The Clean Water Act and the Void-for-Vagueness Doctrine

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ABSTRACT

The Clean Water Act (CWA) seeks protect "the chemical, physical, and biological integrity of the Nation's waters." To do so, the act uses administrative, civil, and criminal sanctions to penalize the unpermitted discharge of a pollutant into the "navigable waters," which the act defines as "the waters of the United States." The availability of criminal punishments as an enforcement tool, however, creates a severe problem for the interpretation and constitutionality of the CWA. The Void-for-Vagueness Doctrine requires that all criminal laws be readily understandable by an "average person"—viz., a person without the advanced education possessed by experts in fields such as hydrology, botany, or law. The term "waters of the United States" is hopelessly vague, as several justices of the Supreme Court of the United States have noted. The vagueness of that that term cannot be ignored or quarantined. It is a linchpin of the entire CWA, and statutes must receive a uniform interpretation regardless of the nature of an enforcement proceeding. The implementing rules proposed by the Environmental Protection Agency and U.S. Army Corps of Engineers cannot remedy the vagueness of the statute and, in any event, they only aggravate the problem. The agencies' definition requires a person to possess an advanced degree to understand how the CWA applies, as well to undertake an enormously burdensome, expensive, and potentially inconclusive scientific fact-finding investigation of an entire watershed to know what is prohibited by this criminal law. The Void-for-Vagueness Doctrine does not allow Congress to impose such an impossible burden on the average person. To remedy the problem, the Supreme Court has three options: First, it could prohibit any criminal enforcement of the CWA. Second, it could adopt what I have called a "Canoe Rule" to interpret the CWA—viz., only those water bodies that in fact connect to an interstate waterway and can be traversed by a canoe fall within the term "waters of the United States." Third, it could adopt a Mistake of Law Defense to prevent an innocent person from unknowingly breaking the law. What the Court should not do is leave unaddressed the Void-for-Vagueness Doctrine infirmity in the CWA.

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INTRODUCTION

Congress passed the Clean Water Act (CWA) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] To do so, the act requires parties to obtain a permit before discharging a pollutant into "navigable waters,"[2] which the act defines, without further elaboration, in relevant part as "the waters of the United States."[3] Violations are subject to civil (including administrative) penalties and criminal punishments.[4]

That last fact gives rise to a problem. The term "waters of the United States" is hopelessly vague, as several Justices of the Supreme Court of the United States have noted. To implement and clarify the meaning of that term, in 2015 the

1. 33 U.S.C. § 1251(a) (2018). The CWA is the colloquial label given to the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq. (2018).

2. 33 U.S.C. §§ 1311(a), 1344(a); U.S. Army Corps of Engineers v. Hawkes Co., 578 U.S. 590, 594 (2016). The National Pollutant Discharge Elimination System ("NPDES") program authorizes the EPA or an approved state agency to issue a pollution-discharge permit. 33 U.S.C. §§ 1342(a)(1), (b). NPDES permits address point-source discharges (e.g., pipes) by defining permissible rates, concentrations, and quantities of specified pollutants, as well as other appropriate limitations and conditions. 33 U.S.C. § 1342(a)(1)–(2); 40 C.F.R. §§ 122, 125 (2016).

3. 33 U.S.C. § 1362(7).

4. 33 U.S.C. §§ 1319(b), 1319(c), 1319(g).

Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers adopted a rule, known as the "Waters of the United States" (or WOTUS) Rule. Unfortunately, it is uncertain whether, for purposes of criminal and constitutional law, an agency can remedy an unintelligible statutory term. In any event, the 2015 rule fails to give the CWA an understandable content. The result is that the act is unconstitutionally vague under the Void-for-Vagueness Doctrine. This Article will explain why that is so.

This Article will proceed as follows: Part I will explain the provenance of the present controversy. It will also discuss the confusion resulting from efforts by the Supreme Court and lower federal courts to understand what the term "waters of the United States" means. Part II considers the 2015 rule that the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers adopted ostensibly to clarify the term's meaning. That rule, however, approaches the definition from a pollution-oriented perspective, which is far too confusing and demanding for the average person to understand. Part III then turns to the Void-for-Vagueness Doctrine. It bars the government from prosecuting someone for violating a vague law—viz., a law whose terms are so uncertain that no reasonable person could understand what is forbidden.[5] As explained in Part IV, the term "waters of the United States" cannot survive a vagueness challenge, even as supplemented by the WOTUS Rule. The text supplies inadequate guidance, and the implementing regulations, even if relevant, only worsen matters. Part V proposes three remedies that would allow the CWA to function, albeit perhaps by limiting enforcement to noncriminal proceedings.[6]

I. CONFUSION OVER THE MEANING OF THE "WATERS OF THE UNITED STATES"

Despite its apparent simplicity, the term "waters of the United States" has created an interpretive conundrum that, to date, has defied an easy or uniform interpretation. On the one hand, the term's breadth signifies that Congress wanted the agencies responsible for implementing the federal permit system—the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE)—to possess considerable latitude in defining the CWA's reach. On occasion, the Supreme Court of the United States has read the act broadly with that goal in mind.[7] Yet on the other hand, a very different factor strongly points

5. The classic discussion of the doctrine remains Anthony G. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

6. A related question is whether the courts should defer to a government agency's interpretation of a statute with criminal applications. That issue is beyond the scope of this article, but I have previously argued that this question must be answered in the negative. *See* Paul J. Larkin Jr., *Agency Deference after* Kisor v. Wilkie, 18 GEO. J.L. & PUB. POL'Y 105, 131–40 (2020); Paul J. Larkin Jr., Chevron *and Federal Criminal Law*, 32 J.L. & POL. 211 (2017).

7. *See* Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1473 (2020) (rejecting the argument that the CWA's permitting requirement does not apply if a pollutant traverses groundwater because that reading "would risk serious interference with EPA's ability to regulate ordinary point source discharges"); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132–33 (1985) (relying on the CWA's purposes to uphold the government's interpretation).

the courts toward adopting a narrower reading of that term: viz., the act imposes criminal sanctions for violating its terms, and the U.S. Department of Justice has not been reluctant to bring criminal prosecutions.[8] Those facts trigger the well-settled Rule of Lenity, which requires courts strictly to construe the act's terms to avoid creating legal traps for law-abiding parties.[9] The rule does not require courts to disregard a straightforward interpretation of the CWA's text, but it does mean that, at the end of the day, the courts must give a defendant the benefit of the doubt.[10] In baseball a tie goes to the runner; here, it goes to each of us. The conflict between the CWA's purposes and text makes interpreting its scope a difficult endeavor.

Another, equally important consideration further complicates interpretation of the act. To maintain a consistent construction of its provisions regardless of the relief sought, courts must give the CWA the same interpretation in civil and criminal cases, a canon that I will label the Rule of Consistency.[11] Under it, two consequences follow: courts cannot create one law for Athens (civil cases) and another one for Rome (criminal cases), and, just as Rome came to rule Athens, the interpretation that the CWA should receive in criminal cases must apply to civil ones as well. That construction rules all; as Justice Antonin Scalia put it, "the lowest common denominator, as it were, must govern."[12] Coupled with the Rule of Lenity, the Rule of Consistency disallows a court from affording the CWA's terms the type of broad ranging construction that some would argue, and the Supreme Court has twice concluded, that its broad remedial goals apparently require.

Sadly, the Supreme Court has never reconciled those divergent lines of precedent when construing the CWA. The most important decision in that regard is

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8. For a sample of such prosecutions, see United States v. Caldwell, 626 F. App'x 683 (9th Cir. 2015); United States v. Wilmoth, 476 F. App'x 448 (11th Cir. 2012); United States v. Long, 450 F. App'x 457 (6th Cir. 2011); United States v. Panyard, 403 F. App'x 17 (6th Cir. 2010); United States v. Agosto-Vega, 617 F.3d 541 (1st Cir. 2010); United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999); United States v. Patrick, No. 16-CR-20390, 2016 WL 6610983 (E.D. Mich. Nov. 9, 2016); United States v. Giles, No. 3:16-CR-0004-GFVT-REW, 2016 WL 5867421 (E.D. Ky. Oct. 6, 2016); United States v. Kaluza, No. CR 12-265, 2016 WL 740328 (E.D. La. Feb. 24, 2016); United States v. Hubenka, No. 10-CV-93-J, 2014 WL 12634287 (D. Wyo. Oct. 22, 2014); United States v. Acquest Dev., LLC, 932 F. Supp. 2d 453 (W.D.N.Y. 2013).

9. *See* United States v. Wiltberger, 18 U.S. 76, 95 (1820) (Marshall, C.J.) (articulating the "Rule of Lenity").

10. *See, e.g.*, Shular v. United States, 140 S. Ct. 779, 787 (2020) ("The rule applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.") (punctuation omitted); Ocasio v. United States, 578 U.S. 282, 295 n.8 (2016) (stating that the Rule of Lenity applies "only if, after seizing everything from which aid can be derived, the Court can make no more than a guess as to what Congress intended") (punctuation omitted).

