ARTICLE

WORDS AND WORLDS: THE SUPREME COURT IN RAPANOS AND CARABELL

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I. INTRODUCTION

Rapanos v. United States and Carabell v. United States Army
Corps of Engineers (collectively Rapanos), decided together in
June 2006, are the third time in twenty-one years that the Supreme
Court has addressed the jurisdictional scope of the federal Clean
Water Act (CWA).1 This essay interprets the decision from a cul-
tural perspective, as another chapter in the struggle for institu-
tional recognition of environmentalists’ beliefs and values. In

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particular, it explores the competition between environmentalist and anti-environmentalist worldviews, and their associated values, that is evident in three of the five opinions in *Rapanos*. This competition has figured prominently in a number of the Court's most significant environmental cases in the modern environmental era, and in *Rapanos* reaches a kind of equipoise.\(^2\)

This essay attends to the Justices' differing approaches to statutory interpretation in *Rapanos*, including their use of text, purpose, and interpretive rules. It argues that these divergent interpretational methods are themselves informed by values that are either congruent with environmentalism or opposed to it. In this analysis, a Justice's affinity for the environmentalist worldview or its antithesis follows from the values implicit in his or her judicial philosophy. Justice Scalia is antagonistic to environmentalism for at least some of the same reasons he is a textualist; Justice Stevens is receptive to environmentalism for some of the same reasons he is an intentionalist; and Justice Kennedy, not identified with the extremes on either of these dimensions (textualist/intentionalist or pro-/anti-environmentalist), navigates the middle.

A. **Ecological and Atomistic Worldviews**

A few basic tenets are common to most of those who call themselves environmentalists. Perhaps chief among these and of central relevance to this inquiry is the interdependence or ecological model. This model incorporates the belief that nature is fragile and interdependent, so that environmental disturbances are likely to have adverse consequences that can be distant in place and time. The ecological model stresses interconnectedness, positing extended causal relationships between and among events.\(^3\) In John Muir's words, “When we try to pick out anything by itself, we find it hitched to everything else in the universe.”\(^4\) This model of the world might be confirmed or refuted in particular cases by persuasive evidence of harmful so-called secondary effects or their absence. But without such evidence, it operates for environmentalists as a presumption or default rule.

The ecological model is associated with cultural values that support communal action for environmental protection or restoration.

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\(^2\) For an account of this competition in the Court's decisions, see Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 *Ecology* L.Q. 363 (2006). This article uses the analytical framework developed in that article.

\(^3\) Cannon, *supra* note 2, at 369-70.

\(^4\) JOHN MUIR, *MY FIRST SUMMER IN THE SIERRA* 211 (1911).
These values include collectivism (emphasizing the common good and endorsing individual restraint) and harmony (in particular, fitting harmoniously into the natural and social environment). Aldo Leopold and others have linked the ecological model directly to an emerging collective responsibility to care for the "biotic community" or "the land organism": understanding the close interdependencies within the biotic community, they argue, supports extension of ethical consideration to that community - Leopold's "land ethic." Environmentalists often use the rhetoric of altruism, stressing action for the "common good" or moral regard for the environmental "other," in arguing for public constraints on private interests to protect vulnerable, interconnected natural systems.

The alternative model is atomistic. It projects a world of discrete features and events, with largely individual or local significance. It assumes the natural world is resilient rather than fragile. Environmental disturbances are not expected to radiate broadly through a larger system. Proponents of this model emphasize boundaries, distances and distinctions among components of natural systems and the actions of their human inhabitants.

The atomistic model too is associated with a set of cultural values, but these values stress human agency in contrast to the communitarianism of environmentalists. These values include autonomy (emphasizing pursuit of self-interest) and mastery (getting ahead through active self-assertion to attain personal or group goals). This value set encompasses what cultural psychologists have identified as the dominant cultural pattern in the United States, in particular "a relatively strong emphasis on [m]astery and . . . [a]utonomy values and a weak emphasis on harmony values." Thus, people in the United States, as compared to other

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5 See Cannon, supra note 2, at 372-76, 377-78. A third value, egalitarianism (that is, equalizing power, resources and burdens within society), is also relevant to the ecological model, but does not figure significantly in my analysis of Rapanos.


7 See Cannon, supra note 2, at 408.

8 See id., at 372-76, 377-78. A third value, hierarchy (unequal allocations of resources and power that may come from use of the environment), is also associated with atomist views, but does not play a significant role in my analysis of Rapanos.

9 Shalom H. Schwartz & Maria Ros, Values in the West: A Theoretical and Empirical Challenge to the Individualism-Collectivism Cultural Dimension, 1 WORLD PSYCHIATRY 91, 11-12 (1995). See Shalom H. Schwartz, Mapping and Interpreting Cultural Differences Around the World, in COMPARING CULTURES: DIMENSIONS OF CULTURE IN A COMPARATIVE PERSPECTIVE 43, 63 (Tukumbi Lumumba-Kasongo et al. eds., 2004) (framing this individualistic aspect of American values as an "emphasis on affective autonomy and mastery at the expense of harmony"). See also Shalom H. Schwartz & Galit Sagie, Value Con-
developed nations, place a high value on assertive behavior that controls, directs or changes the natural environment to achieve personal goals. Those opposing collective intervention to protect natural systems often use the language of individualism, stressing the merits of self-interest and active self-assertion within a rights-based system. They may even acknowledge, at some level, the systemic nature of environmental problems but resist regulation urged by environmentalists as inimical to autonomy-mastery values.

These two competing worldviews have contrary implications for law. As compared to a model in which effects are assumed to be discrete or contained within a narrow physical or temporal sphere, the ecological model projects damage and thus, environmentalists argue, warrants intervention on a broader scale. The ecological model is more likely to assume secondary effects or externalities from environmental disturbances, even though they may be difficult to predict or measure, and thus supports the need to control those externalities. Supreme Court Justices that favor liberal access to the courts, a broad scope of federal regulatory power, limited property rights, and generous interpretations of environmental regulatory authority have tended to embrace the ecological model. Justices with contrary views on these issues have resisted it. In Rapanos these opposing worldviews are evident in the Justices' differing conclusions on the breadth of the Corps' CWA jurisdiction.

B. Rapanos in Context

Rapanos posed the issue of the Corps of Engineers' CWA jurisdiction over wetlands adjacent to non-navigable tributaries of navigable waters. Under the statute, the scope of the Corps' permitting authority is limited to "navigable waters," defined as "waters of the United States including the territorial seas." In its regulations, the Corps claims jurisdiction over "navigable waters," as traditionally defined, tributaries of those waters, other waters that "could affect interstate. . . commerce," and wetlands adjacent to ("bordering, contiguous, or neighboring") all of these. In United States v.

\[\textit{sensus and Importance: A Cross-National Study,} 31 \textit{J. Cross-Cultural Psychol.} 465, 492 (finding that personal achievement in the United States is unusually important and other-regarding values are unusually unimportant).\]

\[10 \text{ See Cannon, supra note 2, at 407-08.}\]


\[12 \text{ 33 C.F.R. § 328.3(a) (1999).}\]
Riverside Bayview Homes, Inc., its first encounter with the CWA’s jurisdictional scope, the Court upheld the Corps’ assertion of jurisdiction beyond traditional “navigable waters” to include wetlands that were adjacent to open waters. In its second encounter, Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC), the Court ruled that the Corps’ jurisdiction did not extend to “isolated ponds” that lacked a “significant nexus” to traditionally navigable waters.

In coming to different outcomes in these cases, the Court projected very different views of the aquatic world. In Riverside Bayview, the Court rested its rationale on the stated purpose of the Act: to protect and restore the “integrity” of the nation’s waters. It interpreted this purpose as incorporating “a broad, systemic view of the goal of maintaining and improving water quality.” The Court observed that the wetlands in the case were connected to other waters through the “hydrologic cycle” and further that wetlands performed valuable ecosystem services such as water filtration, flood prevention, and various “biological functions.” The unanimous opinion in Riverside Bayview was thus grounded in a robust notion of ecological interdependence, informed by the Court’s understanding of the CWA’s policy goals.

