

legislative exemptions: “RFRA . . . plainly contemplates that *courts* would recognize exceptions — that is how the law works.”⁷⁰

Given *O Centro*’s straightforward result, its chief mystery is what message it is meant to convey. Through its silence, the Court seems to imply that its previous concerns about RFRA are no longer weighty enough to merit even a cursory debate over the statute’s constitutionality. There are multiple explanations for the Court’s refusal to engage the constitutional question,⁷¹ but the most plausible is simply that the statute has had very little impact on litigation results.⁷² In light of RFRA’s “surprisingly tepid” litigation record,⁷³ the fiery controversy surrounding the statute, memorialized in *Boerne*, is more a dull ember in practical consequence. In this sense *O Centro* could mark a de nouement in the RFRA saga, which will henceforth be characterized by holdings that, should another case ever again reach the point of being granted certiorari, can be expected, like *O Centro*’s, to be quite narrow.

E. Review of Administrative Action

1. *Clean Water Act — Federal Jurisdiction over Navigable Waters.* — Many of us think of swamps, bogs, and morasses as places to avoid. Yet in environmental law and policy, the subject of such zones, known as wetlands, is far from avoided. Indeed, debates abound over how wetlands should be regulated¹ and even defined.² Since Congress

⁷⁰ *O Centro*, 126 S. Ct. at 1222.

⁷¹ A partial reason, not explored here, might center on changes in the Court’s makeup. Chief Justice Roberts, having had no part in the *Smith* and *Boerne* decisions, is perhaps apt not to take so personally Congress’s arguable trespass on the Court’s domain. Justice O’Connor is no longer on the Court, and it was the exchanges between her and Justice Scalia that contributed most to the contentious atmosphere of both the *Smith* and *Boerne* decisions.

⁷² As of 1998, according to a study by Professor Ira Lupu, only fifteen percent of cases involving RFRA resulted in a victory by those claiming a religious exemption; administrative agencies virtually ignored the statute. See Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 569–70 (1999); Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. REV. 575, 590–92 (1998). However, other commentators have suggested that RFRA’s impact has been significant by sheer dint of the variety of claims brought under the statute. See, e.g., Eisgruber & Sager, *supra* note 2, at 102–03 & nn.78–82 (“The statute generated a tide of Free Exercise litigation in the federal courts. . . . A substantial number of these claims in fact prevailed under RFRA.”).

⁷³ Lupu, *The Failure of RFRA*, *supra* note 72, at 592. Interestingly, the “compelling interest” test of *Sherbert v. Verner* — a less strict standard for analyzing government interest than RFRA itself contemplates — generated similarly lukewarm results, at least at the Supreme Court level. See Ryan, *supra* note 2, at 1413–14 (explaining that between the *Sherbert* decision in 1963 and the *Smith* decision in 1990, the Court “rejected thirteen of the seventeen free exercise claims it heard” and that “three of the four victories [that is, all but *Wisconsin v. Yoder*] involved unemployment compensation and thus were governed by the explicit precedent of *Sherbert*.” (footnotes omitted)).

¹ See Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L.

passed the Clean Water Act³ (CWA) in 1972, the Supreme Court has attempted three times to divine where “water ends and land begins”⁴ by assessing the scope of a program that requires landowners to obtain permits before filling “navigable waters.”⁵ In *United States v. Riverside Bayview Homes, Inc.*,⁶ the Court unanimously upheld the program’s application to wetlands adjacent to navigable waters.⁷ A decade and a half later, in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*,⁸ a bare majority struck down the so-called migratory bird rule by holding that the program did not apply to isolated ponds even though they were home to migratory birds.⁹ Last Term, in *Rapanos v. United States*,¹⁰ the Court divided 4–1–4 as it continued its effort to define the scope of federal authority over water. Because Justice Kennedy’s concurrence exhibits a pragmatic approach to environmental law and policy, it is the soundest of the three methods showcased in *Rapanos* and is the one that future courts, regulators, and environmental advocates should embrace.