11. *See* Clark v. Martinez, 543 U.S. 371, 380 (2005); Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); United States v. Thompson/Center Arms Co., 504 U.S. 505, 517–18 (1992) (plurality opinion) (applying the rule of lenity to a tax statute litigated in a civil setting because the act had criminal applications); *Thompson/Center*, 504 U.S. at 519 (Scalia, J., concurring in the judgment).

12. *Clark*, 543 U.S. at 380.

Rapanos v. United States.[13] In that case, Justice Scalia defined "waters of the United States" as referring to only relatively permanent standing or flowing bodies of water,[14] to include "wetlands"—viz., adjacent, flooded but non-navigable water bodies—only if they have a continuous surface connection to traditional "waters of the United States."[15] That reading is narrower than the act's broad purposes would allow. But his opinion garnered only three other votes. Justice Anthony Kennedy provided the fifth vote necessary for a majority, but he only concurred in the judgment because he disagreed with the plurality's construction of "waters of the United States." In his view, the question whether a particular body of water or parcel of land qualifies turns on whether there is a "significant nexus" between it and a traditional navigable water.[16] He found support for that test in two of the Court's precedents: *United States v. Riverside Bayview Homes, Inc*.[17] and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[18] which, he said, implicitly or explicitly adverted to a "substantial nexus" test.[19] Yet, neither decision arose in the context of a federal criminal prosecution, and neither one discussed how the Rule of Consistency applies when a statute is the basis for a criminal charge.[20] In fact, *Solid Waste* merely used the term "substantial nexus" in passing to distinguish *Riverside Bayview Homes* without ruling that it was a requirement for defining the "waters of the United States." *Riverside Bayview Homes* could not have held that any "substantial nexus" allows a court to disregard the Rule of Consistency because the Court did not first clearly articulate that rule until seven years *after* it had decided *Riverside Bayview Homes*. The Court simply had no occasion to discuss in *Riverside Bayview Homes* an as-yet unadopted canon of construction.

At bottom, *Rapanos* brought only confusion to the meaning of "waters of the United States." The Scalia and Kennedy interpretations of the CWA are materially different from each other, and neither one noted the importance of construing the term "waters of the United States" with criminal prosecutions in mind.[21] That

13. 547 U.S. 715 (2006).

14. *Id*. at 730–39 (plurality opinion).

15. *Id*. at 739–42.

16. *Id*. at 759–87 (Kennedy, J., concurring in the judgment).

17. 474 U.S. 121, 131–32, 131 n.8 (1985).

18. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

19. *See id*. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.").

20. Early in the plurality opinion, Justice Scalia adverted to the fact that the Clean Water Act "imposes criminal liability, as well as steep civil fines, on a broad range of ordinary industrial and commercial activities." Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion) (punctuation omitted). But that comment appeared in the context of a discussion of the cost of obtaining a permit. He did not refer to the possibility of a criminal prosecution or the Rule of Consistency when discussing how the CWA should be read. *Id*. at 730–57 (plurality opinion). Justice Kennedy did not address either subject. *Id*. at 759–87 (Kennedy, J., concurring in the judgment).

21. The federal government did not discuss this issue in its Supreme Court brief in *Rapanos*. *See* Brief for the United States, *Rapanos v. United States*, O.T. 2005, (No. 04-1304), 2006 WL 123765. Perhaps that was because it would not have been in the government's interest to highlight a problem with its broad interpretation of the CWA.

failure was surprising. Unlike 1985, when the Court decided *Riverside Bayview Homes*, by 2006 the Court had invoked the Rule of Consistency on three occasions.[22] Why it did not do so in *Rapanos* is a mystery.

That confusion has persisted to this day. Lower courts cannot rewrite a Supreme Court opinion, and since the *Rapanos* decision the federal circuit courts of appeals have expressed some degree of bewilderment (and exasperation) over the task of finding a rule of law in *Rapanos*. Not surprisingly, they have decided that the CWA reaches any body of water satisfying either standard. Yet, they also have not construed the act with an eye toward a possible criminal prosecution.[23]

Although judicial efforts to interpret the term "waters of the United States" have made a hash of the matter, relief might be at hand. The Supreme Court likely realizes that it is necessary to provide clarity on the issue because the Court recently decided to revisit the subject. In *Sackett v. EPA*, the Court granted certiorari to decide whether the Ninth Circuit was correct to apply the "substantial nexus" test that Justice Kennedy had proposed in his separate opinion in *Rapanos*.[24] As a result, we might finally have a resolution before the Court's October Term 2022 ends.

II. THE "WATERS OF THE UNITED STATES"

Uncertainly over the meaning of the term "waters of the United States" has existed for decades.[25] The federal government sparked the current controversy in 2015 by adopting what is known today as the WOTUS Rule.[26] EPA and USACE promulgated the rule to "provid[e] simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA."[27] To define "waters of the United States," the agencies relied on the "significant nexus" test

22. *See supra* note 11.

23. *See, e.g.*, United States v. Donovan, 661 F.3d 174, 180–84 (3d Cir. 2011); United States v. Bailey, 571 F.3d 791, 798–99 (8th Cir. 2009); United States v. Robison, 505 F.3d 1208, 1221–22 (11th Cir. 2007); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999 (9th Cir. 2007); United States v. Johnson, 467 F.3d 56, 64–66 (1st Cir. 2006); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006).

24. Sackett v. EPA, No. 21-454, 2022 WL 199378 (Jan. 24, 2022) (*Sackett II*) ("[The] petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted limited to the following question: Whether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the Clean Water Act, 33 U. S. C. § 1362(7)."). The *Sackett* case was previously before the Court a decade ago. *See* Sackett v. EPA, 566 U.S. 120 (2012) (*Sackett I*) (holding that the Sacketts' claim was judicially reviewable).

25. *See infra* text accompanying notes 110–117.

26. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015). The 2015 rule replaced a 1977 rule. *See* 33 C.F.R. § 323.2(c) (1978) ("The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.").

27. 80 Fed. Reg. at 37,057.

that Justice Kennedy proposed in his separate opinion in *Rapanos*.[28] He had concluded that the term embraced any body of water, regardless of its usefulness for navigation,[29] that could "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[30] EPA and USACE rested the 2015 WOTUS Rule on that definition, focusing it on pollution, not navigability. "This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas."[31] The focus on pollution can be seen throughout the agencies' discussion.

At the outset, EPA and USCOE acknowledged that, given the Court's CWA decisions such as *Rapanos*, almost anything wet could qualify as a "water of the United States."[32] In an effort to clarify that term while protecting the nation's waters against pollution, the agencies were "guided by the best available peer-reviewed science—particularly as that science informs the determinations" of what qualifies as a "water of the United States."[33] Noting that even science made it extremely difficult to identify a "wetland,"[34] the agencies listed certain conclusions that "play[ed] a critical role in informing" their interpretation of the CWA.[35] As the agencies explained:

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28. 80 Fed. Reg. at 37,060 ("The key to the agencies' interpretation of the CWA is the significant nexus standard, as established and refined in Supreme Court opinions: Waters are 'waters of the United States' if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas."); *see also*, *e.g*., 80 Fed. Reg. at 37,056, 37,0599, 37,061.

29. Rapanos v. United States, 547 U.S. 715, 779–80 (2006) (Kennedy, J., concurring in the judgment) ("[J]urisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense . . . [which] must be assessed in terms of the statute's goals and purposes. . . . [W]etlands possess the requisite nexus . . . if [they] either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'") (citations omitted; emphasis added).

30. "Peer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, significantly affect the chemical, physical, and biological integrity of downstream waters by playing a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes." 80 Fed. Reg at 37,055–37,056.

31. *Id*. at 37,055.

32. *Id*. at 37,056 ("As a result of the ambiguity that exists under current regulations and practice following these recent decisions, almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination."); *see id*. at 37,055–37,127.

33. *Id*. at 37,057; *id*. at 37,061 ("While a significant nexus determination is primarily weighted in the scientific evidence and criteria, the agencies also consider the statutory language, the statute's goals, objectives and policies, the case law, and the agencies' technical expertise and experience when interpreting the terms of the CWA.").

34. *Id*. at 37,057, 37,060.

35. *Id*. at 37,057.

- Waters are connected in myriad ways, including physical connections and the hydrologic cycle; however, connections occur on a continuum or gradient from highly connected to highly isolated.
- These variations in the degree of connectivity are a critical consideration to the ecological integrity and sustainability of downstream waters.
- The critical contribution of upstream waters to the chemical, physical, and biological integrity of downstream waters results from the accumulative contribution of similar waters in the same watershed and in the context of their functions considered over time.