The Court’s decision in SWANCC, by contrast, was marked by a near total absence of recognition of the possible ecosystem consequences of filling the lakes and ponds north of Chicago. The Court in SWANCC briefly explained the contrary result in Riverside Bayview as based on “the significant nexus” in that case between the adjacent and “navigable waters.” But it made no effort to explore the possible nexus between the lakes and ponds in this case and other waters or the aquatic ecosystem more generally, as expansively portrayed in Riverside Bayview. It appeared simply to assume that “isolated waters” were just that: isolated physically, chemically, and biologically from “navigable waters” or other “waters of the United States” and therefore not within the Corps’ CWA jurisdiction. A dissenting opinion by Justice Stevens, joined

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15 Id. at 167-68, 171-72.
16 474 U.S. at 132.
17 Id.
18 Id. at 134-35.
19 531 U.S. at 167.
by Justices Souter, Ginsburg, and Breyer, vigorously challenged this assumption.20

Different interpretive approaches helped generate the different worldviews emanating from these cases. Riverside Bayview rested heavily on the Court’s broad understanding of Congress’ purpose to protect the aquatic ecosystem. The Court’s analysis of the statutory text, structure, and legislative history all worked to support a purpose-driven, ecosystem-regarding interpretation. Most significantly, the Court downplayed the potentially limiting effect of the term “navigable waters” used by Congress to denote the CWA’s jurisdictional scope and instead emphasized the statute’s relatively open definition of the term, “waters of the United States,” as accommodating a broad jurisdictional reach. Hence, the Court concluded the potentially limiting “navigable waters” language itself was of “limited effect.”21

In SWANCC, while acknowledging the Act’s integrity-protection purpose, the Court limited the goal’s influence by emphasizing the statute’s recognition of “primary responsibilities and rights of the States” in achieving that goal.22 Also, the Court gave the textual term “navigable waters” – deemed of “limited import” in Riverside Bayview – important work to do; it argued that “navigable waters” signified what Congress “had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or could reasonably be so made.”23 The Court’s technique in SWANCC, was to use a traditional or commonplace meaning of a statutory term to bound an aspiring ecological worldview; I will show that this technique appears even more assertively in Justice Scalia’s plurality opinion in Rapanos. The SWANCC Court reinforced this scope-limiting view of the text’s meaning with arguments based on statutory structure and canons of construction, including reading the statute to avoid significant questions of federalism and constitutionality under the Commerce Clause.24

Riverside Bayview and SWANCC left for the future the questions of the Corps’ CWA jurisdiction over non-navigable tributaries of navigable waters and wetlands adjacent to those tributaries. Rapanos presented both questions. In the first of the two cases decided

20 Id. at 174.
21 Id. at 172.
22 Id. at 174.
23 Id. at 172.
24 Id. at 172-74.
in *Rapanos*, the United States brought a civil enforcement action against Rapanos, his wife, and companies controlled by them, for unlawfully filling three tracts of wetlands that the Corps had determined were within its jurisdiction. Each of these tracts had a surface water connection with a ditch, drain, or stream that flowed ultimately into a traditionally navigable water. A federal district court upheld the Corps’ jurisdiction over these wetlands and the Sixth Circuit affirmed. In the second case, the Carabells sought and were refused a permit to fill a tract of wetlands adjoining a ditch that also drained ultimately into traditionally navigable waters but was separated from the wetlands by a man-made berm that prevented, at least under normal conditions, surface water flow from the wetlands into the ditch. The Corps’ jurisdiction was upheld by a district court in the Carabells’ appeal from the permit denial and the Sixth Circuit, again, affirmed.

On review, the Supreme Court reversed and remanded both cases, an outcome complicated by the diversity of views expressed in separate opinions by five of the Justices. Of these five opinions, three are central to the analysis here: Justice Scalia’s plurality opinion, joined by Chief Justice Roberts and Justices Thomas and Alito, vacating and remanding the cases for further proceedings under restrictive tests for determining the Corps’ jurisdiction; Justice Kennedy’s concurrence, agreeing to the remand but advancing a generally less restrictive test for jurisdiction; and a dissent by Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, opposing the remand.

All Justices agreed, as the narrowest reading of *Riverside Bayview* would require, that the Corps’ jurisdiction extended to traditionally navigable waters and wetlands adjacent thereto. Beyond that, Justice Scalia’s plurality opinion would extend jurisdiction only to “relatively permanent” standing or flowing bodies of water that drain to traditionally navigable waters and to wetlands with a “continuous surface connection” to such bodies of water. Justice Kennedy’s concurrence would extend Corps’ jurisdiction to non-navigable waters and adjacent wetlands that the agency could show had a “significant nexus” to traditionally navigable waters, measured by impact on the aquatic system. Justice Stevens’ dissent would uphold the application of the Corps’ regulations in these cases asserting jurisdiction over tributaries of tradi-

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26 *Id.* at 2248.
tionally navigable waters, whether permanent or intermittent, and wetlands adjacent to those tributaries. On remand, the dissent observed, the Corps’ jurisdiction over the Rapanos’ and Carabells’ lands should be reinstated if either the plurality’s or Justice Kennedy’s test were met, since the dissenting Justices would find jurisdiction in either case.27

C. The Analysis

These competing worldviews and associated values are evident in Rapanos. Justice Scalia’s opinion advances an atomistic worldview and makes room for mastery and autonomy values linked to that model in his interpretation of the CWA. Justice Stevens would substitute a generous version of the ecological model in his interpretation of the statute, giving sway to the harmony and collectivist values associated with that model. Justice Kennedy’s interpretation negotiates between the two models; consistent with his opinions in other environmental cases, however, he is relatively more sympathetic to the ecological worldview. The analysis that follows examines the role of these competing models in the interpretive enterprise, considering their relationship to the Justices’ preferred approaches to statutory interpretation and their applications in this case.

II. Justice Scalia’s Plurality Opinion

In his stance on constitutional issues such as standing, property rights, and the scope of federal regulatory power, and in his readings of some environmental regulatory statutes, Justice Scalia has signaled his allegiance to landowner autonomy and assertive resource use. He has combined this allegiance in environmental cases with vigorous resistance to the ecological model. In Lujan v. Defenders of Wildlife,28 for example, in concluding for the Court that environmental plaintiffs lacked standing, Scalia expressed his strong commitment to limited judicial access for beneficiaries of environmental legislation and a corresponding skepticism of claims of universal injury flowing from the ecological model. With characteristic rhetorical flare, he demolished expansive theories of standing based on ecological concepts, including the “ecosystem nexus” (whereby a person using part of an ecosystem adversely affected by defendant’s actions has standing even though the actions are

27 Id. at 2265.
located far away) and the “animal nexus” (whereby a person interested in seeing or studying an endangered species anywhere on earth affected by an action subject to federal court jurisdiction has standing). 29 His castigation of these nexus theories seemed intended to marginalize, if not reject entirely, injury arguments based on the genetic commons or ecosystem effects and on the ecological model that those arguments assume.

Writing for the majority in *Lucas v. South Carolina Coastal Council*, 30 Scalia rejected the stewardship obligations implied by the ecological model as limitations on private property and invoked principles of nuisance law developed in the pre-ecological era to prevent states from imposing those obligations without compensation. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 31 he dissented from a ruling upholding an administrative interpretation of the Endangered Species Act (ESA) prohibiting indirect harm to endangered species through destruction of their habitat. His concerns focused on the attribution of injury through attenuated and not fully predictable mechanisms of ecosystem interactions and the “large number of routine activities” on private land that this would subject to regulatory prohibition. 32 Similarly, in *SWANCC* Scalia joined Chief Justice Rehnquist for the Court in rejecting federal regulation of isolated waters based on their asserted ecological connections with distant jurisdictional waters.

In all these cases, Scalia not only eschewed the “pro-environment” outcome but also expressed his antagonism to the most basic precept of environmentalism – that humans are part of an interconnected biotic community, with attendant obligations to protect that community from adverse effects of their actions. Against this background, his refusal to make protection of aquatic ecosystems his guide in interpreting the CWA in *Rapanos* is quite predictable. 33

A. Scalia’s Interpretation of the CWA

The petitioners in *Rapanos* are made-to-order protagonists in Justice Scalia’s autonomy-mastery narrative. The Rapanos and the

29 Id. at 564-67.
32 Id. at 721.
33 See *Rapanos*, 126 S. Ct. 2208, 2259 n.8 (2006) (Stevens, J., dissenting) (characterizing the plurality in *Rapanos* as “defending its own antagonism to environmentalism”).
Carabells are landowning individuals, or families, prevented by regulation from economic gain through development or other physical alteration of their property. Scalia makes no mention of Rapanos’ high-handed efforts to avoid regulation, which both Kennedy’s and Stevens’ opinions lay out, but attends instead to the “discretion of an enlightened despot” wielded by the Corps and to the “immense expansion of federal regulation of land use” under the CWA.