The CWA forbids the discharge of any pollutant into “navigable waters,”¹¹ which the Act defines as “the waters of the United States.”¹² An exception to this prohibition allows landowners to discharge dredged or fill material, considered pollutants under the Act’s broad definition,¹³ if the Army Corps of Engineers grants them a permit under section 404 of the Act.¹⁴ The Corps has the authority to decide whether to grant permits and also sets permit-granting guidelines in collaboration with the EPA.¹⁵ At first, the Corps interpreted the CWA narrowly, applying section 404 only to waters that were in fact navigable.¹⁶ The Corps’s interpretation broadened over time, however, eventually defining “waters of the United States” to include all interstate

REV. 1242, 1243 (1995) (“Wetlands regulation may be the most controversial issue in environmental law.”).

² See WILLIAM M. LEWIS, JR., WETLANDS EXPLAINED 32 (2001) (“A historian probably could find more than a dozen definitions of wetland . . .”).

³ 33 U.S.C. §§ 1251–1387 (2000).

⁴ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

⁵ CWA § 404(a), 33 U.S.C. § 1344(a).

⁶ 474 U.S. 121.

⁷ *Id.* at 139.

⁸ 531 U.S. 159 (2001).

⁹ *Id.* at 171–72.

¹⁰ 126 S. Ct. 2208 (2006).

¹¹ See CWA §§ 301(a), 502(12), 33 U.S.C.A. §§ 1311(a), 1362(12) (West 2001 & Supp. 2006).

¹² *Id.* § 502(7), 33 U.S.C.A. § 1362(7).

¹³ See *id.* § 502(6), 33 U.S.C.A. § 1362(6).

¹⁴ 33 U.S.C. § 1344 (2000).

¹⁵ See *id.* § 1344(b)–(c). For an explanation of the permitting process, see Houck & Rolland, *supra* note 1, at 1254–57.

¹⁶ *Rapanos*, 126 S. Ct. at 2216 (plurality opinion).

waters, all waters subject to use in interstate commerce, and “[a]ll other waters . . . the use, degradation or destruction of which could affect interstate or foreign commerce.”¹⁷ The interpretation also included tributaries to these bodies and wetlands adjacent to them.¹⁸ Shortly after the Court struck down the Corps’s migratory bird rule in *SWANCC*, the Corps and the EPA issued an advance notice of proposed rulemaking.¹⁹ After receiving over 130,000 comments, however, the Corps and the EPA decided not to issue any new rules.²⁰

Rapanos consisted of two companion cases that arose from the development of four Michigan wetlands. John Rapanos owned three of the four properties, all of which lay near ditches or human-made drains and eventually flowed into either a river or Lake Huron.²¹ In 1989, Rapanos began filling and clearing his land even after both the State and an independent consultant told him a permit was probably required.²² Federal officials brought criminal charges and instituted a civil action.²³ The United States District Court for the Eastern District of Michigan upheld the Corps’s exercise of jurisdiction, ruling that the filled areas constituted “waters of the United States” because they were adjacent to tributaries of navigable waters.²⁴ The Sixth Circuit affirmed,²⁵ holding that the CWA and its permit requirements extend to all wetlands that share a “hydrological connection” with actually navigable waters.²⁶

The fourth property, from the companion case, was a wetland on which Keith and June Carabell wanted to build condominiums.²⁷ The land was abutted by a ditch, which connected to a drain that flowed into a creek and eventually into Lake St. Clair,²⁸ a 430-square-mile lake on the Michigan-Ontario border.²⁹ However, unlike in Rapanos’s

¹⁷ *Id.* (alteration in original) (quoting 33 C.F.R. § 328.3(a)(3) (2006)); see also 33 C.F.R. § 328.3(a) (defining “waters of the United States”).

¹⁸ 33 C.F.R. § 328.3(a)(5), (7).

