when it enacted the CWA. This allows them to consider the agency's interpretation of its jurisdiction in light of the statutory goals of improving water quality.¹¹⁶ Justice Kennedy, for example, notes that not only do wetlands promote water quality, but their destruction may have adverse effects on downstream waters, a result that is directly contrary to Congress' aims in enacting in CWA.¹¹⁷ In short, the intentionalist/purposivist approach applied by Kennedy and Stevens facilitates, rather than hinders, the Corps' ability to adapt to evolving science.

C. *By Failing to Incorporate the Statute's Aspirational Purpose in its Analysis, Textualism Alone is Insufficient to Properly Interpret Complex Environmental Laws like the Clean Water Act*

While appealing in its claim of objectivity in conducting statutory interpretation, textualism's narrow focus on plain meaning proves insufficient with regard to environmental statutes. By turning a blind eye to evidence of congressional purpose and intent, the textualist approach of Justice Scalia's plurality opinion casts aside some of the CWA's most important components. The application of textualism in the *Rapanos* decision demonstrates how the CWA, an example of a comprehensive, ambitious environmental law, can be constrained to the detriment of the environmental values it was intended to protect.

116. *Id.* at 2252 (Stevens, J., dissenting) ("The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow.").

117. *Id.* at 2245 ("Where wetlands perform these filtering and runoff-control functions, filling them may increase downstream pollution, much as a discharge of toxic pollutants would. Not only will dirty water no longer be stored and filtered but also the act of filling and draining itself may cause the release of nutrients, toxins, and pathogens that were trapped, neutralized, and perhaps amenable to filtering or detoxification in the wetlands.").

1. *The Clean Water Act Embodies Sweeping Congressional Goals and Reflects Recognition of the Importance of Environmental Values*

As a comprehensive environmental statute, the CWA is inherently aspirational. In a sense, it attempts to express abstract values of conservation and preservation in a practical implementation scheme. The Act remains one of the most significant environmental laws in the United States in large part because of its broad, aspirational language and purpose.¹¹⁸ The introductory sections of the Act reflect a legislative awareness of the importance of protecting environmental values. In its statement of the Act's goals, Congress declared: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹¹⁹ As for the CWA's specific objectives in the achievement of these goals, the Act states:

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
- (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited.¹²⁰

Coupled with the goal of improved national water quality is Congress' recognition of the states' concurrent responsibility for pollution control and management of land and water resources.¹²¹

The CWA's legislative history confirms that Congress not only understood and supported the breadth of the law it had enacted, but that it sought to vindicate values of a more idealistic nature. Senator Ed Muskie argued as much in introducing the Conference Committee report on the 1972 amendments:

I have been a Member of the Senate for 13 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from its members. The difficulty in reaching agreement on this legislation has been matched only by the gravity of the problems with which it seeks to cope.

118. See ADLER ET AL., *supra* note 13, at 8 ("As important as the principle objective and the interim goals of the law was Congress's newfound fortitude in supporting theory with on-the-ground controls, spurred by the Senate finding that the prior approach 'has been inadequate in every vital aspect.'").

119. 33 U.S.C. § 1251(a) (2006).

120. *Id.*

121. *Id.* § 1251(b).

Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment which has been prescribed in the past. The cancer of water pollution was engendered by our abuse . . . ; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.

We have ignored this cancer for so long that the romance of environmental concern is already fading in the shadow of the grim realities of lakes, rivers, and bays where all forms of life have been smothered by untreated wastes, and oceans which no longer provide us with food.¹²²

Congress' reports and debate brim with similar statements of the Act's far-reaching and comprehensive scope, and of the importance of the environmental values at stake.¹²³ The statements of individual members of Congress and reports of committees do not, of course, carry the same interpretive weight as legislative text. When, however, as in the case of the Clean Water Act, the same type of sweeping, aspirational language does appear in the statute, it is appropriate for the Court to interpret ambiguous language in light of historical evidence that confirms Congress' broad purpose.