After SWANCC, the Corps had continued to assert regulatory authority over dredging and filling in the tributaries of traditionally navigable waters and in wetlands adjacent to those tributaries. In Justice Scalia's account, the Corps regulations included intermittent (“ephemeral streams”) and man-made (“drainage ditches”) waterways as “tributaries” subject to its jurisdiction if they show a “high water mark.” The regulations provided a similarly liberal definition of adjacency: the Corps maintained jurisdiction over wetlands “neighboring” traditionally navigable waters or their tributaries, even if physically separated from those waters “by man-made dikes or barriers, natural river berms, beach dunes and the like.”

Justice Scalia expresses his concern that the Corps’ interpretations threatened to turn too much – not only waters but also land to the extent connected, however tenuously, to the aquatic ecosystem – into federally regulable “waters.” He then proceeds to cut the aggressively colonizing aquatic ecosystem down to size and to divide it into jurisdictional chunks small enough to protect traditional state and local land use prerogatives and, not incidentally, to make room for the aspirations of citizens like the Rapanos and Carabells. I analyze his arguments below, attending to his interpretation of statutory text and precedent and application of canons of construction to accomplish this task.

Using words in statutory text as devices of limitation, Justice Scalia imposes boundaries on an otherwise protean aquatic system.

34 Scalia has storiied their counterparts elsewhere, for example, in his opinion for the Court in Lucas (describing enterprising property owner prevented by state environmental rules from building houses on two beachfront lots) and in his dissent in Sweet Home, 515 U.S. at 714 (“the simplest farmer who finds his land conscripted [by Endangered Species Act regulation] to national zoological use”).
35 126 S. Ct. at 2214-15.
37 126 S. Ct. at 2217 (explicating 33 C.F.R. § 328.3 (1993)).
38 Id. at 2216 (explicating 33 C.F.R. § 328.3(c) (1993)).
39 Id. at 2222 (criticizing the Corps ’ Land Is Waters approach).
He acknowledges the CWA’s stated purpose to “restore and protect the chemical, physical and biological integrity of the nation’s waters” – a purpose invoked by the Corps to justify its expansive jurisdictional claims as necessary to assure protection at the ecosystem level. But he argues, as he has in similar connections and as the Court argued in SWANCC, that this stated, broad purpose is not the same as that of the particular authorities and mechanisms the statute created: in the CWA, Congress’ goal of ecological protection is offset by its stated intent “to recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources. . . .”\(^{40}\) He also argues that the extent of Congress’ commitment to its protection goal is limited by the statute’s key defined terms.

I. “Waters”

The Court’s focus in Riverside Bayview and SWANCC was on the role, if any, that “navigable” played in delimiting the CWA’s jurisdictional scope. In Justice Scalia’s plurality opinion in Rapanos, that focus shifts to “waters.” With scholastic rigor, Scalia mines that term to achieve two interpretational outcomes. First, in order to support Corps jurisdiction, “tributaries” to navigable waters must be fixed bodies of water with continuous flows; intermittent or ephemeral streams do not qualify, even if they may impact downstream water quality. Second, to come within the Corps’ jurisdiction, wetlands must have a continuous surface connection to a traditionally navigable water or a tributary; mere proximity is not enough, even if the wetlands perform ecological functions such as flood control.

In his analysis, Justice Scalia notes that in defining “navigable waters” as “the waters of the United States,” Congress used the definite article (“the”) and the plural form (“waters”). From this he infers that the reference was not to water in general, which could be present anywhere, but “more narrowly to water ‘[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes.”\(^{41}\) With this move, he establishes “waters” as discrete and bounded features of the landscape. As Kennedy’s concurrence and Stevens’ dissent point out, there are less restrictive definitions of “waters,” including “flood” or “inun-

\(^{40}\) 33 U.S.C. § 1251(b) (1994).
\(^{41}\) 126 S. Ct. at 2220-21 (quoting from WebSTer’s New International Dictionary (2d ed. 1954)).
dation,” that could have encompassed intermittent streams or even dry washes subject to periodic flooding. But Scalia dismisses these alternatives as more “poetic” than Congress could have intended in an “otherwise prosaic, indeed downright tedious, statute.”42 More fundamentally, accommodating these additional meanings would support the very result that he wished to avoid, turning land (e.g., “wet meadows,” “drain tiles,” “dry arroyos in the middle of the desert”) into regulated waters. This is just too silly or, as he puts it, “beyond parody.”43

Concluding that there is no ambiguity in the meaning of the CWA on this point, Justice Scalia grants no deference to the Corps’ more expansive interpretation.44 But even if there were ambiguity, he argues, two canons of construction would render the Corps’ interpretation impermissible; Chief Justice Rehnquist’s opinion for the Court in SWANCC applied these same canons of construction to similar effect. The first resists extension of federal authority into areas of traditional state and local power, such as land use, without a “clear and manifest” statement of congressional intent to do so. The second resists interpretations of agency jurisdiction that press the limits of constitutional power without a clear statement of congressional intent.45 Together with his restrictive, rule-like interpretations of text and precedent, Scalia uses these canons to shrink the CWA’s domain as a fraction of the aquatic ecosystem.

2. Adjacency

In his treatment of the adjacency issue, Justice Scalia similarly uses verbal analysis to create limiting jurisdictional boundaries. But on this issue, Scalia was forced to address Riverside Bayview, in which the Court had dealt with adjacent wetlands, albeit wetlands adjacent to “open waters” rather than tributaries. He produces a minimalist reading of that decision that limits the relevance of ecological interconnectivity and the statutory purpose that supports it.

In Riverside Bayview, the Court had held that wetlands adjacent to open waters were jurisdictional but did not elaborate on what was required to establish adjacency. In SWANCC, the Court observed that the result in Riverside Bayview turned on the “signif-

42 Id. at 2221.
43 Id. at 2222.
44 Id. at 2225, 2232.
45 Id. at 2224.
icant nexus between the wetlands and the ‘navigable waters’—a nexus fatally absent for the isolated ponds in SWANCC. Both Kennedy’s concurrence and Stevens’ dissent in Rapanos take this observation as justifying ecological interdependence as a basis for their more expansive jurisdictional interpretations in Rapanos. Scalia, however, sharply cabins it. Riverside Bayview, he argues, was a case in which the line between waters and land was ambiguous, as the wetlands in that case merged into open waters with no clear line of demarcation. In those limited circumstances, the Court recognized that an ecological connection could justify treating abutting wetlands as waters. That alone was the point of the reference to “significant nexus” in SWANCC. In circumstances where there is no ambiguity where waters begin and end—for example, where as in Carabell wetlands are surficially separated from neighboring waters by a berm—ecological considerations are irrelevant. In such cases the line between land and waters is clear and no complicating notions of ecological connectivity can be allowed to blur it.

In sum, Justice Scalia’s opinion establishes sharp boundaries between major features of the landscape—lands and waters—and uses those boundaries to limit the Corps’ regulatory encroachments. To accomplish this, he chops away the features of Riverside Bayview resonant with the environmentalists’ paradigm and converts that holding into a narrow case of unclear boundaries. He mines “waters” to extract hard-edged meanings for the term as against more permeable possible meanings compatible with notions of ecological interdependence underlying the Corps’ jurisdictional claims. In his hands, the word becomes a tool to bound, limit, and close off wider connections within the landscape.

It is not that Scalia denies the ecological connections between or among waters or between waters and land. Indeed, the existence of those relationships seems implicit in his struggle to prevent their consideration in defining the CWA’s scope. What he rejects are their implications for the federal regulatory scheme. He would control those implications by imposing a simplifying, limiting law grid on the living topography, dividing up the landscape somewhat arbitrarily perhaps, but in a manner consistent with his preferred institutional arrangements and the values they reflect. In Defenders, the Article III standing case, dissenting Justice Blackmun

\[47\] A berm is an earthen wall or bank.
\[48\] See Rapanos, 126 S. Ct. at 2230.
accused Justice Scalia of applying “rigid principles of geographic formalism” to defeat environmentalists’ claims.\textsuperscript{49} In \textit{Defenders}, Scalia based this formalism on traditional nuisance law; in \textit{Rapanos} he bases it on statutory text and canons of construction. However, the effect on the legal landscape is similar.