The Science Report and the SAB review also confirmed that:

- Tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters.
- Wetlands and open waters in floodplains and riparian areas are chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters.
- Non-floodplain wetlands and open waters provide many functions that benefit downstream water quality and ecological integrity, but their effects on downstream waters are difficult to assess based solely on the available science.[36]

The agencies then turned to offer a lengthy discussion of the "substantial nexus" test. They explained at length why various water bodies—such as "tributaries,"[37] "adjacent waters,"[38] "streams," and waters within the once-in-a-century floodplain of a navigable water,[39] and so forth[40]—were statutory "waters." Some

36. *Id.*

37. *Id.* at 37,058 ("The rule only covers as tributaries those waters that science tells us provide chemical, physical, or biological functions to downstream waters and that meet the significant nexus standard.").

38. *Id.* ("The rule only covers as tributaries those waters that science tells us provide chemical, physical, or biological functions to downstream waters and that meet the significant nexus standard."); *id.* ("'[A]djacent waters' . . . have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas based upon their hydrological and ecological connections to, and interactions with, those waters. Under this final rule, 'adjacent' means bordering, contiguous, or neighboring, including waters separated from other 'waters of the United States' by constructed dikes or barriers, natural river berms, beach dunes and the like. Further, waters that connect segments of, or are at the head of, a stream or river are 'adjacent' to that stream or river. 'Adjacent waters' include wetlands, ponds, lakes, oxbows, impoundments, and similar water features.").

39. *Id.* at 37,059 ("The final rule also provides that waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and waters within 4,000 feet of the high tide line or the ordinary high-water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary are subject to case-specific significant nexus determinations, unless the water is excluded under paragraph (b) of the rule. The science available today does not establish that waters beyond those defined as 'adjacent' should be jurisdictional as a category

physical features of water or land have that status as a matter of law, while others might be included based on the facts of each case.[41]

A host of different functions that water serves must be evaluated when making the "substantial nexus" determination.[42] For example, interruptions caused by natural[43] or man-made breaks[44] do not necessarily except a water body from the WOTUS Rule.[45] Also, no one location can be examined in isolation. The entire watershed must be considered,[46] because each river or stream can affect every other one irrespective of their size.[47] Also, no judgment is permanent. Because

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under the CWA, but the agencies' experience and expertise indicate that there are many waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or out to 4,000 feet where the science demonstrates that they have a significant effect on downstream waters. . . . [I]t must be first demonstrated that these waters function alike and are sufficiently close to function together in affecting downstream waters. The significant nexus analysis must then be conducted based on consideration of the functions provided by those waters in combination in the point of entry watershed. A 'similarly situated' analysis is conducted where it is determined that there is a likelihood that there are waters that function together to affect downstream water integrity."); *id*. at 37,063 ("Riparian/Floodplain Wetlands" and "Non-Floodplain Wetlands").

40. For the agencies' explanation of the rule, see *id*. at 37,063 ("[C]ertain ditches are excluded from jurisdiction, including ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that are not a relocated tributary, or excavated in a tributary, or drain wetlands. The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent, such as stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land.").

41. *Id*. at 37,059–37,067 ("Consistent with the significant nexus standard articulated in the Supreme Court opinions, waters are 'waters of the United States' if they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. This determination will most typically be made on a water individually, but can, when warranted, be made in combination with other waters where waters function together. . . . Anthropogenic actions and natural events can have widespread effects within the watershed that collectively impact the integrity and quality of the relevant traditional navigable water, interstate water, or the territorial sea. The functions of the contributing waters are inextricably linked and have a cumulative effect on the integrity of the downstream traditional navigable water, interstate water, or the territorial sea. For these reasons, it is more appropriate to conduct a significant nexus analysis at the watershed scale than to focus on a specific site, such as an individual stream segment."); *see also id*. at 37,086–37,101 (discussing the case-by-case determination).

42. Among them are "sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of floodwaters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, and use as a nursery area)"—essentially the entire cycle of life—for "species located in traditional navigable waters, interstate waters, or the territorial seas." *Id*. at 37,067; *see id*. at 37,067–37,068.

43. Such as "debris piles, boulder fields, or a stream that flows underground so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." *Id*. at 37,078.

44. Such as ones due to "bridges, culverts, pipes, dams, or waste treatment systems." *Id*. A man-made ditch with an "ephemeral flow" can still qualify under the rule if the waters above and below it do. *Id*.

45. *Id*.

46. *Id*. at 37,066 ("Watersheds are generally regarded as the most appropriate spatial unit for water resource management.").

47. *Id*. at 37,063–37,064 ("The incremental effects of individual streams and wetlands are cumulative across entire watersheds, and therefore, must be evaluated in context with other streams and wetlands.

water moves, the determination whether a particular site or watershed is covered can change over time, and this year's judgment might differ from last year's.[48]

If those consideration did not complicate the matter enough, the agencies have come up with more. Atop those *Federal Register* explanations, the USACE has a "*Wetlands Delineation Manual*," containing "over 100 pages of technical guidance for Corps' officers."[49] Not to be outdone, to assist in the 2015 rulemaking EPA published its own report—*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*,[50] a 400-plus page document prepared by "27 technical experts in an array of relevant fields, including hydrology, wetland and stream ecology, biology, geomorphology, biogeochemistry, and freshwater science,"[51] which analyzed "more than 1,200 peer-reviewed publications"[52] and "[o]ver 133,000 public comments."[53]

Now consider how the government has applied its "significant nexus" test. The agencies "utilize many tools and many sources of information to help make jurisdictional determinations," such as "U.S. Geological Survey (USGS) and state and local topographic maps, aerial photography, soil surveys, watershed studies, scientific literature and references, and field work."[54] In court, the government has

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Downstream waters are the time-integrated result of all waters contributing to them. For example, the amount of water or biomass contributed by a specific ephemeral stream in a given year might be small, but the aggregate contribution of that stream over multiple years, or by all ephemeral streams draining that watershed in a given year or over multiple years, can have substantial consequences on the integrity of the downstream waters. Similarly, the downstream effect of a single event, such as pollutant discharge into a single stream or wetland, might be negligible but the cumulative effect of multiple discharges could degrade the integrity of downstream waters. [¶] When considering the effect of an individual stream or wetland, all contributions and functions of that stream or wetland should be evaluated cumulatively."); *id.* at 37,065 ("Through this experience, the agencies developed wide-ranging technical expertise in assessing the hydrologic flowpaths along which water and materials are transported and transformed that determine the degree of chemical, physical, or biological connectivity, as well as the variations in climate, geology, and terrain within and among watersheds and over time that affect the functions (such as the removal or transformation of pollutants) performed by streams and wetlands for downstream traditional navigable waters, interstate waters or the territorial seas."); *id.* at 37,068 ("Covered tributaries influence the chemical composition of downstream waters, through the transport and removal of chemical elements and compounds, such as nutrients, ions, organic matter and pollutants.").

48. *Id.* at 37,063 ("Connectivity of streams and wetlands to downstream waters occurs along a gradient that can be described in terms of the frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to downstream waters. These terms, which we refer to collectively as connectivity descriptors, characterize the range over which streams and wetlands vary and shift along the connectivity gradient in response to changes in natural and anthropogenic factors and, when considered in a watershed context, can be used to predict probable effects of different degrees of connectivity over time.").

49. Rapanos v. United States, 547 U.S. 715, 761 (2006) (Kennedy, J., concurring in the judgment).

50. OFFICE OF RESEARCH & DEV., NAT'L CTR. FOR ENV'T ASSESSMENT, U.S. ENV'T PROT. AGENCY, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE: FINAL REPORT EPA/600/R–14/ 475F (2-15).

51. 80 Fed. Reg. at 37,062.

52. *Id.* at 37,057.

53. *Id.* at 37,062.

54. *Id.* at 37,065; *id.* ("For example, USGS and state and local stream maps and datasets, aerial photography, gage data, watershed assessments, monitoring data, and field observations are often used

relied heavily on the opinions of experts who testified about a host of different considerations. Among them were hydrological and chemical analyses of upstream and downstream water bodies; nearby natural botanical features; and any disturbances in the terrain, such as the presence of a "ditch."[55] At one time, the government even relied on the transient presence of migratory birds to establish coverage.[56] Federal court proceedings have more closely resembled post-graduate environmental science conferences than ordinary trial-level fact-finding hearings.

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to help assess the contributions of flow of tributary streams, including intermittent and ephemeral streams, to downstream traditional navigable waters, interstate waters or the territorial seas. Similarly, floodplain and topographic maps of federal, state and local agencies, modeling tools, and field observations can be used to assess how wetlands are trapping floodwaters that might otherwise affect downstream waters. Further, the agencies utilize the large body of scientific literature regarding the functions of tributaries, including tributaries with ephemeral, intermittent and perennial flow and of wetlands and open waters to inform their evaluations of significant nexus. In addition, the agencies have experience and expertise for decades prior to and since the SWANCC and Rapanos decisions with making jurisdictional determinations, and consider hydrology, ordinary high water mark, biota, and other technical factors in implementing Clean Water Act programs. This immersion in the science along with the practical expertise developed through case-specific determinations across the country and in diverse settings is reflected in the agencies' conclusions with respect to waters that have a significant nexus, as well as where the agencies have drawn boundaries demarking where 'waters of the United States' end.").