It is one thing, however, for Congress to declare a broad policy of improved water quality on a national scale; it is quite another to provide specific guidance for the implementing agencies as to how the overarching goals are to be accomplished. The Act's introductory section and legislative history, therefore, must also be interpreted in conjunction with the statute's substantive implementation provisions. Section 404, for example, instructs that in issuing permits for discharge of dredge and fill materials into navigable waters, the Secretary of the Army must select disposal sites,

(1) through the applications of guidelines developed by the [EPA] Administrator . . . and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.¹²⁴

122. LEGISLATIVE HISTORY, *supra* note 92, at 161-62.

123. *See id.* at 185 (statement of Sen. Randolph) ("We felt that we had a responsibility to the people of the United States to produce the best possible program for alleviating water pollution conditions and maintaining high standards of water quality in the years ahead."); *see also id.* at 374 (statement of Rep. Clausen) ("The stated goal of [the amendments] is to establish a national goal of no discharge of pollutants into the Nation's waters by 1985. By approving the measure . . . we will be making a congressional commitment to all Americans that we will back up the fight for clean water by providing the necessary financial, enforcement, and technological assistance that will be required to achieve our goal.").

124. 33 U.S.C. § 1344(b).

By instructing the manner in which the Act's purposes are to be carried out, these more specific provisions may seem to temper the weight of the aspirational introductory language.¹²⁵ The interpreting court must adhere to the particular provisions that implement a statute's goals. Nevertheless, while courts cannot rely exclusively on evidence of statutory purpose, it should not be excluded from the interpretive analysis, especially in instances of ambiguous language.¹²⁶

2. *The Aspirational Character of the CWA is Improperly Discounted Under a Purely Textual Analysis*

Under a textualist approach, a statute's purpose typically receives little, if any, weight in determining overall meaning.¹²⁷ Textualists generally categorically reject evidence of statutory purpose contained in legislative history.¹²⁸ Likewise, aspirational language that appears in the statute's introductory sections and describes its purpose, while comprised of legislative text, often does not factor into the interpretive analysis of the ambiguous language at issue.¹²⁹

Justice Scalia's plurality opinion in *Rapanos* exemplifies the textualist approach to statutory interpretation. In discerning the meaning of "navigable waters," defined in the statute as "waters of the United States," Scalia turns first to the internal context of the phrase.¹³⁰ Noting that another section of the Act authorizes state jurisdiction in some cases over "navigable waters" that are not used in interstate commerce and their adjacent wetlands, Scalia observes, "This provision shows that the Act's term 'navigable waters' includes something other than traditional navigable waters."¹³¹

Next, Scalia looks to identify the plain meaning of the contested language according to an ordinary understanding of the word "waters."¹³² He argues that the plural "waters" cannot mean water in general, and

125. Mank, *supra* note 88, at 1253.

126. Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 178 (D.C. Cir. 1982).

127. See Mank, *supra* note 88, at 1254 ("the fundamental problem with textualism is that its use by courts is likely to lead to a flawed approach when balancing aspirational and narrow economic language"); see also *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting) (Justice Scalia uses a textual argument to support a narrow definition of the ESA's use of the term "take"; criticizing the majority's reliance on the ESA's broad purpose, he argues, "I thought we had renounced the vice of 'simplistically . . . assum[ing] that *whatever* furthers the statute's primary objective must be the law." (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987))).

128. Lin, *supra* note 71, at 575.

129. See *Sweet Home*, 515 U.S. 687.

130. *Rapanos v. United States*, 126 S. Ct. 2208, 2220 (2006).