¹⁹ See Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991 (Jan. 15, 2003) (to be codified at 33 C.F.R. pt. 328).

²⁰ See U.S. GEN. ACCOUNTING OFFICE, GAO-04-297, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION 9–10, 14 (2004) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/do4297.pdf>.

²¹ *Rapanos*, 126 S. Ct. at 2219 (plurality opinion).

²² *United States v. Rapanos*, 376 F.3d 629, 632 (6th Cir. 2004).

²³ *Id.* at 633–34.

²⁴ *Rapanos*, 126 S. Ct. at 2219 (plurality opinion).

²⁵ *Rapanos*, 376 F.3d at 632.

²⁶ *Id.* at 639.

²⁷ See *Carabell v. U.S. Army Corps of Eng’rs*, 257 F. Supp. 2d 917, 923–24 (E.D. Mich. 2003).

²⁸ *Id.* at 923.

²⁹ *Rapanos*, 126 S. Ct. at 2239 (Kennedy, J., concurring in the judgment).

case, a human-made barrier ran between the ditch and the Carabells' land.³⁰

Both the Corps and the state department of environment denied the Carabells' permit application.³¹ After their administrative appeal was rejected, the Carabells filed suit in the United States District Court for the Eastern District of Michigan, which upheld the Corps's jurisdiction.³² The Sixth Circuit affirmed.³³ Citing its decision in *Rapanos*, the court found that a hydrological connection existed between the Carabells' land and the "navigable waters" of Lake St. Clair.³⁴ The court held that the nearby ditch was a "tributary," meaning that the Carabells' land was covered because it was "adjacent" to the tributary.³⁵ After consolidating the Carabells' case with *Rapanos*'s, the Supreme Court granted certiorari.

The Supreme Court vacated the Sixth Circuit's judgments in both cases and remanded. Writing for a four-member plurality, Justice Scalia³⁶ narrowed the range of possible interpretations of the CWA. Lamenting the burdens of time and cost that the section 404 program imposes on landowners,³⁷ he rejected the Corps's broad interpretation of "waters of the United States," calling it a "Land Is Waters" approach to federal jurisdiction,³⁸ and argued that a body of water must meet two criteria to fall under the CWA. First, it must be a "relatively permanent, standing or flowing bod[y] of water," such as a stream, ocean, river, or lake.³⁹ "[I]ntermittent or ephemeral" water flows, Justice Scalia wrote, do not fall within a "commonsense understanding" of the word "waters."⁴⁰ Justice Scalia emphasized that one of the CWA's purposes was to preserve a role for states in managing pollution, hence the need to constrain federal authority through a narrow reading of the CWA.⁴¹ He also supported his narrower interpretation by evoking two canons of construction: the need to preserve state autonomy —

³⁰ *Carabell*, 257 F. Supp. 2d at 923.

³¹ *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704, 706 (6th Cir. 2004).

³² *Carabell*, 257 F. Supp. 2d at 931–32.

³³ *Carabell*, 391 F.3d at 710.

³⁴ *Id.*

³⁵ *See id.* at 708–09.

³⁶ Chief Justice Roberts and Justices Thomas and Alito joined Justice Scalia's opinion. Chief Justice Roberts filed a brief concurrence in which he bemoaned the lack of a majority opinion. The Chief Justice also chastised the Corps for its failure to issue new jurisdictional guidelines following *SWANCC*. *See Rapanos*, 126 S. Ct. at 2235–36 (Roberts, C.J., concurring).

³⁷ *See id.* at 2214–15 (plurality opinion).

³⁸ *Id.* at 2222.

³⁹ *Id.* at 2221.

⁴⁰ *Id.* at 2222.