55. *See* United States v. Donovan, 661 F.3d 174, 177 (3d Cir. 2011) ("The Government submitted two expert reports based on extensive analysis and testing of Donovan's property between June 2009 and November 2009. Launay used a variety of methods to map stream channels on and around Donovan's property and to demonstrate that they were perennial. The Stroud scientists examined the physical, chemical, and biological connections between the wetlands on Donovan's property and downstream waters of the Sawmill Branch. The Stroud scientists analyzed, *inter alia,* the wetlands' hydrological connections to downstream waters, the wetlands' potential for filtering pollutants, and the wetlands' role in the aquatic ecosystem for fish and invertebrates."); United States v. Bailey, 571 F.3d 791, 800–01 (8th Cir. 2009) ("To determine whether an area is dominated by hydrophytic vegetation, the Corps establishes at least one sample point within each plant community and surveys the herbaceous vegetation within a five-foot radius and the woody vegetation within a thirty-foot radius. The Corps consults a list of plant species published by the United States Fish and Wildlife Services, which assigns an indicator status to individual plant species reflecting their probability of occurrence in wetlands. Hydrophytic vegetation is present if greater than fifty percent of the dominant plant species are obligate wetland plants, facultative wetland plants, or facultative plants (excluding facultative negative). [¶] To determine whether the land has wetland hydrology, the Corps requires either one primary indicator, such as direct observation of soil saturation within twelve inches of the surface, or two secondary indicators, such as the FAC-neutral test and local soil survey data. The FAC-neutral test uses vegetation as a secondary indicator of hydrology. If obligate wetland plants and facultative wetland plants outnumber facultative upland plants and obligate upland plants, then the sample meets the FAC-neutral test and tests positive as a secondary indicator of hydrology. The rationale is that obligate wetland plants and facultative wetland plants occur in wetlands 67 to 99 percent of the time. Facultative plants, which occur in both wetlands and nonwetlands, are considered neutral."); N. Calif. River Watch v. City of Healdsburg, 496 F.3d 993, 1000 (9th Cir. 2007) ("The water from the Pond seeps into the river through both the surface wetlands and the underground aquifer. The district court's findings of fact regarding this hydrological connection support the conclusion that Basalt Pond has a significant effect on 'the chemical, physical, and biological integrity' of the Russian River. [¶] The district court also found that Basalt Pond significantly affects the chemical integrity of the Russian River by increasing its chloride levels.").

56. The Supreme Court held that factor insufficient in *Solid Waste Ag. of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

In 2020, the Trump Administration adopted a new WOTUS Rule.[57] On his first day in office the following year, however, President Joe Biden ordered that rule withdrawn as part of an initiative commanding all agency heads to "immediately review all existing regulations, orders, guidance documents, policies and any other similar agency action" that had been "promulgated, issued, or adopted" since January 20, 2017.[58] Late in 2021, the Biden Administration issued a notice of proposed rulemaking to redefine the "waters of the United States."[59] No new rule has yet been issued.

III. THE VOID-FOR-VAGUENESS DOCTRINE

The Void-for-Vagueness Doctrine is a first-order application of the principle of *nulla crimen sine lege*, *nulla poena sine lege*: there can be no crime or punishment absent an existing law.[60] As Justice Neil Gorsuch explained in *United States v. Davis*, "[in] our constitutional order, a vague law is no law at all."[61] To avoid that hamartia, a statute must afford "ordinary people"[62]—viz., people of "common intelligence"[63] or "ordinary intelligence"[64]—fair notice of what the law makes a crime.[65] A criminal law is vague when its text "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"[66] or its "mandates are so uncertain that they will reasonably admit of different constructions."[67]

That standard should focus the inquiry on how the average *lay person* would read a statute—*not* the average lawyer, geologist, hydrologist, botanist, or expert in some other field. Why? Because the advanced, specialized education and training those parties enjoy give them far more than "common" or "ordinary intelligence." Physicians and nurses have more knowledge about medicine than medics or EMTs, and textbooks are written with those different audiences in mind. Statutes, however, must focus on the last two groups, as well as people without any more knowledge of medicine than basic first-aid. Otherwise, we have made it a crime not to graduate from medical school. Demographics therefore matter when deciding if a law is understandable by the average person.[68]

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57. 85 Fed. Reg. 22,250 (Apr. 21, 2020).

58. Exec. Order No. 13990, "Protecting Public Health and the Environment and Restoring Science to tackle the Climate Crisis" (Jan. 20, 2021), Fed. Reg. 7037 (Jan. 25, 2021).

59. 86 Fed. Reg. 69,372 (Dec. 7, 2021).

60. *See* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165 (1937).

61. United States v. Davis, 139 S. Ct. 2319, 2323 (2019).

62. *Id*.

63. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

64. Harriss v. United States, 347 U.S. 612, 617 (1954).

65. *See* Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. 335, 343–45, 342 n.35 (2018) (collecting cases).

66. *Connally*, 269 U.S. at 391.

67. *Id*. at 393; *see also*, *e.g*., *Davis*, 139 S. Ct. at 2325.

68. "Who is the typical person of 'ordinary intelligence'? Like the 'reasonable person' used in tort law when defining negligence, a 'person of ordinary intelligence' is a legal construct, an ideal, not a particular individual. The Supreme Court has not defined the criteria that a court must use to identify

If so, consider what Census Bureau statistics reveal. In the United States, the average person has only a high school diploma—*not* a college degree, let alone a professional degree in law or a graduate degree in science. Only 17 percent of U.S. residents hold a bachelor's degree (56 of 331 million people) and only 10 percent hold an advanced degree (32 million).[69] The American Bar Association reports that less than 0.4 percent of the population are practicing attorneys (roughly 1.3 million lawyers).[70] Those facts are important when deciding whether the CWA is vague.

IV. INTERPRETING THE "WATERS OF THE UNITED STATES"

The threshold issue is whether an *agency regulation* can eliminate the vagueness of a *congressional statute*. The answer is, "Maybe; maybe not." In any event, the 2015 WOTUS Rule does not clarify the meaning of "waters of the United States."

A. Can Agency Rules Salvage a Vague Criminal Law?

In 1911, the Supreme Court held in *United States v. Grimaud* that it does not violate the so-called Nondelegation Doctrine for Congress to authorize an agency to promulgate regulations whose violation can be punished as crimes.[71] The Court has (at least implicitly) reiterated that proposition as recently as 2019.[72] But the question whether Congress may conscript an agency to fill out a criminal statute is materially different from the question whether the average person can understand what those implementing rules demand. Plus, two Supreme Court decisions far more recent than *Grimaud*—*Whitman v. American Trucking Association*[73] and *United States v. Davis*[74]—raise a serious doubt whether the government can defend against a vagueness challenge by pointing to clarification

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that individual for vagueness purposes, but we can safely assume that, for the construct to make sense, it must correspond to reality. Just as someone need not be an Olympic athlete to be physically fit, a person need not be a Nobel laureate to possess 'ordinary intelligence.' That would set the bar so high that the extraordinary would become the ordinary. Language does not equate the two, so neither should the law. [¶] If that is true, actual population demographics matter." Larkin, *supra* note 65, at 344.

69. U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2020 (Oct. 8, 2021), https://www.census.gov/data/tables/2020/demo/educational-attainment/cps-detailed-tables.html [https://perma.cc/RN89-677V]. The above numbers are approximations.

70. AM. BAR ASS'N, PROFILE OF THE LEGAL PROFESSION 10 (July 2021).

71. 220 U.S. 506 (1911).

72. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116 (2019) (rejecting a Nondelegation Doctrine challenge to a federal statute empowering the U.S. Attorney General to decide whether to apply retroactively sex offender registration requirements); Touby v. United States, 500 U.S. 160 (1991) (same, a statute empowering the U.S. Attorney General temporarily to schedule controlled substances); Yakus v. United States, 321 U.S. 414 (1944) (same, Price Administrator's power to control wartime prices). Recently, however, several justices have expressed interest in reconsidering the so-called Nondelegation Doctrine. *Gundy*, 139 S. Ct. at 1246–47 (Gorsuch, J., dissenting) (endorsing limits on Congress's power to delegate); Paul v. United States, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) (expressing interest in Justice Gorsuch's views in *Gundy*). If that reconsideration occurs, the Court might rethink its *Grimaud* decision.

73. 531 U.S. 457 (2001).