\textbf{B. Scalia’s Textualism}

Scalia’s opinion in \textit{Rapanos} might plausibly be seen as stemming from his commitment to a “textualist” approach to interpretation rather than an anti-ecological worldview, but at the level of values, Scalia’s textualism and atomism are complementary. Textualists like Scalia are understood to seek the “public meaning” of statutes as enacted, rather than congressional purpose or intent.\textsuperscript{50} They emphasize statutory text and structure, invoke canons of construction, and discount legislative history or ignore it entirely.\textsuperscript{51} Two standard arguments are given for the textualist approach. First, multi-member legislatures, as distinct from individuals, do not have a discernible “intent.” Hence the intent of a statutory provision, separate from the meaning that a reasonable person reading the provision would give it, is a fiction.\textsuperscript{52} Interpretive approaches that seek intent behind the enacted language create room for judges to insert their own preferences and, Justice Scalia has argued, “render democratically adopted texts mere springboards for judicial lawmaking.”\textsuperscript{53} Second, ascribing an intent that is not ascertainable from the statute is not fair to those subject to the statute.\textsuperscript{54} Citizens are entitled to presume that what is not specifically prohibited is allowed, and the derivation of intent-based meanings not reasonably apparent in statutory text violates this presumption. This textualist preference for plain meaning tends to favor narrow interpretations of the scope of regulatory statutes to the benefit of those whom Congress would regulate.

Textualists’ emphasis on plain meaning may yield less deference to agency interpretations of regulatory statutes. Although he embraces the rule of deference announced in \textit{Chevron U.S.A., Inc.}

\textsuperscript{49} 504 U.S. 555, 595 (1992).
\textsuperscript{51} William N. Eskridge, Jr., \textit{Dynamic Statutory Interpretation} 226-29 (1994).
\textsuperscript{52} Antonin Scalia, \textit{Judicial Deference to Administrative Interpretations of Law}, 1989 Duke L. J. 511, 517.
\textsuperscript{54} Id. at 17.
v. Natural Resources Defense Council,\textsuperscript{55} Justice Scalia has stated that the predisposition of textualists to find plain meaning in the words of a statute will likely produce less "agency-liberating ambiguity" and therefore less receptivity to agency interpretations.\textsuperscript{56} In his view, non-textualists, in allowing "the apparent meaning of a statute to be impeached by the legislative history," will be more likely to find ambiguity and hence a range of agency interpretations to which deference is due.\textsuperscript{57} Thomas Merrill rejects Scalia's claim that textualism's emphasis on plain meaning necessarily reduces the number of occasions on which courts will defer to agency interpretations: intentionalists might just as well argue that consulting legislative history may eliminate ambiguities in statutory text and thus reduce occasions when courts are unable to determine a controlling meaning.\textsuperscript{58} But Merrill does suggest that textualism's search for plain meaning occasions a kind of judicial ingenuity or creativity that is "subtly incompatible with an attitude of deference toward other institutions -- whether the other institution is Congress or an administrative agency."\textsuperscript{59}

A Justice with strong allegiance to autonomy-mastery values might be expected to prefer an interpretive approach with these democratic, notice-giving, and discretion-limiting characteristics. He might be concerned that agencies tasked with implementing regulatory statutes will tend to advance the state's collectivist purposes at undue expense to those values.\textsuperscript{60} Even if he could not be certain that these agencies would exhibit this tendency, he might be more concerned about preventing overly aggressive agency interpretations than he is interested in permitting less aggressive interpretations. Thus, he would still be attracted to a method that tended to contract the interpretive discretion of agencies, even if he knew that in some cases the plain meaning approach would lead him to require agencies to take a more rather than less expansive view of their authorities.\textsuperscript{61} A general distrust of administrative

\textsuperscript{55} 467 U.S. 837 (1984).
\textsuperscript{56} Scalia, Judicial Deference to Administrative Interpretations of Law, supra note 52, at 521.
\textsuperscript{57} Id.
\textsuperscript{58} Thomas Merrill, Textualism and the Future of the Chevron Doctrine, 72 WASH. L. Q. 351, 366-67 (1994).
\textsuperscript{59} Id. at 372.
\textsuperscript{60} Kenneth A. Shepsle & Mark S. Bonchek, Analyzing Politics: Rationality, Behavior, and Institutions (1997).
\textsuperscript{61} E.g., City of Chicago v. Envtl. Defense Fund, 511 U.S. 328 (1994) (writing for the Court, Justice Scalia employed textualist methods to determine a broader jurisdictional scope for a federal regulatory statute than was asserted by the implementing agency); see
agencies, viewed as agents of the regulatory state, would further support this methodological preference.

A recent empirical study offers some insight into the relationship between textualism and a Justice’s propensity to validate agency interpretations of statutes, as at issue in Rapanos. Thomas Miles and Cass Sunstein canvassed Supreme Court decisions from 1989 to 2005 that reviewed agency interpretations of law, and focused on the sixty-nine decisions in which the Court explicitly applied Chevron. They found a strong correlation between the ideological orientations of the Justices and their receptivity to agency interpretations. Conservative Justices (predominantly textualists) are significantly more likely to validate agency interpretations whose ideological content is conservative. Liberal Justices (predominantly non-textualists) are significantly more likely to validate interpretations with liberal ideological content. Swing Justices (O’Connor and Kennedy) show no significant variation in response to ideological content.

Miles and Sunstein’s findings are suggestive on the question of whether the textualists’ preference for plain meaning exerts an effect distinguishable from the direct influence of a Justice’s substantive values on outcomes. The authors conclude that ideological preferences alone are not sufficient to explain the variations in the data: conservative Justices tend to show less frequent deference to agency interpretations than their liberal counterparts. In particular, although conservative-textualist Justices show higher validation rates during Republican administrations than during Democratic administrations, their validation rates during Republican administrations are still lower than those of their liberal, non-textualist


63 Id. at 825-26; see also Ruth Ann Watry, Administrative Statutory Interpretation: The Aftermath of Chevron v. Natural Resources Defense Council 67-71 (2002) (finding, in a similar data analysis, that “textualism significantly decreases the likelihood that a justice will defer to agency outcomes only when those outcomes have been in a liberal direction. It appears that conservative justices . . . may be using textualism as a means of refraining from deference to liberal agency actions.”).


65 E.g., SWANCC, 531 U.S. 159, 174 (2001) (Stevens, J., dissenting) (arguing for deference to Corps’ interpretation extending regulatory authority to isolated waters under the Clean Water Act).
counterparts. As one explanation for this asymmetry, Miles and Sunstein cite Justice Scalia’s assertion that textualists are more likely to conclude that a text is unambiguous and are therefore less likely to defer to the agency.

Miles and Sunstein’s study is consistent with the thesis that a Justice’s values affect the selection as well as the application of an interpretive method. Justices with autonomy-mastery leanings are likely, as a general matter, to prefer a plain meaning approach, because that approach will tend to cabin the threat to those values posed by the regulatory state. They will also be inclined to apply their preferred approach in direct service of those values (i.e., contesting regulatory interpretations adversely affecting property interests and economic freedom). This explains both why Justice Scalia is a textualist and why, as a textualist, he deploys his methods as he does in cases such as Rapanos.