⁴¹ *Id.* at 2223–24.

specifically, state power over land use — and the interest in not exceeding the bounds of the Commerce Clause.⁴²

Justice Scalia's second criterion for CWA jurisdiction applies only to wetlands. For a wetland to be subject to section 404, there must be a "continuous surface connection" between the wetland and a water of the United States such that it is "difficult to determine where the 'water' ends and the 'wetland' begins."⁴³ Remanding both cases for application of his two conditions, Justice Scalia rejected the Sixth Circuit's view that a "mere hydrologic connection" to waters of the United States is sufficient to bring a wetland within the CWA's ambit.⁴⁴

Justice Kennedy concurred in the judgment. Like Justice Scalia, he rejected the Corps's interpretations as overbroad, but he proposed a different legal test for jurisdiction. For the CWA to apply to a wetland, Justice Kennedy said, a "significant nexus" must exist between that wetland and a navigable-in-fact waterway.⁴⁵ He stated that the test should be informed by the CWA's goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."⁴⁶ Therefore, he said, a "significant nexus" would exist if the wetlands "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"⁴⁷ The link cannot be "speculative or insubstantial."⁴⁸ When a wetland is adjacent to a navigable-in-fact waterway, jurisdiction can rest on a "reasonable inference of ecologic interconnection."⁴⁹ When, however, the wetland is adjacent to a *nonnavigable* tributary of that navigable-in-fact waterway, the Corps must "establish a significant nexus on a case-by-case basis."⁵⁰ Although agreeing that the case should be remanded, Justice Kennedy hinted at the "possible existence" of a significant nexus in both cases.⁵¹

Justice Kennedy agreed with the plurality that the modifier "navigable" implies some limits on the Corps's jurisdiction, but he rejected Justice Scalia's two limitations on CWA jurisdiction as "inconsistent with the Act's text, structure, and purpose."⁵² He criticized, as both over- and underinclusive, Justice Scalia's requirement that navigable

⁴² *Id.* at 2224. Justice Scalia noted that the Corps's theory of jurisdiction "presse[d] the envelope of constitutional validity" and "raise[d] difficult questions about the ultimate scope of" Commerce Clause authority. *Id.*

⁴³ *Id.* at 2227.

⁴⁴ *Id.* at 2225.

⁴⁵ *Id.* at 2241 (Kennedy, J. concurring in the judgment).

⁴⁶ *Id.* at 2248 (quoting 33 U.S.C. § 1251(a) (2000)) (internal quotation marks omitted).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 2249.

⁵¹ *Id.* at 2250.

⁵² *Id.* at 2246.

waters be relatively permanent.⁵³ Justice Kennedy also criticized the plurality's requirement that wetlands be linked to waters of the United States by a continuous surface connection as inconsistent with Court precedent as well as with the way wetlands actually work.⁵⁴

Justice Stevens dissented.⁵⁵ He would have upheld the Corps's interpretation as reasonable under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁵⁶ because the Corps's broad interpretation of "waters" was consistent with the purpose of the legislation.⁵⁷ The reasonableness of the Corps's interpretation, he contended, was confirmed by Congress's failure to pass a legislative response to the Corps's regulations in 1977.⁵⁸ The costs and benefits of "particular conservation measures," said Justice Stevens, constituted a "classic question of public policy that should not be answered by appointed judges."⁵⁹ Like Justice Kennedy, Justice Stevens rejected the two conditions — relative permanence and continuity of surface connection — that the plurality imposed on wetlands jurisdiction.⁶⁰ Criticizing the plurality's continuous surface connection requirement as "revisionist,"⁶¹ Justice Stevens argued that the plurality's reliance on *SWANCC* was undue because *SWANCC* dealt with isolated bodies of water and did not apply to wetlands.⁶²

Because Justice Kennedy concurred in the judgment on the narrowest grounds, his opinion is the one that both lower courts and rulemaking agencies are likely to follow.⁶³ Fortunately, Justice Kennedy's middle-ground test represents a pragmatic alternative to today's polarized environmental law and politics. It deserves the embrace of both future courts and environmental advocates.