131. *Id.*

132. *Id.*

must instead refer to “only relatively permanent, standing or flowing bodies of water.”¹³³ Justice Scalia cites the Webster’s New International Dictionary definition of “waters” in support of his interpretation: “In this form, ‘the waters’ refers more narrowly to water ‘[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,’ or ‘the flowing or moving masses, as of waves of floods, making up such streams or bodies.’”¹³⁴

Finally, Justice Scalia appeals to a commonsense understanding of “the waters of the United States” for the proposition that the phrase does not include intermittent or ephemeral flows.¹³⁵ “In applying the definition to ‘ephemeral streams,’ ‘wet meadows,’ storms sewers . . . and dry arroyos in the middle of the desert,” Justice Scalia writes, “the Corps has stretched the term ‘waters of the United States’ beyond parody. The plain language of the statute does not authorize this ‘Land is Waters’ approach to federal jurisdiction.”¹³⁶

In Justice Scalia’s fine-tuned exposition of the etymological and linguistic connotations of a single word—“waters”—consideration of the policy goal of improved national water quality is notably absent. Justice Scalia declines to give any interpretive weight to the statute’s aspirational purpose of promoting clean water.¹³⁷ The plurality opinion displays open derision of Justice Kennedy’s attempt to incorporate the legislative purpose into his analysis:

Only by ignoring the text of the statute . . . does Justice Kennedy reach the conclusion he has arrived at. Instead of limiting its meaning by reference to the text it was applying, he purports to do so by reference to what he calls the “purpose” of the statute. Its purpose is to clean up the waters of the United States, and therefore anything that might “significantly affect” the purity of those waters bears a “significant nexus” to those waters, and thus (he never says this, but the text of the statute demands that he mean it) *is* those waters. This is the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose.¹³⁸

According to Justice Scalia, the purpose of protecting national water quality has no proper role in interpreting the meaning of the Clean Water Act.

133. *Id.* at 2220–21.

134. *Id.*

135. *Id.* at 2222.

136. *Id.*

137. *Id.* at 2234.

138. *Id.*

Despite his criticism of Justice Kennedy's purposive analysis, Scalia does not abstain from giving substantial weight to statutory purpose. The purposive language he relies on is carefully selected to support a particular reading of the text. While nowhere in his opinion does he discuss the importance of implementing the Clean Water Act's first stated purpose, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," he stresses the need to comply with the statute's recognition of the states' primary responsibility to control land and water resources.¹³⁹ Scalia claims that only his constrained definition of the Corps' jurisdiction "is consistent with the CWA's stated 'policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'¹⁴⁰ While, as Scalia correctly notes, "clean water is not the only purpose of the statute," his plurality opinion elects to ignore the CWA's primary objective, and gives interpretive credence to just one statement of secondary legislative purpose.¹⁴¹

This selective consideration of statutory purpose is inconsistent with the plurality's purported adherence to a textual approach to statutory interpretation. To maintain the semblance of strict textualism, Scalia disguises his purposivist investigations as "plain meaning constructions." In an objective, text-based analysis that focuses on plain meaning, evidence of Congress' intended purpose ought not to factor heavily into Scalia's decision. As a textualist, Justice Scalia purportedly declines to give substantial weight to statutory purpose, and even criticizes its use by other justices. If purposive language contained in the statute's introductory sections is to appear at all in Justice Scalia's analysis, one would expect equal treatment of all the stated objectives. However, Justice Scalia's opinion in *Rapanos* employs significant, but selective use of purposive language. Although they are clearly secondary to the CWA's main purpose of promoting water quality, Justice Scalia singles out the statutory purpose provisions that document Congress' recognition of concurrent state control over land use decisions. He chooses those purposive elements that align with a viewpoint that places high value on individual property rights at the expense of environmental protections. By shrouding evidence of statutory purpose within a more "objective" plain meaning analysis, Justice Scalia's textual approach provides a

139. *Id.* at 2223–24; *see also* 33 U.S.C. § 1251(a), (b) (2006).

140. *Rapanos v. United States*, 126 S. Ct. 2208, 2223–24 (2006) (quoting 33 U.S.C. § 1251(b)).

141. *Id.* at 2234.

vehicle for selective inclusion of certain purposive elements and not others. In the Rapanos plurality opinion, it is the aspirational purposes of the CWA that, under the textualist guise of objectivity, receive short shrift.