Textualists also evidence a partiality for rules both in their approach to interpreting statutes and in the interpretations they produce, and this partiality is likewise traceable to values. Textualist rules for interpreting statutes include canons of construction of two sorts – canons such as expressio unius est exclusio alterius that address linguistic usage, and substantive canons that impose policy preferences. Although arguments can be made for both kinds of canons as tools for getting at congressional intent, the textualists’ selection and application of substantive canons tend to limit remedial statutes, such as the CWA, as we see in Justice Scalia’s opinion in Rapanos. Although Scalia, speaking for the

66 Miles & Sunstein, supra note 62, at 837.
67 Id. at 838. But see Watry, supra note 63 at 69-70 (concluding that among Supreme Court Justices “a textualist approach to statutory interpretation as a general matter is not to a statistically significant degree associated with a decreased likelihood to defer to administrative agency interpretations of statutes”).
68 See Michael C. Dorf, The Supreme Court 1997 Term – Foreward: The Limits of Socratic Deliberation, 112 HARV. L. REV. 4, 20 n.74 (1998); Caleb Nelson, What is Textualism? 91 VA. L. REV. 347, 373-74 (2005). Although definitions differ, the essence of a rule is that in the presence of factors specified in the rule, a decisionmaker is required to reach a result prescribed by the rule; in its application, a rule is not open to amendment in light of the substantive objectives or purposes that underlie its formulation. See FREDERICK SCHAUER, PLAYING BY THE RULES A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 83-84 (1991) (arguing the absence of “continuous malleability” as the essence of rules). Standards, by contrast, are substantive objectives or purposes, which the decisionmaker is to advance directly through application to the facts of a particular situation; in applying standards, a decisionmaker must assess each case separately in light of the guiding objectives. Id. at 77-78 (describing “particularistic decisionmaking”).
“honest textualist,” has elsewhere expressed skepticism over “dice-loading” rules of interpretation that favor one substantive outcome over another,70 his opinion nonetheless relies on two substantive canons – the canon of avoidance of constitutional questions and the presumption in favor of readings that reflect historical allocations of state and local authority – are substantive. As applied to federal regulatory programs adopted pursuant to the commerce power to address systemic environmental problems, these canons have the inevitable effect of constricting federal regulatory domains. More generally, they also have an arguably anti-regulatory thrust to the extent they restrict federal regulation of activities that, while within the scope of a state’s police powers, may require federal expertise or institutional capacity to be effectively addressed.71 Textualists on the Court have shown no inclination to consider contrary canons that could also claim to give effect to likely congressional intent.72 In a 1997 essay on interpretation, Scalia dismissed a competing canon – that remedial statutes are to be liberally construed to achieve their purposes – as a tool “used . . . to devastating effect in the liberal courts.”73

In Caleb Nelson’s account, a principal distinguishing feature of textualists is their preference for rule-like rather than standard-like interpretations.74 Textualists seek to establish guidelines as to how statutory provisions are to be applied, incorporating judgments about what factors are relevant to the statute’s application or how those factors are to be weighed; this includes an affinity for drawing firm distinctions (as for example in Rapanos, between land and waters) that are to be adhered to by lower courts and implementing agencies.75 This preference is grounded, Nelson states, on the textualists’ sense that rulelike interpretations may better approximate what Congress meant by what it said than do standardlike interpretations shaped by a court’s understanding of an underlying purpose.76 Not only do textualists tend to read regulatory statutes

70 Id. at 28-29 (making an exception for “sovereign immunity”).
71 Thirty-three states and the District of Columbia filed an amici brief in Rapanos “asserting that the Clean Water Act is important to their own water policies.” Rapanos, 126 S. Ct. 2208, 2246 (2006) (Kennedy, J., concurring).
72 See, e.g., Daniel Farber, Eco-Pragmatism 126-27 (1999) (proposing a “green” canon favoring protection of environmental values based on policies adopted by Congress in the National Environmental Policy Act).
75 Nelson, supra note 68, at 374-75.
76 Id. at 374-77.
as "having somewhat smaller 'domains' than their counterpart intentionalists,"77 but also in their looseness they provide distinct boundaries for those smaller domains that clarify expectations and protect against future expansions. By minimizing and containing legislative intrusions on the liberty and property of citizens, these features of textualism advance the same autonomy and mastery values that support the atomistic worldview.

In a well-known 1967 article, Duncan Kennedy explored the relationship between substantive values and form in private law. He argued that that a preference for rules is associated with "individualism" (pursuit of self-interest within a framework of rights); a preference for standards, by contrast, is associated with "altruism" (restraint in asserting one's self-interest over the interests of others).78 Kennedy asserted these associations between looseness and individualism based on the identity of the arguments that are made that support them. His analysis focused on contract law, and later commentators have argued effectively that the same identity of arguments for rules and individualism does not exist in other contexts, such as torts or criminal law.79 More generally, Frederick Schauer has argued that rules might well operate as instruments of altruism rather than individualism, as they suppress differences among members of a community and promote cooperation.80

Although there may be no fixed logical connection between form and substance, Justices may make instrumental choices between rules and standards in advancing substantive values. We might expect a contemporary Justice holding strong autonomy-mastery values to show a general preference for rule-like rather than standard-like interpretations for the same basic reasons that he prefers plain meaning. Desiring to prevent unwarranted intrusions of public-regarding regulation on background principles of private property and economic freedom, he might be concerned that lower federal court justices, applying the purposes of remedial statutes in standard-like fashion, would tend to give these statutes

77 Id. at 416-17. For a good example of Scalia's use of textual analysis to shrink the reach of a federal regulatory statute, see Sweet Home, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting).
78 Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1967).
80 Schauer, supra note 68, at 162-66.
overly generous applications. Similarly, the Justice might be concerned that agencies would tend to be overzealous in implementation if not sufficiently constrained.

A Justice with these concerns could be expected generally to favor rulelike interpretations, because such interpretations would more effectively restrain the activist inclinations of lower court judges and the zeal of mission-driven agencies. Justice Scalia has argued for rule-like rather than standard-like interpretations by the Supreme Court as a way of limiting judicial discretion in the interests of equal treatment and predictability, but the inevitable effect is to reign in agency discretion as well.81 He has also argued that rule-like decisions can enable courts to “stand up to . . . the popular will” when necessary to protect the rights of individuals.82 The beneficiaries of this ruleness include “individuals and minorities” subject to regulation by majority-pleasing programs “such as environmental protection.”83

Even if our hypothetical Justice were uncertain as to the direction discretionary exercises by lower court judges and bureaucrats would tend to take, he might be more concerned about preventing regulatory excess than facilitating the least possible regulatory intrusion. While framing his rules in as limiting a form as he could justify, he would understand that his rule might preclude future applications that he might otherwise prefer. Nevertheless, he would opt for the disciplining effect of rules.

Thus, as with plain meaning, it is reasonable to conclude that the autonomy-mastery values held by textualist Justices influence their general preference for ruleness. The substantive canons favored by textualists are selected to advance those values in an obvious way. The textualists’ general preference for rule-like interpretations functions more subtly, tending to narrow and constrain the discretion of lower courts and agencies as a hedge against more aggressive regulation, in much the same way as plain meaning. In cases such as Rapanos, we see this ruleness deployed to precisely this end.

For the reasons already discussed, the ecosystem model presents a particular threat to autonomy-mastery values, and the crucial, purpose-defining role of that model in the CWA helps explain the vigor with which Justice Scalia deploys his textualist tools in Rapanos.

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82 *Id.* at 1180.
He truncates both the statutory term “waters” and the precedent of Riverside Bayview to create a rule-like construct that would control future courts and jurisdictionally aggressive agencies and provide some relief and certainty for the regulated community. He applies substantive canons of construction to bolster the outcome. His rhetoric tends toward the heatedly dismissive (“beyond parody”), as it has in other settings in which he has battled expansive regulation linked to the ecological worldview. As in other cases where he has confronted this worldview in a regulatory setting, Scalia has distinguished himself not so much by an “anti-environment” stance as, in Justice Stevens’ phrase, by an “antagonism to environmentalism” itself.  

III. JUSTICE STEVENS’ DISSERT

While Justice Scalia has been the adversary of the ecological model, Justice Stevens has, in recent years, been its champion. Although he concurred in the judgment of the Court in Defenders, Stevens disagreed with Scalia’s analysis of the standing question, arguing that injury might be based on an established interest in a distant species, which he likened to “the interest in a relationship among family members that can be immediately harmed by the death of an absent member.” He dissented from Scalia’s opinion for the Court in Lucas, and particularly Scalia’s use of common law to protect property owners from changing expectations in a new ecological era: we must make room, he contended, for “evolving understandings of property rights” based on new knowledge of the vulnerability of species, wetlands and coastal systems. Stevens wrote for the majority in Sweet Home, upholding ecosystem protection for endangered species against Scalia’s vehement dissent. And he led the dissenters in SWANCC, arguing that even ostensibly “isolated” waters could support CWA jurisdiction based on hydrological and ecological connections with distant waters. It is therefore no surprise that his dissenting opinion in Rapanos, joined by the same three justices who joined his dissent in SWANCC, posits protection of an extended, interconnected aquatic ecosystem

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84 Rapanos, 126 S. Ct. 2208, 2259 n.8 (2006) (Stevens, J., dissenting). See also id. at 2246 (Kennedy, J., concurring) (arguing that the plurality opinion is “unduly dismissive” of environmental interests).
as Congress’ controlling concern and the touchstone for an expansive regulatory jurisdiction under the CWA as embodied in the Corps’ regulations.