74. 139 S. Ct. 2319 (2019).

supposedly found in agency rules. *American Trucking* held that, for delegation purposes, an agency cannot by rule "cure an unconstitutionally standardless delegation of power by declining to exercise some of" it.[75] *Davis* emphasized that, from "the twin constitutional pillars of due process and separation of powers," it follows that "[o]nly the people's representatives in Congress have the power to write new federal criminal laws."[76] Accordingly, the burden of providing clarity falls to Congress: "*it* has to write statutes that give ordinary people fair warning about what the law demands of them."[77] *American Trucking* and *Davis* could bar Congress from punting to an agency the task of curing a vague criminal law.

If the Supreme Court were to decide that an agency can issue rules to fill in defects in the comprehensibility of a statute, that would not end the analysis. The Court would then need to explain why it is reasonable to demand that the average person learn the Code of Federal Regulations and stay abreast of it as it grows in size. And grow it certainly does. Agencies produce "reams of regulations—so many that they dwarf the statutes enacted by Congress."[78] In 2018, "the Code of Federal Regulations filled 242 volumes and was about 185,000 pages long," Justice Gorsuch noted, "almost quadruple the length of the most recent edition of the U.S. Code."[79] There is a limit as to just how much legal knowledge the law can demand that a lawyer, law professor, or judge possess,[80] let alone person of "ordinary intelligence."[81] At common law it was reasonable to require that everyone know what qualified as a crime.[82] There were only nine felonies, and each

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75. *American Trucking*, 531 U.S. at 473.

76. *Davis*, 139 S. Ct. at 2323, 2325.

77. *Id*. (emphasis added).

78. Kisor v. Wilkie, 139 S. Ct. 2400, 2446–47 (2019) (Gorsuch, J., concurring in the judgment) (footnote and punctuation omitted).

79. *Id*. at 2447. Want a visual image of that quantity? "Near the close of the New Deal in 1938, the *Code of Federal Regulations*, the compendium of agency rules, contained 18,000 pages. In 1975, it consisted of 71,224 pages spread over 133 volumes. Today, it is more than 175,000 pages long in 236 volumes, approximately double what it was 45 years ago. If those regulations were laid end to end, they would constitute a 30-mile stretch of federal law. It would take someone who read them as he walked (and did nothing else) more than three years to finish (unless he mercifully committed seppuku somewhere along the way)." Paul J. Larkin & GianCarlo Canaparo, *Gunfight at the New Deal Corral*, 19 GEO. J.L. & PUB. POL'Y 477, 488 (2021) (footnotes omitted).

80. *See* Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 107–08 (2013) ("[A]ny reasonable observer would have to conclude that actual knowledge of all applicable criminal laws and regulations is impossible, especially when those regulations frequently depart from any intuitive sense of what 'ought' to be legal or illegal.").

81. *See* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000) ("Ordinary people do not have the time or training to learn the contents of criminal codes."). There is even a limit to how much knowledge we can expect of Supreme Court justices. They have had their "Oops" moments too. *See, e.g*., Estelle v. McGuire, 502 U.S. 62, 72 n.4 (1991) ("We acknowledge that language in the later cases of *Cage v. Louisiana*, 498 U.S. 39 (1990), and *Yates v. Evatt*, 500 U.S. 391 (1991), might be read as endorsing a different standard of review for jury instructions. . . . So that we may once again speak with one voice on this issue, we now disapprove the standard of review language in *Cage* and *Yates*, and reaffirm the standard set out in *Boyde* [*v. California*, 494 U.S. 370, 380 (1990)].") (citations omitted).

82. A demand that follows from the maxim that ignorance of the law is no excuse. *See*, *e.g*., Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 581 (2010) ("We have long recognized

one (murder, rape, robbery, and so forth) rested on a then-contemporary consensus regarding religious and social mores.[83] That day, however, is dead and gone. Today, the federal criminal statutory code alone is more than *500 times* as long as the list of common law felonies, and no provision in the Decalogue defines the "waters of the United States."[84] Demanding that the average person also know 185,000 pages of rules on pain of incarceration for falling short is like demanding that the average jogger outrun Usain Bolt or go to prison.

But there is more. When publishing a new rule, agencies often include in the *Federal Register* an explanation of what the agency believes its rule means.[85] That is important because some members of the Court believe that an agency's interpretation of its own rules is entitled to deference from the courts.[86] Yet, as Justice Lewis Powell once noted, it "is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation . . . would have knowledge of its promulgation or familiarity with or access to the Federal Register."[87] We indulge the legal fiction that people know not to murder, rape, rob, or swindle because American morality condemns that conduct (and because, practically speaking, there is little else that we can do).[88] If a court put a gun to our heads, we might also accept the necessary fiction that all are presumed to know what statutes and their implementing regulations provide, although, as noted above, that is not very sensible. But it is absurd to require that we know the contents of the *Federal Register*—let alone the USACE's *Wetlands Delineation Manual* or any other internal agency publication on which it relies (and to which the public might not have access). To borrow from Justice Scalia, "necessary fiction descends to needless farce" when the criminal law makes such a demand.[89]

We're not done yet. Not every agency document interpreting its own rules is publicly available. On taking office, President Biden rescinded an executive order issued by his predecessor requiring that all federal agencies publish their rules to protect Americans against "overcriminalization."[90] An agency can now keep its

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the common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.") (punctuation omitted); Bryan v. United States, 524 U.S. 184, 193 (1998); Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833).

83. *See* STUART P. GREEN, 13 WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 10, 280 n.3 (2012) (listing the common law felonies); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 442–62 (5th ed. 1956) (discussing them).

84. There are 1,510 federal statutes that create at least one crime, and the entire federal code creates 5,199 total offenses. GianCarlo Canaparo et al., *Count the Code: Quantifying Federalization of Criminal Statutes*, HERITAGE FOUND., SPECIAL REP. No. 251, at 1 (Jan. 7, 2022).

85. 80 Fed. Reg. 37,054–37,127 (June 29, 2015).

86. *Compare* Kisor v. Wilkie, 139 S. Ct. 2400, 2408–24 (2019) (lead opinion of Kagan, J.) (endorsing the proposition stated in the text), *with Kisor*, 139 S. Ct. at 2425–48 (Gorsuch, J., concurring in the judgment) (rejecting that proposition).

87. Adamo Wrecking Co. v. United States, 434 U.S. 275, 290 (1978) (Powell, J., concurring).

88. *See* United States v. R.L.C., 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment).

89. *Id*. at 309 (Scalia, J., concurring in part and concurring in the judgment).

90. *See* Exec. Order No. 13980 (Jan. 18, 2021), "Protecting Americans from Overcriminalization through Regulatory Reform," 86 Fed. Reg. 6817 (Jan. 22, 2021), *rescinded by* Exec. Order No. 14029

legal opinions, bulletins, interpretive manuals, documents, go-bys, "Dear Colleague" letters, and the like secret and still claim that its interpretation of a statute or regulation is entitled to deference.[91] If deferring to an agency's secret interpretation of a criminal law is reasonable, then Cole Porter was right: anything goes.[92] Indeed, if the government can do Caligula one better by not just posting the laws too high for anyone to read them,[93] but also locking them away, we might as well dispense with a trial and just send a defendant directly to prison. A Soviet-style show trial would give the accused a better shot at an acquittal.[94]

A final point. Deciding what conduct is so out of bounds that it merits social condemnation, ostracism, and lengthy physical isolation is a decidedly moral judgment. Societies originally made those judgments as a group in the mores they adopted, enforced by community elders.[95] Over time, polities grew, direct democracy became too unwieldy to maintain, and we delegated those judgments to elected officials who represented their communities. If those representatives did a poor job, the community had the power to remove them. Not so with contemporary agency officials. The traditional rationale for creating agencies and giving their officials tenure is the comparative advantage they offer with regard to problem-solving requiring specialized education, training, and experience in scientific or technical fields like geology, hydrology, engineering and the like.[96] Morality is not one of them. People of "common intelligence"[97]—"ordinary people"[98]—can make those judgments as well as their neighbors with advanced degrees; some, even better. A court that lets an agency fix a vague criminal law would be allowing an unelected government official to decide what conduct the community deems immoral, a judgment that we leave to communities themselves.

To be sure, we empower agencies to make a small number of scientific judgments that are backed up by the force of the criminal law. We allow the Food and Drug Administration to decide what is a "drug" and whether a particular drug is "safe" and "effective."[99] We also allow the U.S. Attorney General, with the

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(May 14, 2021), "Revocation of Certain Presidential Actions and Technical Amendment," 86 Fed. Reg. 27025 (May 19, 2021).

91. Of course, it is no answer that the public can request a copy of the USACE's *Wetlands Delineation Manual* or any other relevant internal agency publication under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 501 et seq. (2018). Requesters need to know what to look for. Aside from that, do we really need to file FOIA requests to know what the criminal law prohibits (let alone wait for an answer and possibly have to sue the government for the sought-after materials)?

92. COLE PORTER, ANYTHING GOES (1934).

93. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 46 (1765) (stating that Caligula "wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.").

94. *See* LON FULLER, THE MORALITY OF LAW 39 (3d ed. 1969) (arguing that "a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe," renders those rules "immoral" and therefore not deserving of the legitimacy implied by the description of "law").