3. *Justice Kennedy's and Justice Stevens's Opinions Reflect More Balanced Interpretive Approaches of the CWA*

The concurring and dissenting opinions of Justices Kennedy and Stevens's contrast sharply with the plurality opinion in their approaches to statutory interpretation. Both Kennedy and Stevens adhere to more traditional purposivist/intentionalist techniques, beginning their analysis with the statutory texts but drawing on a range of contextual and extrinsic interpretive aids. Both justices agree that the CWA's broad objective, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," supports a more expansive interpretation of the Corps jurisdiction; the Act's purposive language is quoted in the first sentence of Justice Stevens' opinion and in the first section of Justice Kennedy's.¹⁴² Further, while Justice Kennedy seems to find sufficient evidence of Congress' broad purpose in the statutory text itself, Justice Stevens displays willingness to consult legislative history as confirmation of such a broad reading.¹⁴³ Stevens also argues that the unanimous opinion in *Riverside Bayview* should control the outcome in *Rapanos*.¹⁴⁴ *Riverside Bayview*, which upheld an expansive definition of the term "navigable waters," incorporated substantial analysis of legislative history into its holding.¹⁴⁵

Perhaps more importantly, however, the opinions of Kennedy and Stevens reflect a recognition of the environmental values the CWA sought to encapsulate. "It bears mention also," writes Justice Kennedy, "that the plurality's overall tone and approach . . . seems unduly dismissive of the interests asserted by the United States in these cases. Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular."¹⁴⁶ Justice Stevens expresses a similar view:

[T]he Corps has concluded that such wetlands play important roles in maintaining the quality of their adjacent waters, and consequently in the waters downstream. . . . These values are hardly "independent"

142. *Id.* at 2236 (Kennedy, J., concurring); *id.* at 2252 (Stevens, J., dissenting).

143. *Id.* at 2262 (Stevens, J., dissenting) ("the most casual perusal of the legislative history demonstrates that . . . views on the comprehensive nature of the legislation were practically universal" (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981))).

144. *Rapanos*, 126 S. Ct. at 2255.

145. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-34 (1985).

146. *Rapanos v. United States*, 126 S. Ct. 2208, 2246 (2006).

ecological considerations as the plurality would have it—instead, they are integral to the “chemical, physical, and biological integrity of the Nation’s waters.”¹⁴⁷

In a sense, the inclusion of such aspirational language in these opinions reflects the CWA’s legislative history and the text of the statute itself. While neither Stevens’ nor Kennedy’s opinion relies completely on the significance of environmental values, they each acknowledge them in their interpretation of the ambiguous statutory language. In this way, both justices present a more comprehensive landscape of interpretively relevant factors than does the textualist approach applied by the plurality.

D. By Forcing “Plain Meaning” on Statutory Text, Textualism Ignores Democratic Process Checks on Policymaking

Ultimately, the issue of the extent of the Corps’ jurisdiction under the CWA turns on the degree to which the Court is willing to defer to agency discretion and congressional acquiescence. Both of these are avenues of policymaking that have a stronger democratic character than judicial action. Because environmental statutes like the implementation structure of the Clean Water Act involve a high degree of agency action and a congressional response to such action, these elements are especially important to the judicial interpretation of environmental legislation. However, a textualist approach is unlikely to result in deference to either.

1. A Textualist Approach is Less Likely to Result in Deference to Other Avenues of Policymaking.

Decided in 1984, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* remains the guiding case in deciding issues of judicial deference to agency interpretations. Under the *Chevron* doctrine, courts undertake a two-part analysis. First, the court must decide whether Congress has spoken to the precise question at issue.¹⁴⁸ If the statute is unambiguous, the court must reject the agency interpretation if it is inconsistent with the statute.¹⁴⁹ If the court finds vagueness in the statutory language, however, it should defer to the agency’s interpretation if it is a “permissible,” or reasonable, interpretation of the statute.¹⁵⁰

147. *Id.* at 2257 (Stevens, J., dissenting) (quoting 33 U.S.C. § 1251(a) (2006)) (citations omitted).

148. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

149. *Id.*

150. *Id.*

As an approach to statutory interpretation, textualism is not incompatible with the *Chevron* doctrine.¹⁵¹ In a 1989 speech at Duke Law School, Justice Scalia discussed the various theoretical bases for the *Chevron* doctrine and concluded that the doctrine “more accurately reflects the reality of government and . . . more accurately serves its needs.”¹⁵² In that same speech, however, Justice Scalia candidly acknowledged that as a textualist, he is more likely to find “that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby find[ing] less often that the triggering requirement for *Chevron* deference exists.”¹⁵³ He stated, “It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.”¹⁵⁴ Textualists, therefore, while receptive to the theory of deference to administrative agencies under *Chevron*, in fact rarely defer to agency interpretations of statutes because they almost always find the statutory language to be unambiguous.¹⁵⁵

A textual approach is even less likely to result in deference to congressional acquiescence to an agency interpretation.¹⁵⁶ As an interpretive theory, textualism holds that “Congress takes no action except by legislation.”¹⁵⁷ Thus, to give weight to Congress’ failure to act is almost always inappropriate as a textualist interpretive technique.

2. *The Clean Water Act Requires Implementation Through Agency Rulemaking, a Participatory Democratic Process*

In implementing regulations that interpret its own authority under the Clean Water Act, the Corps must comply with the Administrative Procedures Act (APA).¹⁵⁸ The APA requires public notice in the Federal Register and a comment period whereby interested groups and individuals may provide information to the agency regarding how the regulation should operate.¹⁵⁹ The agency must respond to the substantive issues raised in all comments it receives in its final issuance of the rule or regulation.¹⁶⁰ The result is an agency policymaking process that “furnishes

151. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (discussing *Chevron* deference).

152. *Id.* at 521.

153. *Id.*

154. *Id.*

155. Mank, *supra* note 88, at 1248.

156. See *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (“I think we should admit that vindication by congressional inaction is a canard.”).

157. *Rapanos v. United States*, 126 S. Ct. 2208, 2231 (2006).

158. 5 U.S.C. § 553 (2006).

159. *Id.*

160. *Id.*

agencies with a far broader perspective on political interests than the litigation process and often provides their decisions with a semi-majoritarian level of political legitimacy.”¹⁶¹ The Corps, therefore, through its rulemaking processes, likely has a better informed and more nuanced view of the policy landscape of wetlands regulation than the Court could gain through the *Rapanos* litigation.

The agency’s advantage in policy perspective is aided by its ability to apply the technical expertise and political sensitivity of agency personnel.¹⁶² *Chevron* indicates that the specialized expertise of agency employees supports deference to agency decisions.¹⁶³ The combination of scientific proficiency and practical regulatory policy experience allows agency officials “to understand the interplay between technical issues and congressional statutes better than the general public or most judges.”¹⁶⁴ The administrative process provides a nuanced policymaking setting in which experienced agency personnel must respond to democratically-generated public comments in promulgating administrative rules.¹⁶⁵

The development of the Corps’ rules regarding the extent of its jurisdiction to regulate wetlands under the Clean Water Act involved this process of public participation.¹⁶⁶ Further, the Corps again sought public comment regarding the definition of “navigable waters” after the *SWANCC* decision.¹⁶⁷ Though Chief Justice Roberts admonishes the Corps for failing to significantly amend the definition as a result of that proposed rulemaking and call for public comment, it is not clear that the Corps would have been justified in restricting its definition in the face of a large number of public comments supporting a more expansive reading of Corps jurisdiction.¹⁶⁸ Regardless, the agency regulations at issue in *Rapanos* are the result of a participatory rulemaking process.

One might point out, however, that despite these rulemaking processes in an administrative agency like the Corps, the decision makers are appointed by the President or employed in the civil service—they are

161. Mank, *supra* note 88, at 1281–82.

162. *Id.* at 1279–80.

163. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865–66 (1984) (“Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so Judges are not experts in the field . . .”).

164. Mank, *supra* note 88, at 1280.

165. *See id.*

166. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,217 (Nov. 13, 1986).

167. *Rapanos v. United States*, 126 S. Ct. 2208, 2235 (2006) (Roberts, C.J., concurring).