⁵³ See *id.* at 2242–43.

⁵⁴ See *id.* at 2244–46.

⁵⁵ Justices Souter, Ginsburg, and Breyer joined Justice Stevens. Justice Breyer filed a separate dissent in which he implored the Corps to pass new regulations as quickly as possible. *Id.* at 2266 (Breyer, J., dissenting).

⁵⁶ 467 U.S. 837 (1984).

⁵⁷ See *Rapanos*, 126 S. Ct. at 2252–53, 2262 (Stevens, J., dissenting).

⁵⁸ *Id.* at 2257–58.

⁵⁹ *Id.* at 2259.

⁶⁰ *Id.*

⁶¹ *Id.* at 2255.

⁶² *Id.* at 2256.

⁶³ See *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When 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 . . .'" (omission in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.))). Indeed, the first court of appeals to have applied *Rapanos* adopted Justice Kennedy's significant nexus test. See *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006).

Commentators frequently note the polarized character of environmental politics in the United States and abroad.⁶⁴ These observations have produced calls for more pragmatic environmental law and policy.⁶⁵ Pragmatism, in these accounts, means a range of things, from incorporating Deweyan philosophy,⁶⁶ to recognizing the importance of economic values such as growth,⁶⁷ to brokering more political deals with nonenvironmental constituencies.⁶⁸ What the pragmatist arguments share is the hope of an environmental agenda that is more moderate and therefore more viable politically.

The facts and legal issues in *Rapanos* have the potential to polarize. The case could easily be characterized as pitting property rights against environmental protection, states' rights advocates against champions of a strong central government, or opponents of excessive bureaucratic discretion against friends of the administrative state.⁶⁹ Justice Scalia's plurality opinion and Justice Stevens's dissent exemplify these polar positions. Justice Kennedy's test, in contrast, offers olive branches to a wide range of political positions and thus has the potential to shift a "deeply divided"⁷⁰ national debate over wetlands protection away from one-sided extremes and onto middle-ground terrain.

Opponents of judicial activism will appreciate the consistency of Justice Kennedy's approach with Court precedent. Unlike Justice Scalia's rule, the "significant nexus" test incorporates language from

⁶⁴ See, e.g., Douglas A. Kysar & James Salzman, *Environmental Tribalism*, 87 MINN. L. REV. 1099, 1099–1103 (2003); Christopher H. Schroeder, *Prophets, Priests, and Pragmatists*, 87 MINN. L. REV. 1065, 1068 (2003); Robert R.M. Verchick, *Feathers or Gold? A Civic Economics for Environmental Law*, 25 HARV. ENVTL. L. REV. 95, 96–97 (2001).

⁶⁵ See, e.g., DANIEL A. FARBER, *ECO-PRAGMATISM* (1999); Symposium, *The Pragmatic Ecologist: Environmental Protection as a Jurisdynamic Experience*, 87 MINN. L. REV. 847 (2003); MICHAEL SHELLENBERGER & TED NORDHAUS, *THE DEATH OF ENVIRONMENTALISM* (2004), http://www.thebreakthrough.org/images/Death_of_Environmentalism.pdf.

⁶⁶ See Verchick, *supra* note 64, at 127–31.

⁶⁷ See FARBER, *supra* note 65, at 70–92.

⁶⁸ See SHELLENBERGER & NORDHAUS, *supra* note 65, at 26–28.