95. Paul J. Larkin Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 327–30 (2016).

96. *See* Larkin & Canaparo, *supra* note 79, at 519–20.

97. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

98. United States v. Davis, 139 S. Ct. 2319, 2323 (2019).

99. *See*, *e.g.*, 21 U.S.C. §§ 321(g), 351(a)–(d), 352–53a, 355(a) (2018).

approval of the Secretary of Health and Human Services, to decide whether a particular drug should be included on the schedules of controlled substances.[100] Private parties can be prosecuted for distributing listed or scheduled drugs except as authorized by law.[101] The argument will be made that the designations made by the EPA and USACE are not materially different from those other scientific judgments. Indeed, the words "science" or "scientific" appear 167 times in the *Federal Register* explanation for the 2015 rule, the argument would go, and the agencies repeatedly said that they relied on "peer-reviewed science" in crafting it.[102]

But the EPA and USACE did *not* make entirely scientific judgments. The agencies admitted as much in their *Federal Register* notice: "*Significant nexus is not a purely scientific determination*" because "science does not provide bright line boundaries with respect to where 'water ends' for purposes of the CWA."[103] Accordingly, "the agencies' interpretive task in this rule," EPA and USACE wrote, "requires scientific *and policy judgment, as well as legal interpretation*."[104] Justice Scalia put it well in *Rapanos* when describing an earlier version of the WOTUS Rule, saying that the government "exercises the discretion of an enlightened despot, relying on such factors as 'economics,' 'aesthetics,' 'recreation,' and 'in general, the needs and welfare of the people.'"[105] But a "policy judgment" regarding the "needs and welfare of the people" is what we trust the average person to decide precisely because that is *not* an expert judgment. Agencies usurp the legislative and democratic processes when they make those judgments in place of Congress and the public. Plus, agencies are no better at making legal judgments than federal courts are.[106] That is why Congress entrusted the U.S. Attorney General with the responsibility to represent the federal government in court. By statute, his or her legal interpretation, not an agency's, is the position of the United States.[107]

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100. *See, e.g.*, 21 U.S.C. § 811 (2018); Touby v. United States, 500 U.S. 160 (1991).

101. *See, e.g.*, 21 U.S.C. §§ 331(a), 333(a) & (b), 841 (2018).

102. *See supra* note 33 (and text accompanying the note); *see also*, *e.g.*, 80 Fed. Reg. 37,054, 37,084–37,086 (June 29, 2015) (responding to the question "How do science and law support the rule?").

103. 80 Fed. Reg. 37,054, 37,060 (June 29, 2015) (emphasis added).

104. *Id.* at 37,057 (emphasis added).

105. Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion).

106. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2425–48 (2019) (Gorsuch, J., concurring in the judgment); Larkin & Canaparo, *supra* note 79, at 520–28.

107. *See* 28 U.S.C. § 516 (2018) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *see* 28 U.S.C. §§ 509, 511 ("The Attorney General shall give his advice and opinion on questions of law when required by the President."), 512 ("The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department."); 513 ("When a question of law arises in the administration of the Department of the Army, the Department of the Navy, or the Department of the Air Force, the cognizance of which is not given by statute to some other officer from whom the Secretary of the military department concerned may require advice, the Secretary of the military department shall send it to the Attorney General for disposition."), 515(a), 518, 519 ("Except as otherwise authorized by law, the Attorney General shall

Besides, the Void-for-Vagueness Doctrine requires that a person of "common intelligence" not only know what a term means, but also be able to apply it in life. The average person (at least the ones who remember their high school geometry) knows that *pi* is a mathematical constant reflecting the ratio of a circle's circumference to its diameter. But no average person (or expert, for that matter) can calculate the last digit in *pi*. Similarly, we all have an understanding of what is "annoying" (for some, it's people loudly talking or playing music in an elevator; for others, it might be reading this article). But the Void-for-Vagueness Doctrine prohibits the government from making it a crime to "annoy" someone.[108] What the CWA demands of the public is essentially the same.

The bottom line is this: Allowing an agency to make up for the shortcoming in a vague statute is a treacherous endeavor. There is no logical reason to stop at regulations issued pursuant to the Administrative Procedure Act's notice-and-comment rulemaking process.[109] Agencies use numerous other documents to interpret —and, if courts give an agency's opinion deference, also *make*—the law.[110] To be sure, the Supreme Court by fiat could slice off the latter like so much baloney, but doing so would be an exercise in legislative line-drawing instead of judicial decision-making. Doing so also would confuse scientific prowess with moral discernment. So, if a road takes you where you don't want to go, perhaps you shouldn't start down the path that leads you there. The Court could, and should, leave to Congress the task of fixing a vague criminal law.

B. The Vagueness of the Term "Waters of the United States"

The average person would read the term "waters of the United States" to cover a readily identifiable interstate river or lake, as well as an immediately adjacent, continually flooded, wetland that can be used for transportation. Examples would include major rivers—such as the Mississippi or Rio Grande, along with obvious, large-scale tributaries—and other major water bodies, such as the Great Lakes. All are large and obviously navigable themselves or plainly connect to navigable

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supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties."). *See generally* Larkin & Canaparo, *supra* note 79, at 521–24 (arguing that Congress has entrusted the Attorney General, not federal agencies, with the responsibility to decide the federal government's legal interpretations of statutes and agency rules).

108. *See* Coates v. Cincinnati, 402 U.S. 611 (1971) (holding vague a local ordinance making it unlawful for three or people to congregate on a sidewalk and "conduct themselves in a manner annoying to persons passing by").

109. 5 U.S.C. § 553 (2018).

110. *See*, *e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1320 (1992) (noting that the term "rules" includes "legislative rules, interpretive rules, opinion letters, policy statements, policies, program policy letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidance, guidelines, staff instructions, manuals, questions-and-answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, testimony before Congress, and many others").

waters. The average person would extend that understanding to the Chesapeake Bay and Gulf of Mexico, at least until they meet the Atlantic Ocean (or extend outward for three miles). That is critical. As noted, the average American has only a high school education, not a college, law, or doctoral degree. Under the Void-for-Vagueness Doctrine, *that* person is the one whom a criminal law must inform whether a particular body of water—or (though it still seems odd to include it) parcel of land—is a "water of the United States."

The average person is not the only type of individual facing difficulty in determining what satisfies the CWA's definition. Members of the academy have expressed difficulty too. Scholars have criticized the WOTUS Rule's vagueness since the 1977 version was in effect. One noted that "[s]ome common wetland types in North America include" the following: "salt marsh, freshwater marsh, tidal marsh, alkali marsh, fen, wet meadow, wet prairie, alkali meadow, shrub swamp, wooded swamp, bog, muskeg, wet tundra, pocosin, mire, pothole, playa, salina, salt flat, tidal flat, vernal pool, bottomland hardwood swamp, river bottom, lowland, mangrove forest, and floodplain swamp."[111] Ask yourself, how many "ordinary people"[112] could define what those terms mean? But, as another scholar has pointed out, even if you limit that term to its "common conception" of swamps, marshes, bogs, and similar areas,[113] you are still left with the problem of identifying what particular water body or parcel of land is and is not a "wetland."[114] That is no mean feat. Assume that "a wetland has water, plants that are adapted to water, and soil that has been exposed to water"[115] (assumptions that the EPA and USACE might dispute in a particular case). You still have a problem because that definition "does not necessarily tell an individual property owner whether (or to what extent) his or her site is a wetland and thus subject to the requirements of the Clean Water Act."[116] Consider how two other scholars have described the difficulty of determining exactly what is a "wetland":

> Although water is present for at least part of the time, the depth and duration of flooding varies considerably from wetland to wetland and from year to year. . . .
>
> Wetlands are often located at the margins between deep water and terrestrial uplands, and are influenced by both systems. . . .

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111. RALPH W. TINER, WETLAND INDICATORS 1 (1999). For the agencies' definitions of some of those terms, see 80 Fed. Reg. 37,054, 37,071–37,073 (June 29, 2015).

112. United States v. Davis, 139 S. Ct. 2319, 2323 (2019).

113. *See* WILLIAM M. LEWIS, JR., WETLANDS EXPLAINED: WETLANDS, SCIENCE, POLICY, AND POLITICS IN AMERICA 3 (2001) ("[T]hose portions of a landscape that are not permanently inundated under deep water, but are still too wet most years to be used for the cultivation of upland crops such as corn or soybeans. Wetlands, in other words, coincide pretty well with the common conception of swamps, marshes, and bogs."). Here, too, the author discusses the simpler 1977 rule.

114. ROYAL C. GARDNER, LAWYERS, SWAMPS, AND MONEY: U.S. WETLAND LAW, POLICY, AND POLITICS 36–37 (2011). Again, the author discusses the simpler 1977 rule.