168. *Id.* at 2235–36; *see also id.* at 2256 n.4 (Stevens, J., dissenting) (“The Chief Justice neglects to mention, however, that almost all of the 43 states to submit comments opposed any significant narrowing of the Corps’ jurisdiction—as did roughly 99% of the 133,000 other comment submitters.”).

not elected. As a result, they might be seen to have no more representational legitimacy than the justices of the Supreme Court. Unlike the members of the Court, however, agency officials, while not directly accountable to the electorate, are accountable to the democratically elected Executive.¹⁶⁹ This grounding of agency action in executive authority gives the agency an additional basis of democratic legitimacy as well as a mandate for limited policymaking. As the Court in *Chevron* noted, “it is entirely appropriate for [the executive] branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”¹⁷⁰

3. Considered in Light of the Thirty-Year History and Agency Rulemaking Process, Congressional Acquiescence Should be Given Some Weight

Both Scalia’s plurality opinion and Stevens’ dissent acknowledge the fact that Congress has consistently declined to amend the Corps’ regulations outlining its jurisdiction since the enactment of the CWA in 1970.¹⁷¹ Furthermore, legislative history indicates that Congress actually considered the issue and rejected proposals that would restrict the Corps’ jurisdiction.¹⁷²

Courts are often rightfully hesitant to attribute much significance to congressional inaction.¹⁷³ Given the complexity of the legislative process, there may be many reasons why Congress may fail to pass laws in a particular policy arena.¹⁷⁴ As a result, courts do, and should,¹⁷⁵ use “extreme care” in recognizing congressional acquiescence to agency interpretations. However, where legislative history indicates consideration of and deliberate refusal to reverse an agency interpretation, courts may presume that Congress has acquiesced to the correctness of the interpretation.¹⁷⁶ In the case of the Corps’ jurisdiction

169. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

170. *Id.*

171. *Rapanos*, 126 S. Ct. at 2231–32, 2257–58.

172. *Id.* at 2257–58; *see also* *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135–37 (1985).

173. *Riverside Bayview*, 474 U.S. at 137.

174. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 169–70 (2001).

175. *Id.*

176. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1020–22 (3d ed. 2001); *see also* *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 629 n.7 (“The fact that inaction may not

under the CWA, Congress did debate whether or not the agency had exceeded its authority.¹⁷⁷ The fact that Congress declined to constrain the Corps' interpretation appropriately serves as evidence of the legislature's view of wetlands protection under section 404. While such evidence is not dispositive, the fact that it stems from the nation's democratically elected lawmaking body should give it some weight in the eyes of the Court.

The *Rapanos* court faced two semidemocratic avenues of policymaking, both of which support the Corps' jurisdictional interpretation rejected by Scalia's plurality opinion. The textualist approach applied by Scalia enabled him to easily dismiss both out of hand. Because he finds the language of the CWA clear in delineating the extent of the Corps' authority, he concludes that the phrase "the waters of the United States" "cannot bear the expansive meaning that the Corps would give it."¹⁷⁸ This approach exemplifies the textualist application of the *Chevron* doctrine, as Scalia, finding the statute to be unambiguous, rejects the agency interpretation as deviating from the narrow "plain meaning." Similarly, Scalia gives no interpretive weight to Congress' acquiescence to the Corps' jurisdictional regulations, finding the legislative debates on the issue too vague to constitute meaningful action.¹⁷⁹ Scalia's opinion in *Rapanos* demonstrates the manner in which a textualist approach to statutory interpretation can result in judicial rejection of democratic process checks supplied by the legislative and executive branches.