⁶⁹ Indeed, during hearings held by the United States Senate Subcommittee on Fisheries, Wildlife, and Water on the possible impact of the *Rapanos* decision, two of the three Republicans who presented statements at the hearing, Senators Lisa Murkowski and James Inhofe, argued in their opening statements for a larger role for states in wetlands regulation, while the two Democrats who presented statements, Senators Hillary Clinton and Frank Lautenberg, and the one Democratic-leaning independent who presented a statement, Senator James Jeffords, argued for preserving the federal role on environmental protection grounds. See *Interpreting the Effect of the U.S. Supreme Court's Recent Decision in the Joint Cases of Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers on "The Waters of the United States": Hearing Before the Subcomm. on Fish, Wildlife, and Water of the S. Comm. on Environment and Public Works*, 109th Cong. (2006) (statements of Sens. Clinton, Inhofe, Jeffords, Lautenberg, and Murkowski), available at http://epw.senate.gov/hearing_statements.cfm?id=259992 (partial reprinting), and at <http://epw.senate.gov/epwmultimedia/epwmultimedia.htm> (audiovisual recording).

⁷⁰ *Id.* (statement of Sen. Murkowski).

SWANCC's interpretation of *Riverside Bayview*.⁷¹ Unlike Justice Stevens's dissent, the nexus test does not read *SWANCC* down to its facts, construing that decision as having nothing to do with wetlands,⁷² but rather integrates it with *Riverside Bayview* to provide a consistent line of case law. Politically, decisions that adhere closely to prior cases increase the likelihood of consensus because actors from across the ideological spectrum can at least agree on the value of precedent.

On federalism issues, Justice Kennedy's approach offers an attractive balance between federal and state interests. On the one hand, the significant nexus test keeps the Rehnquist Revolution alive, dovetailing nicely with the Court's recent Commerce Clause jurisprudence — specifically, the recognition of federal authority to regulate classes of activities that substantially affect interstate commerce.⁷³ The term “significant” in Justice Kennedy's test mirrors the modifier “substantial” in the Commerce Clause cases and thus should ensure that not all hydrological connections will lead to federal jurisdiction, but only ones where federal action is at least plausibly⁷⁴ consistent with the Commerce Clause limits on federal authority that the Rehnquist Court revived. Also, by rejecting the “migratory molecule theory,”⁷⁵ under which *any* hydrological connection would establish jurisdiction, Justice Kennedy's significant nexus test places substantive limits on the scope of federal regulatory authority. On the other hand, Justice Kennedy's approach offers to preserve a meaningful federal role in environmental regulation because he did not embrace Justice Scalia's argument that states' traditional power over land and water use mandated a narrow reading of the CWA.⁷⁶ By effectively classifying water pollution regulation within the category of land and water use, Justice Scalia's reasoning would have the potential to restrict dramatically the federal government's ability to regulate environmental affairs.

Justice Kennedy's opinion demonstrates similar balance in relation to the scope of agency discretion. This test allows the Corps enough discretion to employ its scientific expertise. Under Justice Kennedy's scheme, the Corps retains the opportunity to issue its own regulatory

⁷¹ See *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001).

⁷² See *Rapanos*, 126 S. Ct. at 2256 (Stevens, J., dissenting).

⁷³ See *Gonzales v. Raich*, 125 S. Ct. 2195, 2205 (2005).

⁷⁴ Cf. *Rapanos*, 126 S. Ct. at 2249 (Kennedy, J., concurring in the judgment) (“To be sure, the significant nexus requirement may not align perfectly with the traditional extent of federal authority.”).

⁷⁵ See generally Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle over the Scope of Federal Jurisdiction Under the Clean Water Act*, 30 COLUM. J. ENVTL. L. 473, 502–12 (2005) (analyzing the leading cases that have adopted this theory).

⁷⁶ Cf. *Rapanos*, 126 S. Ct. at 2224 (plurality opinion) (“[T]he Government's expansive interpretation would ‘result in a significant impingement of the States’ traditional and primary power over land and water use.’” (quoting *SWANCC*, 531 U.S. at 174)).