A. Justice Stevens’ Interpretation of the CWA and Deferral to the Corps

Stevens’ argument for affirmance is, in its outlines, straightforward. In stating its purpose to protect “the chemical, physical, and biological integrity of the Nation’s waters,” Congress meant that the goal of maintaining and improving water quality was to be understood in broad, ecosystemic terms. “Wetlands” adjacent to tributaries of “navigable waters,” as those terms are defined by the Corps, generally perform ecological functions that protect water quality. The jurisdictional term, “waters,” is ambiguous, and therefore the Corps has discretion is establishing the lines between land and waters. Because they are a reasonable construction of ambiguous statutory language and fully consistent with Congress’ purpose of protecting the aquatic ecosystem, the Corps’ definitions are entitled to Chevron deference and should be upheld.

Stevens’ opinion gives much greater weight to congressional purpose – and particularly the “integrity”-protecting purpose – than does Scalia’s. It also differs importantly in its understanding of the statutory text and relevant precedents.

In Scalia’s minimalist rendering of Riverside Bayview, that case is about a narrow and unique class of “waters” – wetlands that flow continuously into open waters such that it is difficult to tell where the wetlands end and the waters begin; for this narrow set in which boundaries are hard to determine, the Corps may consider ecological connections in deciding to assert jurisdiction. For Stevens, by contrast, Riverside Bayview sanctions a principle of ecosystem protection broadly applicable to the universe of waters potentially subject to CWA jurisdiction. By its own terms, Stevens argues, Riverside Bayview addressed the Corps’ jurisdiction over “wetlands adjacent to navigable bodies of waters and their tributaries.”

There is no evidence in the Court’s opinion in that case that the Justices were only considering wetlands that had a continuous flow into continuously flowing adjacent waters; indeed, there is no evidence that there was continuous flow from the wetlands in that

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90 Rapanos, 126 S. Ct. 2208, 2255 (Stevens, J., dissenting) (quoting Riverside Bayview, 424 U.S. 121, 123) (emphasis added).
case. The Court deferred to the Corps’ assertion of jurisdiction over this general class of wetlands as advancing “congressional concern for protection of water quality and aquatic ecosystems.”

It is perhaps stretching a point to say, as Stevens seems to, that the specific issues in Rapanos were resolved by Riverside Bayview. But what this earlier case does legitimately offer Stevens is the enthusiastic embrace of a notion of “waters” as highly interconnected aquatic systems, in which various components function together to provide natural services, and the general understanding that Congress intended to extend protection to individual components of these systems. Just as Scalia emphasizes SWANCC, which implicitly rejected the ecological model in its holding and studiously avoided any consideration of potential ecosystem connections, Stevens dismisses SWANCC as irrelevant. “SWANCC had nothing to say about wetlands,” Stevens remarks, “let alone about wetlands adjacent to traditionally navigable waters or their tributaries.”

Stevens not only diverges from Scalia in his interpretation of the Court’s precedents but also in his reading of the statutory text. Neither Webster’s 2d nor the practice of topographers, he claims, supports Scalia’s definition of “waters” as requiring continuous flow; “common sense and common usage demonstrate that intermittent streams, like perennial streams, are still streams.” Nor does the language of the statute support the requirement that wetlands be connected to other waters by continuous flow. Consistent with keeping the CWA open to the Corps’ ecologically based regulatory approach, Stevens interprets “waters” as largely open-ended, susceptible to interpretive possibilities consistent with Congress’ ecological purpose. The jurisdictional words by themselves do not draw clear lines, in his view; they allow lines to be drawn where necessary to protect ecosystem integrity. This is in sharp contrast to Justice Scalia’s use of the word as the source of boundaries that constrain and limit what he sees as the open-ended globalism of ecological protection.

Justice Stevens disputes the plurality opinion’s reliance on the canons of avoidance of constitutional issues and intrusions into areas of traditional state authority. Congress has made the determination that water quality should be protected at the source,

91 Id. at 2255 (quoting Riverside Bayview, 424 U.S. at 133).
92 Id. (“Our unanimous opinion in Riverside Bayview squarely controls these cases.”).
93 Id. at 2256.
94 Id. at 2260.
whether permanent or intermittent, and it plainly has the power under the Commerce Clause to regulate on a watershed or system-wide basis to protect navigable waters and their tributaries.95

Although Justice Stevens would uphold the Corps’ jurisdictional regulation, his method in coming to this result is anything but rule-like. Rather, he applies a standard (the CWA’s purpose to protect the integrity of the aquatic system) to the facts before the Court (the regulations adopted by the Corps) and determines that the Corps’ regulations are consistent with the standard. Concluding only that the Corps’ interpretation is reasonable, Stevens’ opinion does not preclude alternative interpretations that might also fulfill this standard.

Two features of Justice Stevens’ ecological worldview are of particular importance not only in distinguishing Justice Scalia’s views but also in understanding the more subtle differences between Stevens and Justice Kennedy. Drawing support from Riverside Bayview, Stevens’ aquatic system is expansive. It includes water quality functions, such as storage of storm waters and flood control and water purification, and also “nesting, spawning, rearing and resting sites for aquatic or land species.”96 He advanced this broad view in SWANCC, arguing that even “isolated waters” could be included not only because they were likely to be hydrologically connected to other waters but also because they provided habitat for waterfowl and other species. While generally sympathetic to the ecological view, Kennedy generally avoids mentioning “habitat” among the water quality concerns addressed by the Act and focuses instead directly on water flow and purity.

Also Justice Stevens accepts a presumption that disturbances of one part of the aquatic ecosystem will produce significant impacts on other parts of the system. Or at least he is willing to grant the Corps’ claims of jurisdiction over adjacent wetlands based on categorical determinations of ecosystemic significance, even if not every individual adjacent wetland can be shown to have that significance.97 Justice Kennedy’s concurrence, as we will see, refuses to follow this presumption but instead requires a showing by the Corps of significant nexus to navigable waters as a condition of jurisdiction. In both these features of his analysis, Stevens aligns himself more closely than Kennedy with the universalism of the environmentalists’ ecological model. With a more qualified

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95 Id. at 2261-62.
96 Id. at 2257.
97 See id. at 2256 (quoting Riverside Bayview, 474 U.S. 121, 135 n. 9).
embrace of the model, he might have commanded a majority of the Court.

B. Justice Stevens’ Intentionalism

As with Justice Scalia, Justice Stevens’ posture in *Rapanos* might be explained by his approach to statutory interpretation rather than degree of affinity for the ecological model. But in the final analysis, just as we found with Scalia, Stevens’ interpretive preferences reflect the same values that shape his response to that model in legal settings.

I use the label “intentionalist” for Justice Stevens, although that classification may be more debatable than calling Justice Scalia a textualist. Thomas Merrill describes Stevens as “the last true-blue holdout in favor of intentionalism and legislative history in statutory interpretation” and the chief antagonist of the textualists led by Scalia.98 Others might classify Stevens as a purposivist of the Hart and Sacks legal process school, in which judges are to seek out the principle or the purpose of the law and apply it to the case before them.99 But the Hart and Sacks approach has itself been called the “leading intentionalist theory,”100 and I use “intentionalist” here to include the purposivist elements of Stevens’ interpretive method.