By contrast, Justice Stevens, through his broader interpretive approach, exhibits more willingness to recognize and defer to alternative, democratic forms of policymaking. By incorporating congressional purpose and intent into his analysis, Stevens finds that the term "waters of the United States" warrants a broad reading, and is thus subject to the *Chevron* doctrine: "The Corps' . . . decision to treat these wetlands as encompassed within the term "waters of the United States" is a quintessential example of the Executive's reasonable interpretation of a statutory provision.¹⁸⁰ Additionally, although he does not give it dispositive weight, he notes that "Congress' deliberate acquiescence" confirms the Corps' interpretation.¹⁸¹

Justice Kennedy's purposive analysis also leads him to a conclusion that provides for greater deference to the Corps than does Scalia's textual

always provide crystalline revelation, however, should not obscure the fact that it may be probative to varying degrees.").

177. *Riverside Bayview*, 474 U.S. 121.

178. *Rapanos v. United States*, 126 S. Ct. 2208, 2220 (2006).

179. *Id.* at 2231–32.

180. *Id.* at 2252 (Stevens, J., dissenting).

181. *Id.* at 2257–58.

approach. Kennedy would remand the case to the Sixth Circuit for consideration under a “significant nexus” standard.¹⁸² While Kennedy declines to defer entirely to the Corps’ interpretation of its jurisdiction, as Stevens does, a close reading of Kennedy’s opinion reveals that the “significant nexus” test is likely to ultimately result in agency deference. The vagueness of the test provides ample room for the agency to “fill in the gaps” with its own scientific data. Justice Kennedy anticipates that “the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.”¹⁸³ Kennedy would create an avenue for fact-based, technical analysis of a particular wetland’s connection to navigable waters. In this arena of federal agency management, any dispute regarding scientific evidence is likely to be resolved in favor of the agency.¹⁸⁴ Thus, if the Corps, purportedly applying a significant nexus standard, determines that a wetland’s connections with navigable waters, though perhaps not direct, are significant enough to justify regulation, any party wishing to contest the agency’s decision must respond with evidence that the nexus is not “significant.” In such a “battle of the experts” scenario, courts almost always defer to the agency’s scientific expertise.¹⁸⁵ For the wetlands at issue in *Rapanos*, Justice Kennedy accepts that the Corps may receive deference to its interpretation of “significant nexus”:

In both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above. Thus, the end result in these cases . . . may be the same as that suggested by the dissent, namely, that the Corps’ assertion of jurisdiction is valid. Given, however, that neither the agency nor the reviewing courts properly considered the issue, a remand is appropriate . . .¹⁸⁶

Thus, while Justice Kennedy’s arrival at a result of agency deference takes a more circuitous path than does Justice Stevens’s, his consideration of the CWA’s broad purposes leads him to avoid a formalistic construction of the Corps’ jurisdiction under the Act.

182. *Id.* at 2248–49. Exactly how Justice Kennedy envisions the application of a “significant nexus” test is unclear, however. The phrase originated in the majority *SWANCC* opinion, where Justice Rehnquist used it to narrow the holding of *Riverside Bayview* (“It was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview*”). *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001). As it appears in *SWANCC*, the phrase “significant nexus” is not a jurisdictional test, so no one can be sure what factors should be considered in determining whether or not a significant nexus exists. *Id.*

183. *Rapanos*, 126 S. Ct. at 2249.

184. *See* *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1998); *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995).

185. *Glickman*, 92 F.3d 1228; *Marita*, 46 F.3d 606.

186. *Rapanos v. United States*, 126 S. Ct. 2208, 2250 (2006).

CONCLUSION

Far from providing an objective approach to statutory interpretation, textualism proves grossly inadequate in interpreting environmental regulatory statutes. The task of judicial statutory interpretation is inherently problematic—the interpreting judge risks misreading the instructions of the legislature or, at worst, supplanting those instructions with her own views. The delicacy and subtlety of the task thus demand intellectual honesty and transparent reasoning. A judge does the most justice to an ambiguous statute when she employs a range of interpretive aids and describes plainly how they influence her decision.

Textualism aspires to this goal of rational, objective interpretation and attempts to make legal reasoning accessible through reliance on “plain meaning.” However, as Justice Scalia’s *Rapanos* opinion demonstrates, a textual approach guarantees neither objective nor transparent analysis. Instead, textualism serves as a cloak for selective use of evidence and circumvention of democratic processes.