interpretation of the significant nexus test, and to employ its scientific knowledge in so doing. By contrast, in expounding his “continuous surface connection” requirement, Justice Scalia himself assumed the role of expert, deeming such a surface connection necessary for the existence of a significant ecological nexus. Under Justice Scalia’s test, the agency’s role is reduced to assessing whether a connection is continuous — a task that demands less expertise than the determination of ecological importance required under Justice Kennedy’s approach. Nevertheless, by refusing to follow Justice Stevens in applying *Chevron* deference to the Corps and the EPA, Justice Kennedy showed a willingness to place limits on agency discretion under the proper circumstances. Reining in the Corps in this case was appropriate for several reasons. First, the case involved a determination of the scope of the Corps’s jurisdiction, a situation in which scholars suggest that courts should not defer to agency interpretations of statutes.⁷⁷ Second, the Corps had a well-documented record of inconsistency and opacity in the granting of permits.⁷⁸ Third, the Corps declined to issue new regulations following *SWANCC* in spite of considerable disagreement about what *SWANCC* meant.⁷⁹

Professor Richard Lazarus laments that recent Supreme Court cases have decided important environmental questions on grounds completely unrelated to ecology, effectively taking the “environment” out of environmental law.⁸⁰ Justice Kennedy’s pragmatism avoids this pitfall and thus offers meaningful concessions to environmental advocates. It does so primarily through two devices. First, Justice Kennedy’s interpretive approach provides a flexibility well suited to the dynamic and uncertain nature of environmental challenges. Considering Justice Scalia’s more static view that waters of the United States must be relatively permanent illustrates this advantage. The weakness of Justice Scalia’s permanence requirement is not only that non-permanent bodies of water affect the ecological health of American

⁷⁷ See, e.g., Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2097–2100 (1990); see also *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 386–87 (1988) (Brennan, J., dissenting) (“Agencies do not ‘administer’ statutes confining the scope of their jurisdiction, and such statutes are not ‘entrusted’ to agencies.”).

⁷⁸ See GAO REPORT, *supra* note 20, at 3–4 (noting that different Corps districts use inconsistent criteria to determine whether to exercise jurisdiction and that few districts make these criteria publicly available).

⁷⁹ See *id.* at 10.

⁸⁰ See Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 737 (2000) (“Missing [from the Supreme Court’s decisions over the past thirty years] is any emphasis on the nature, character, and normative weightiness of environmental protection concerns and their import for judicial construction of relevant legal rules . . .”).

waters now,⁸¹ but also that the environmental salience of these bodies is likely to increase over time as global warming produces more flooding, extreme weather patterns, and fluctuations in water levels, thereby increasing both the number and the size of temporary waters.⁸² Justice Kennedy's significant nexus test, by contrast, allows judges and regulators to adapt the CWA's scope to the reality of climate change by looking not at a body of water's static characteristics but at its living connection with other waters. Justice Scalia's test is also inconsistent with the uncertainty that pervades environmental science and policy.⁸³ Even if today's science told us that filling ephemeral bodies of water or isolated wetlands had no significant effect on the integrity of U.S. waters, tomorrow's science might tell us something different. Justice Kennedy's flexible standard allows judges and regulators to adjust what kind of nexus is considered "significant" as the science evolves.

The second ecological advantage of Justice Kennedy's approach is that it promises to educate both the judiciary and the public about the environment. It forces judges to think ecologically by searching for connections, departing from the practices of line-drawing or distinction-making that may be their habits as jurists. It will also bring environmental scientists into the courtroom to testify as expert witnesses. Although an altered legal standard is probably neither the cheapest nor the most efficient way to educate judges about the environment,⁸⁴ the educative effect must at least be entered into the ledger when calculating the costs and benefits of a test. The significant nexus test may have a further instructive effect — on the public.⁸⁵ By reading a court's interpretation of the nexus requirement, citizens may learn about hydrology or the benefits of wetlands. Indeed, Justice Kennedy's opinion repeatedly discusses such distinctly ecological issues.⁸⁶

⁸¹ Justice Kennedy offered the example of the Los Angeles River, which is ordinarily nearly dry but "periodically releases water-volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles." *Rapanos*, 126 S. Ct. at 2242 (Kennedy, J., concurring in the judgment).