115. *Id.*

116. *Id.*

> Wetland species (plants, animals, and microbes) range from those that have adapted to live in either wet or dry conditions (facultative), which makes difficult their use as wetland indicators, to those that adapted to only a wet environment (obligate).
>
> Wetlands vary widely in size, ranging from small prairie potholes of a few hectares in size to large expanses of wetlands several hundreds of square kilometers in area. . . .
>
> Wetland location can vary greatly, from inland to coastal wetlands and from rural to urban regions. . . .
>
> Wetland condition, or the degree to which a wetland has been modified by humans, varies greatly from region to region and from wetland to wetland."[117]

As one scholar concluded: "You could not take this [1977] definition out to the field and use it with any confidence to identify the dividing line between a wetland and an adjacent upland."[118] Memorizing the definition of a "wetland" might earn you an "A" on an exam in school, but that is worth little to someone who can't use the definition to identify a "wetland" in a real-life field.

The 2015 WOTUS Rule did not improve the act's comprehensibility. If anything, that rule aggravated the uncertainties regarding its applicability. The rule relies heavily on "the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies' technical expertise and experience as support."[119] An "important element" of the legal boundary of the rule "is the significant nexus standard."[120] According to the agencies, the new rule "will clarify and simplify implementation of the CWA" by using "clearer definitions and increased use of bright-line boundaries to establish waters that are jurisdictional by rule and limit the need for case-specific analysis."[121]

If only.

That rule defined some bodies or parcels as "waters of the United States" as a matter of law. They are (1) all waters that "are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce"; (2) all interstate waters, including interstate wetlands; (3) the territorial seas; (4) all "impoundments of waters" (i.e., waters created by dams that otherwise constitute "waters of the United States"); (5) all tributaries of "waters of the United States"; and (6) all waters "adjacent to" any of the above waters. But there is more. Other waters can constitute the "waters of the United States" if they are one of five types of water bodies: Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas costal prairie wetlands[122]—and, on "a case-

117. WILLIAM J. MITSCH & JAMES G. GOSSELINK, WETLANDS 31–32 (5th ed. 2015)
118. *Id.*
119. 80 Fed. Reg. 37,056 (June 29, 2015).
120. *Id.*
121. *Id.* at 37,055.
122. *Id.* at 37,073.

specific basis," the agencies find them to have "a significant nexus to" one of those categories.[123]

Again, what average person can either define what those terms mean, let alone apply them in the field? Yet, that is where the rubber meets the road for vagueness purposes.

If the average person felt at sea,[124] he or she wouldn't be alone; Justice Samuel Alito would be there too. In *Sackett v. EPA*,[125] he noted that the CWA did not define the term "waters of the United States"; that the term "was not a term of art with a known meaning" when Congress passed the act; and that "the words themselves are hopelessly indeterminate."[126] He elaborated on that last point as follows:

> The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the Agency thinks possesses the requisite wetness, the property owners are at the Agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to $75,000 per day ($37,500 for violating the Act and another $37,500 for violating the compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a Nation that values due process, not to mention private property, such treatment is unthinkable.[127]

The flaws Justice Alito noted alone are fatal to a significant nexus test. But there is more. The flaw in a vague criminal statute is that it affords no one notice as to what a statute means. In the case of the WOTUS Rule, other factors aggravate that uncertainty.

One is that the agencies made no effort to render the rule understandable to the average person. The agencies explained that "[t]he science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, and it is the agencies' task to determine where along

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123. *Id*.

124. Yes, that's a horrible pun, but I couldn't help myself.

125. *Sackett I*, 566 U.S. 120 (2012).

126. *Id*. at 133.

127. *Id*. at 132; *see also* U.S. Army Corps of Engineers v. Hawkes Co., Inc., 578 U.S. 590, 602 (2016) (Kennedy, J., concurring) (quoting *Sackett I*, 566 U.S. at 132) ("As Justice ALITO has noted in an earlier case, the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing.").

that gradient to draw lines of jurisdiction under the CWA."[128] To draw that line, "the agencies must rely, not only on the science, but also on their technical expertise and practical experience in implementing the CWA during a period of over 40 years."[129] That explanation of how the EPA and USCOE acted shows that their WOTUS Rule is twice flawed for purposes of the Void-for-Vagueness Doctrine. Science has "gradients" for deciding what a term means, and language does too, as Ludwig Wittgenstein taught us.[130] But the criminal law requires clarity so that the average person can identify the difference between red lights and green lights, as the Void-for-Vagueness Doctrine has taught us. In addition, the question is not how an agency with a graduate-level quantum of scientific learning and 40-plus years of practical experience can apply a law, but how a person of "common intelligence" can apply it when reading it for the first time. The agencies' *Federal Register* comments prove that EPA and USCOE made no effort to draft a rule that would satisfy the Void-for-Vagueness Doctrine. They did not see the doctrine as relevant or understand what it demands and therefore did not even try to determine how the average person could apply their rule.

The consequence is this: the WOTUS rule effectively imposes on a lay party a duty found nowhere at common law—viz., a duty to retain an attorney to determine what a law means before acting. Congress has never imposed any such duty on the public. No Supreme Court void-for-vagueness decision since the Court's 1926 ruling in *Connally v. General Construction Company*[131] has suggested that a legislature can use indecipherable terminology to shift to a private party the burden of hiring a lawyer to determine what a statute means. Indeed, *Davis* points the other way.

Yet, even legal advice ordinarily would be insufficient to know what the CWA bars. A lawyer would have to enlist assistance from an expert in hydrology, geology, or the like—and perhaps even a historian, because all waters that "were used in the past . . . in interstate or foreign commerce" qualify[132]—to know what is and is not a "water of the United States." In essence, the government is asking the Supreme Court to do Congress's job by construing a federal criminal law to demand that the average person undertake an expensive burden that Congress has never imposed on the public. That would be far in excess of what *interpretation* of a criminal statute permits

It is reasonable to presume that the average person has common sense (some have far more than highly educated parties), but the agencies' interpretation of

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128. 80 Fed. Reg. at 37,057.

129. *Id.*

130. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 32–35 ¶¶ 68–75 (G.E.M. Anscombe trans., 3d ed. 1973) (describing the difficulty of defining the term "game").

131. 269 U.S. 385 (1926).

132. 80 Fed. Reg. at 37,074 ("The existing regulations include within the definition of 'waters of the United States' all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."); *see also id.* at 37,065 ("The agencies, most often the Corps, have made more than 400,000 CWA jurisdictional determinations since 2008.").

"waters of the United States" shows that whoever approved the WOTUS Rule did not. The EPA and USACE have deemed as "waters of the United States" parcels of land[133] such as "an abandoned sand and gravel pit" that was "seasonably ponded" but "not adjacent to open water"; land that lies 120 *miles* from a navigable water; and land that is not even wet most of the time.[134] That interpretation might come naturally to Ph.D.'s concerned about environmental protection and engineering problem-solving. But the CWA cannot be read with that category of experts in mind; the target audience is people with only a high-school education. To them, the experts' interpretation is jarring, even bizarre, so far from their own understanding of the everyday meaning of "waters" as to suggest that the agencies have pursued a green frolic-and-detour of their own devising.

Put yourself in the shoes of a member of the public. Assume that he read the *Federal Register*, understood what its terms meant because he was a hydrologist, and knew the law because he was also an attorney. Even then, that person could not by sight alone determine whether a particular small body of water (to say nothing of dry land) is covered by the CWA—even though that is what the Void-for-Vagueness Doctrine demands. According to the agencies, a "significant nexus" exists whenever a body of water, including a wetland, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a navigable water.[135] (Put aside the fact that the Rule tautologically requires that there be a "significant" effect for there to be a "significant" nexus.) No particular body of water can be examined on its own; each one must be considered "in combination with" every other "similarly situated" body of water (whatever that undefined term means) in the region (however broadly that term is construed).[136] Plus, tools and evidence

133. Stop there for a second. A higher authority than EPA, USACE, and U.S. Supreme Court certainly thought that "water" and "land" were different. *See Genesis* 1:9–10 (King James) ("And God said, Let the waters under the heaven be gathered together unto one place, and let the dry land appear: and it was so. [¶] And God called the dry land Earth; and the gathering together of the waters called the Seas: and God saw that it was good."). "[O]rdinary people," United States v. Davis, 139 S. Ct. 2319, 2325 (2019), would agree.

134. *See* U.S. Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 596 (2016) (noting the government's claim that a particular wetland had a "significant nexus" to a river "120 miles away"); *Sackett I*, 566 U.S. 120, 124 (2012); *id*. at 132 (Alito, J., concurring) (quoted *supra* at text accompanying note 120); *see also* 80 Fed. Reg. at 37,080 ("For example, if a tributary has a 1,000 foot wide 100-year floodplain, then a water that is located within 1,000 feet of the ordinary high water mark of a covered tributary and extends to 2,000 feet is jurisdictional in its entirety as 'neighboring.'").