Like textualists, intentionalists look to statutory language and structure, but they also look to legislative agreement on purposes or goals as a guide to interpretation, and they may use a perceived legislative consensus on policy goals to extend jurisdiction beyond statutory terms as they might otherwise be understood. A standard justification for this approach is respect for the democratic process. Legislative intent is the final measure of the people’s will, as determined by their elected representatives, and where a statute’s reflection of that will is imperfect, it is the job of the courts to recover and express it. This approach assumes, as the textualists generally do not, that a legislative intent distinct from the statute may be ascertainable through the conflicted and convoluted legislative process, although intentionalists understand that assigning intent or purpose to a collective body is more complex than

98 Merrill, *supra* note 58, at 357.
100 Id. at 26. See also Caleb Nelson, *supra* note 68, at 455-56 nn. 20-22.
assigning intent or purpose to an individual.\textsuperscript{101} Intentionalists give correspondingly less attention to the expectations of property owners or others whose activities may be restrained, while seeking the full effectuation of the statute's protective purposes. Thus, with statutes like the CWA that are understood to have an underlying remedial or prophylactic intent, the intentionalists tend to produce relatively generous readings of statutory authority.\textsuperscript{102}

With their emphasis on statutory purpose rather than plain meaning, Stevens and other intentionalists can be expected generally to show greater deference to agency interpretations of regulatory statutes than their textualist counterparts. The author of the opinion for the Court in \textit{Chevron}, Justice Stevens is closely identified with the doctrine of deference announced in that case. And one can see how a Justice with strong collectivist-harmony values would prefer an approach that tended to support agency interpretations. He might believe that agencies will be tend to be diligent in advancing the public-regarding purposes of statutes they are charged to implement and thus be inclined to grant them space to do their work. Even if he cannot be certain that agencies will exhibit this tendency, he might be more concerned about unduly restricting agency discretion than in preventing under-implementation. This preference is consistent with a general receptivity to the exercise of agency discretion, based on a faith in agency expertise and political accountability.\textsuperscript{103} Thus, he might still favor a method that tended to sanction the interpretive discretion of agencies, even if he knew that in some cases that method would lead him to uphold agencies' taking a less expansive view of their authorities.\textsuperscript{104}

Miles and Sunstein's \textit{Chevron} study accords with this analysis. As discussed above, the validation rates of liberal-intentionalist justices, like the rates of their conservative-textualist counterparts, vary with the ideological content of the agency interpretation.\textsuperscript{105} But the validation rates of the liberal-intentionalists are higher overall. Miles and Sunstein's explanation for this difference includes not only the effect of the conservative-textualists' empha-


\textsuperscript{102} For a good example of Stevens' use of intentionalist analysis to support an expansive interpretation of a federal regulatory statute, see \textit{Sweet Home}, 515 U.S. 687 (1995).

\textsuperscript{103} Miles and Sunstein, \textit{supra} note 62, at 838.

\textsuperscript{104} See City of Chicago v. Envtl. Defense Fund, 511 U.S. 328 (1994) (Stevens employed his intentionalist method to argue, in dissent, for a narrower jurisdictional scope for a federal regulatory statute than was adopted by the majority.).

\textsuperscript{105} Miles and Sunstein, \textit{supra} note 62, at 825-26.
sis on plain meaning, as already discussed, but also the liberal-intentionalists' faith in the competence and accountability of administrative agencies.106

These findings are consistent with the thesis that Justices with an affinity for collectivist-harmony values will select and apply an interpretive method that advances those values. Those Justices are likely to prefer intentionalism because it facilitates the expression of those values through the public-regarding purposes of regulatory legislation, and they will apply their preferred approach to that same end (e.g., to uphold expansive agency interpretations of regulatory statutes). This explains both why Justice Stevens is an intentionalist and why he uses his intentionalist methods as he does in *Rapanos*.

Intentionalists are less inclined to interpretive rules and rulelike interpretations than textualists. They criticize canons of construction as artificially limiting judicial consideration of "all available evidence of Congress' true intent when interpreting its work product."107 The canons are oversimplifications that risk sacrificing congressional purpose to consistency and predictability.108 Thus, rather than offer competing canons of their own, intentionalists are typically left in a defensive posture, like Stevens in *Rapanos*, disputing the relevance and force of arguments based on canons relied upon by textualists.

As Caleb Nelson observes, intentionalists also tend to favor standard-like interpretations that are flexible and open-ended to allow full realization of underlying statutory goals. "A 'standard' might simply state those goals and leave implementing officials in charge of deciding how best to promote them under each individual set of facts that might arise."109 The interpretation advanced in Justice Stevens' dissent in *Rapanos*, for example, would recognize discretion on the part of the Corps to assert jurisdiction as necessary to protect aquatic ecosystems and would not constrain that discretion even to the extent proposed by Justice Kennedy by requiring documentation of a significant nexus to water quality. Thus, not only do intentionalists tend to read regulatory statutes as having more generous domains than do textualists,110 they also grant greater flexi-

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106 Id. at 838.
109 Id. at 374-75.
110 Nelson, supra note 68, at 416-17. This is a tendency, not an inevitability. In *City of Chicago v. Env'tl. Defense Fund*, 511 U.S. 328 (1994), for example, Scalia employed his
bility on the part of agencies operating within those domains to determine as-applied boundaries. These interpretational tendencies, as applied to federal regulatory statutes, reflect the collectivist-harmony values that we also see reflected in the ecological model.

A Justice with collectivist-harmony predilections would generally prefer standard-like rather than rule-like interpretations for roughly the same reasons he emphasizes purpose over text. Standard-like interpretations leave room for the further expression and continued evolution of the remedial purposes that animate most modern federal legislation. The Justice might believe that lower courts and agencies would be inclined to advance those purposes to their fullest extent and might be concerned that rule-like interpretations would arbitrarily constrain these decisionmakers in that endeavor. Even if he were uncertain as to the direction discretionary exercises by lower court judges and bureaucrats would tend to take, he might be more concerned about limiting the scope of future decisions than in preventing bad ones. Like his emphasis on statutory purpose, to which it is closely related, this preference would be supported by faith in the competence and fidelity to the mission of agencies over the long term.

Thus, there is a plausible relationship between the collectivist-harmony values held by intentionalist Justices and the tendency of those Justices to choose standards over rules, avoiding both interpretive rules and rule-like interpretations. The intentionalists’ preference for standard-like judicial interpretations reflects the premium these Justices place on legislative goals that reflect those values, as in the CWA and other public-regarding regulatory statutes, and their desire to keep open legal space for future advancement and realization of those goals.

IV. Justice Kennedy’s Concurrence

Justice Kennedy has with some consistency occupied the space between the Court’s ecologists and atomists, expressing a measured sympathy for the ecological model, albeit often while concurring in a result seemingly in tension with the model. In his concurrence in Defenders, joined by Justice Souter, he qualified Justice Scalia’s vehement dismissal of the “nexus” theories, arguing

textualist method to establish a broader jurisdictional scope for a federal regulatory statute than was asserted by the implementing agency. For a good example of Scalia’s use of textual analysis to shrink the reach of a federal regulatory statute, see Sweet Home, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting).
that "in different circumstances a nexus theory . . . might support a claim to standing." Concurring again in *Lucas*, he maintained that the common-law of nuisance was "too narrow a confine for the exercise of regulatory power in a complex and interdependent society." Speaking ecologically, he observed that "[c]oastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit." He joined the majority in *Sweet Home*, rejecting Justice Scalia’s argument against an ecosystem-based interpretation of the ESA. He joined the majority in rejecting ecological arguments for jurisdiction over the isolated ponds in *SWANCC*, presumably because he agreed with the conclusion that there was no "significant nexus" between the ponds and traditionally navigable waters.

Thus, while generally receptive to the possibility of ecosystemic connections between places and events, Kennedy has not indulged the presumption of harm often associated with the ecological model but has tended to require proof of particular vulnerabilities or linkages that would justify intervention. It is entirely predictable in *Rapanos* not only that arguments of ecological interdependence would resonate with him but also that he would want evidence of significant connections to support the Corps’ jurisdiction.

A. Kennedy’s Middle Ground

In his concurrence, Justice Kennedy agrees with Justice Stevens that Justice Scalia’s plurality opinion misreads the statutory text and precedents and gives insufficient deference to the protective purpose of the statute and to the Corps’ authority to craft a program that achieves that purpose. Like Justice Stevens, he criticizes the plurality’s reliance on the avoidance canons and argues the inapplicability of those canons to his own interpretation. But he also criticizes Stevens’ dissent for ignoring the import of the word “navigable” in “navigable waters.”

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113 Id.
115 Id. at 2242-43.
116 Id. at 2246, 2249 ("This interpretation of the Act does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption.").
For Kennedy, the jurisdictional touchstone is not ecological connectivity in general but whether non-navigable waters, including wetlands, "are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."\textsuperscript{117} The Corps may assert general jurisdiction over wetlands adjacent to traditionally navigable waters, as \textit{Riverside Bayview} held, because it is reasonable to infer "ecologic connection" between those wetlands and the navigable-in- fact waters. The relationship between traditionally navigable waters and wetlands adjacent to tributaries, however, is more attenuated and uncertain. Under \textit{SWANCC}, a significant ecological relationship between this more remote class of wetlands and navigable waters is crucial to the Corps' jurisdiction, and it may not be presumed. The Corps' regulations, based on Kennedy's analysis, do not assure that this significant nexus test is met. Thus, at least until "more specific regulations" are adopted, Kennedy would have the Corps demonstrate a significant nexus on a case-by-case basis when it claims jurisdiction over wetlands adjacent to non-navigable tributaries.