⁸² See TIM FLANNERY, *THE WEATHER MAKERS* 135–41 (2005).

⁸³ See generally Howard A. Latin, *Environmental Deregulation and Consumer Decisionmaking Under Uncertainty*, 6 HARV. ENVTL. L. REV. 187, 190–204 (1982) (analyzing the sources of environmental uncertainty in the context of consumer choice).

⁸⁴ Indeed, Professor Lazarus advocates outdoor educational trips at judicial conferences as possibly "the single most effective means for changing perceptions and attitudes on the Court." Lazarus, *supra* note 80, at 768.

⁸⁵ Many scholars highlight the role of courts as civic educators. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 26 (1962); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952). But see Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992) (concluding that the Court's capacity to educate compromises its ability to fulfill other important roles).

⁸⁶ See *Rapanos*, 126 S. Ct. at 2245, 2247–48 (Kennedy, J., concurring in the judgment) (explaining the benefits of wetlands); *id.* at 2237–38 (citing technical reports to define wetlands); *id.* at 2245 (outlining the adverse ecological impact of discharged silt).

Thus, although environmental advocates may be drawn toward Justice Stevens's opinion because it affords the widest discretion to the agency, his deference to the Corps would eliminate the educative benefits of Justice Kennedy's approach. In sum, by offering interpretive flexibility and investing the judge with an ecological role, Justice Kennedy ensured that his eco-pragmatism hung onto its "eco."⁸⁷

Although Justice Kennedy's approach has been criticized for its potential to generate uncertainty,⁸⁸ his test may not do so any more than his colleagues' two alternatives would have. Justice Scalia's test, by curtailing the scope of the CWA, would create regulatory space for state and local governments, some of which would create new legislation to fill the void, others of which would not. The resulting patchwork of varying standards would burden economic actors who operate across state lines.⁸⁹ Under Justice Stevens's proposal, the Corps's inconsistent and opaque practices would likely continue unabated. Justice Kennedy's significant nexus requirement, although admittedly ambiguous on its own, may soon be clarified through new legislation by Congress⁹⁰ or through new regulations by the Corps and the EPA. While it is true that the Corps's and EPA's proposed rulemaking in response to *SWANCC* ultimately went nowhere, *Rapanos*'s comparatively broader holding — which rejected the narrow reading of *SWANCC* that some lower courts had adopted⁹¹ — means that the agencies will now be under more pressure to respond to the Court.

In advancing the goal of rendering environmental law and policy more pragmatic, Justice Kennedy's significant nexus test has many advantages over Justice Scalia's rigid rules and Justice Stevens's generous deference. But with proposed legislation now making its way through Congress, it remains to be seen whether the center will hold.

2. *Deference to Agency Interpretive Rules.* — The apparent clarity of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*'s¹ two-step framework² has become muddled over the years, in large part

⁸⁷ Cf. FARBER, *supra* note 65.

⁸⁸ See, e.g., Posting of Jonathan Adler to The Volokh Conspiracy, <http://www.volokh.com> (Aug. 11, 2006, 18:19) (describing Justice Kennedy's opinion as "hardly a paragon of clarity").

⁸⁹ Cf. Houck & Rolland, *supra* note 1, at 1310 ("A Delaware corporation knows what to expect from section 404 in California, Louisiana and Wisconsin.")

⁹⁰ See Clean Water Authority Restoration Act of 2005, S. 912, 109th Cong. (2005) (defining "waters of the United States").

⁹¹ See, e.g., *United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004); *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407, 415 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 708–13 (4th Cir. 2003).

¹ 467 U.S. 837 (1984).

² Under *Chevron*, when confronted with the permissibility of an agency's statutory interpretation, a court determines first whether the statute is ambiguous, and second, whether the interpretation offered by the agency charged with administering the statute is reasonable. *Id.* at 842–43,