\textbf{B. Kennedy's Pragmatism}

On the Rehnquist Court, Justice Kennedy and Justice O'Connor shared the role of swing Justice; with O'Connor's retirement, this seems to be a role of which Kennedy is sole possessor. For the period of Miles and Sunstein's study, 1989 to 2005, the rates at which Kennedy and O'Connor validated agency interpretations (67 percent) fell halfway between the lower rates of the conservative-textualists (55 percent) and the higher rates of the liberal-intentionalists (70 percent).\textsuperscript{118} Unique among his colleagues on the Court, Kennedy's validation rates were virtually the same for agency interpretations classified as liberal based on their content and those classified as not liberal.\textsuperscript{119} From this data, Kennedy would appear either to have no dominant value preferences (or ideological alignment) or, unlike his colleagues, to be able and willing to suppress his value preferences in administrative cases.

Justice Kennedy is considered a textualist, if not so strong a textualist as Justices Scalia or Thomas. Yet in \textit{Rapanos} he moderates his textualism in search of a workable accommodation between the competing worldviews and their associated values in these cases.

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} Miles and Sunstein, supra note 62, at 832-33.

\textsuperscript{119} \textit{Id.} at 832 (Table 1), 833.
His analysis includes links to the text, but it extends beyond the text to embrace a purpose-based jurisdictional standard, and it eschews ruleness in favor of particularized applications of that standard by the implementing agency.

The phrase that anchors Justice Kennedy's analysis — "significant nexus" — does not appear in the statute but is drawn from the sentence in SWANCC in which the Court characterized its holding in Riverside Bayview as informed by "the significant nexus between the wetlands and the 'navigable waters'" in that case.\(^\text{120}\) Kennedy's use of "significant nexus" as the jurisdictional standard draws a rebuke from Justice Scalia for leaving the CWA's "'text' and 'structure' virtually unaddressed."\(^\text{121}\) Kennedy does use the text, "navigable waters," to limit the reach of his standard by requiring that, to qualify as jurisdictional, wetlands and non-navigable tributaries must significantly affect systems incorporating navigable waters conventionally understood;\(^\text{122}\) "the word 'navigable' in the Act must be given some effect."\(^\text{123}\) But the effect he gives the word is modest. The "significant nexus" standard retains a decidedly purposive thrust, as a functional determination tied directly to the ecosystem protection objectives of the statute.

Justice Kennedy frames his jurisdictional standard to increase the rigor of the ecological model as a guide for statutory implementation and to balance the competing values advanced in the plurality opinion and the dissent. While the standard acknowledges the potential interconnectedness of aquatic systems, its application requires a demonstration of the relevant connections in specific cases or classes of cases. Although, as both Kennedy and Justice Stevens suggest, this requirement is not likely to make a big difference in outcomes, it provides a boundary — a boundary of documented significance — to the ecological model and thus offers some response to concerns that the Corps' regulations and the ecological model on which they rely are unconstrained. In this way, Kennedy attempts to balance the competing values associated with the atomistic and ecological models. Although tilting perhaps in favor of the latter, his approach at least gives the Rapanos and the Carabells arguments to make, as it seeks to assure that regulatory burdens are imposed only where they might actually make a difference to affected systems.

\(^{120}\) 531 U.S. 159, 167.
\(^{121}\) Rapanos, 126 S. Ct. 2208, 2233 (2006).
\(^{122}\) Id. at 2247-49 (Kennedy, J., concurring).
\(^{123}\) Id. at 2247.
Unlike Justice Scalia, Justice Kennedy embodies his interpretation in a standard rather than a rule. One effect of this choice is to allow the Corps considerable discretion in refining the CWA's jurisdictional boundaries to accord with the Act's protective purpose. Kennedy ranks in the middle among the justices in the frequency with which he defers to agency statutory interpretations, suggesting that he is not particularly trusting, or not trusting, of administrative agencies. Here, however, he provides room for the full expression of the CWA's remedial goals informed by factual inquiry and scientific demonstration. Implicit in this choice is a trust in both the capacity and inclination of the agency as well as the lower courts to get it right.

As Chief Justice Roberts points out in his separate concurrence, none of the opinions in *Rapanos* "commands a majority of the Court on how precisely to read Congress' limits on the reach of the Clean Water Act" and thus there is a question about how the Court's various pronouncements should guide the Corps and other implementing agencies on remand. Applying *Marks v. United States*, the Seventh and Ninth Circuit Courts of Appeals have concluded that Justice Kennedy's opinion represents the holding of *Rapanos*, as providing the narrowest grounds of concurrence in the judgment of a fragmented Court. The First Circuit has taken the view Justice Stevens advances in his dissent, that the Corps could establish jurisdiction under either Kennedy's "significant nexus" test or under the tests set forth in the plurality opinion. The court determined that "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction," and because a majority of the Court would support a finding of jurisdiction under either test, assuming the waters were also within the scope of the Corps' regulations, both tests are viable.

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124 Miles and Sunstein, *supra* note 62, at 832 (Table 1).
126 430 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 judgment on the narrowest grounds." (quotes and citations omitted)).
127 United States v. Gerke, 464 F.3d 723 (7th Cir. 2006); River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006).
128 United States v. Johnson, 467 F.3d 56 (1st Cir. 2006).
129 *Id.* at 64-65 (citing League of Latin American Cities v. Perry, 126 S. Ct. 2594, 2607 (2006)).
Thus, "significant nexus" either provides the controlling jurisdictional test or shares that honor with the plurality's test. It also, perhaps not coincidentally, offers a formula for reconciling competing worldviews and values on the Court. Acknowledging the claims of both the atomists and the ecologists, it suggests that factual inquiry and scientific demonstration of ecological connections provide an avenue for navigating between divergent models relevant to environmental concerns.

V. Conclusion

This analysis assumes, as cultural psychologists have sought to establish, that values are influential in shaping the beliefs and practices of a culture and its institutions. A culture's beliefs and practices are subject to ongoing debate and refinement, as we see in the Court's deliberations. My interpretation of Rapanos, as of its precursors Riverside Bayview and SWANCC, features competition between an ecological model that supports a broad scope for regulatory statutes seeking to protect natural systems and an atomistic model that supports limited governmental controls on nature-altering ventures. In this analysis, I don't mean to suggest that Justice Scalia's or Justice Stevens' views on the merits of the ecological worldview, assuming they have such views independent of the cases, determine their decisions in cases such as Rapanos. Rather, the competing models in Rapanos and similar environmental cases, I believe, are best understood as expressions of cultural values that shape the general orientation of each of the Justices.

The values that guide Justices to outcomes that are more or less accepting of the environmental model are also among the values that influence Justices' to be textualists or intentionalists. Justices concerned about expansion of the regulatory state (e.g., the extension of federal regulation supported by the ecological model) will also be Justices who prefer the textualists' adherence to plain meaning and ruleness as devices for limiting the discretion of mission-driven agencies as well as lower courts and narrowing the scope within which the purposes of remedial statutes can be advanced. Justices sympathetic to the remedial goals of these statutes (e.g., restoring and protecting the integrity of ecosystems) will also be Justices who opt for the intentionalists' emphasis on legislative purpose and standard-like interpretations to facilitate the full expression of these goals.

The fight between intentionalists and textualists in environmental cases such as Rapanos is therefore also typically a fight between
those sympathetic to the environmentalist worldview and those who resist it. In quantitative analyses of the Justices’ votes in environmental cases, textualists have low pro-environment scores; intentionalists have comparatively high scores.\textsuperscript{130} Textualists show vigorous resistance to the ecological model as a regulatory engine; intentionalists are receptive to it.\textsuperscript{131} This association of interpretive method with substantive orientation in environmental cases (and regulatory cases more generally) is not a logical inevitability. But there is good reason to believe that it is not mere coincidence.

Justice Kennedy is a textualist who in the past has shown some affinity for the ecological model. He also seems to occupy a values space in the middle of the Court or to be capable of suppressing his value preferences in the interests of other institutional (or perhaps personal) objectives. In \textit{Rapanos}, operating from this values space in the middle and using a combination of textualist and intentionalist methods, he attempts a reconciliation.

\textsuperscript{131} Cannon, \textit{supra} note 2, at 380-408.