135. *See supra* note 32–48 and accompanying text; 80 Fed. Reg. at 37,062 ("The final [EPA] Science Report states that connectivity is a foundational concept in hydrology and freshwater ecology. Connectivity is the degree to which components of a system are joined, or connected, by various transport mechanisms and is determined by the characteristics of both the physical landscape and the biota of the specific system. Connectivity for purposes of interpreting the scope of 'waters of the United States' under the CWA serves to demonstrate the 'nexus' between upstream water bodies and the downstream traditional navigable water, interstate water, or the territorial sea. . . . The Science Report presents evidence of those connections from various categories of waters, evaluated singly or in combination, which affect downstream waters and the strength of that effect.").

136. *Id*. at 37,065.

that the average person will not have at hand, and even the average expert might not possess, can be necessary to make the determination: Remote sensing mapping information, "USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps" (including "aerial photographs"); "light detection and ranging" (also known as LIDAR) data; and "desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling."[137] Agency personnel have access to them, along with "other methods for estimating ordinary high water mark, including, but not limited to, lake and stream gage data, flood predictions, historic records of water flow, and statistical evidence," and "a regional regression analysis and the Hydrologic Modeling System (HEC–HMS)," to make a "hydrologic estimation of stream discharge sufficient to create an ordinary high water mark in tributaries under regional conditions."[138] The bottom line is a simple one: No one armed with either "common" or "uncommon intelligence" can know with any certainty whether the puddle or ditch in front of him is a "water of the United States" simply by looking at it.

Eighth Circuit Court Judge Jane Kelly spotted the effect of that demand. As she put it—in a rather understated manner—"most laws do not require the hiring of expert consultants to determine if they even apply to you or your property."[139] A person would need to retain experts to investigate every other body of water in a watershed with a radius of more than 100 miles[140] to learn whether a particular body of water qualifies. In deciding how far the relevant "region" extends, that person would need to realize that the agencies used that term in a "functional," not simply "geographic," sense—whatever "functional" means.[141] Even then, the government could charge someone with a crime if the agency experts disagree with a person's own experts. As a result, the agencies' position creates a trap, not

137. 80 Red. Reg. at 37,076–37,077; *see also id*. at 37,077 ("Tributaries are observable in aerial photography by their topographic expression, characteristic linear and curvilinear patterns, dark photographic tones, and the presence and pattern of riparian vegetation. The characteristic linear and curvilinear patterns and dark photographic tones observed on aerial photography can be caused by shadow cast from the banks of an incised stream or from water in the stream channel itself. In some cases stream channel morphology is visible, providing evidence of scour, materials sorting, and deposition, all characteristics of an ordinary high water mark.").

138. *Id*. at 37,077.

139. Hawkes Co. v. U.S. Army Corps of Engineers, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring), *aff'd*, 578 U.S. 590, 594 (2016).

140. The radius in *Hawkes*. *Hawkes*, 578 U.S. at 596 ("In February 2012, in connection with the permitting process, the Corps issued an approved [Jurisdictional Determination] stating that the property contained 'water of the United States' because its wetlands had a 'significant nexus' to the Red River of the North, located some 120 miles away.").

141. Understanding the functional definition of a wetland is quite a chore, given that "[i]ndicator[s]" include "[p]resence of hydrophytes," "[n]utrient outflow lower than inflow," "[i]ncrease in depth of sediment," and "[h]igh diversity of vertebrates." NAT'L RSCH. COUNCIL, NAT'L ACAD. OF SCI., WETLANDS: CHARACTERISTICS AND BOUNDARIES 35 Tbl. 2.2 (1995) [hereinafter WETLANDS: CHARACTERISTICS AND BOUNDARIES]. Given the knowledge that a functional analysis of a wetland would require, we should be thankful that "functional analysis is not necessary for the delineation of wetlands[.]" *Id.* at 34.

just for the unwary, but also for someone fastidiously attempting to comply with the law but whose judgment differs from one offered by a government expert.[142]

V. REMEDIES FOR UNCONSTITUTIONAL VAGUENESS

The terms "navigable waters" and "waters of the United States" are the fulcrum to the CWA. Without them, the act could not function. Fortunately, the entire statute need not be held unconstitutional. The problem stems from the combination of three elements: (1) the vague term "waters of the United States" is critical to any enforcement of the CWA, (2) the Supreme Court has required that a statute be consistently interpreted regardless of the enforcement mechanism chosen,[143] and (3) the government can prosecute CWA violations criminally. The first two factors are not inherently problematic; the third one is. But there are three remedies for it. The first one defangs it to save the remainder of the CWA. The other two either construe that term by adopting a commonly understood frame of reference or create a defense to a criminal prosecution. Neither one is as protective as the first remedy, but they should be considered.

There are plusses and minuses to each one. The first one is the most surgical, because it directly addresses the harm at which the Void-for-Vagueness Doctrine is addressed: the risk of a criminal prosecution. The other two would allow the government to continue to file criminal charges, but would address the failure of the current term to instruct what is prohibited. One of those two remedies offers a way to construe the term in a limited but comprehensible manner, while the other enables someone to raise a defense to criminal charges. The problem with both of them, however, is that the Supreme Court could well view them as being far too "legislative" in nature than a federal court can endorse. Nonetheless, the following subparts summarize how each remedy would work, so that the Supreme Court has options other than merely declaring the entire CWA unconstitutional.

A. Remedy 1: Bar Only Criminal Enforcement

Unless the Court is willing to overrule its Rule of Consistency decisions, the Court will need to decide how much of the CWA must be held unconstitutional. That approach should be surgical. Just as a surgeon should remove only cancerous tissue (and a small, additional margin for safety) while leaving healthy tissue in place, the Court should excise only the unconstitutional portions of the statute

142. It is no argument that the government can be trusted to prosecute only truly "bad guys." Our written Constitution rests on the proposition that the law exists to protect the public from malevolent, misguided, or politically motivated government officials, including career prosecutors looking for a cheap "stat." *See* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. L. REV. 715, 774–77 (2013); *cf.* Stevens v. United States, 559 U.S. 460, 480 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

143. *See supra* text accompanying notes 11–12.

leaving the working remainder intact.[144] Here, one way to do that would be to hold the term "waters of the United States" unconstitutional. Doing so, however, would effectively nullify the entire act because that term is the linchpin for the regulatory and other features of the CWA. But there is another option.

The remedy is not to hold the entire CWA unconstitutional due to the vagueness of its "waters of the United States" element, but to hold the criminal penalties unenforceable. That remedy would eliminate the void-for-vagueness objection to the statute while allowing the government (and private parties) to pursue administrative and civil remedies for unlawful actions. True, the critical term would remain vague, and, in their proposed new rulemaking proceeding, the agencies would need to devise an objective standard for themselves and private parties when deciding what is and is not within the act's reach. Barring criminal prosecutions, however, remedies the CWA's vagueness while leaving the remainder of the act enforceable via administrative or civil relief.

Criminal sanctions are different in kind from administrative and civil penalties. Tort law has always used a reasonableness standard for negligence purposes,[145] and on occasion a negligence standard raises some tricky questions.[146] No one, however, would be able successfully to claim that the Void-for-Vagueness Doctrine nullifies tort remedies for negligence. By contrast, numerous constitutional doctrines require that special protection be available when criminal punishments are in the offing. The Fifth Amendment Self-Incrimination Clause protects only against compelling someone to offer proof that will convict him;[147] the companion Double Jeopardy Clause prohibits multiple punishment for the same crime;[148] and the entire Sixth Amendment, as its first four words make clear, is limited to criminal cases.[149] The Void-for-Vagueness Doctrine, which finds its source in the Fifth and Fourteenth Amendments Due Process Clauses, is just another example of such a limitation. Eliminating criminal penalties would take the CWA out of the Void-for-Vagueness Doctrine's concern that no one should be at risk of *criminal* punishment because a law is vague.

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144. *See*, *e.g.*, Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335, 2349 (2020).

145. *See*, *e.g.*, RESTATEMENT (SECOND) OF TORTS § 281 Statement of the Elements of a Cause of Action for Negligence (1965) ("The actor is liable for an invasion of an interest of another, if: (a) the interest invaded is protected against unintentional invasion, and (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and (c) the actor's conduct is a legal cause of the invasion, and (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion."); *id.* § 282 Negligence Defined ("In this Restatement, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.").

146. Particularly regarding causation. *See*, *e.g.*, Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. Ct. App. 1928).

147. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

148. U.S. CONST. amend. V ("No person . . . shall be subject to the same offense to be twice put in jeopardy of life or limb . . . .").

149. U.S. CONST. amend. VI ("In all criminal prosecutions . . . .").

Remember also that pollution was not a concern in the eighteenth century; transportation was.[150] In the twenty-first century, we are troubled about the interconnection of pollution-bearing waters because we do not want our drinking water—whether it comes from above-ground interstate rivers and lakes or underground aquifers—to be poisoned from far away. But that desire does not mean we can use whatever hardware we find in our federal toolkit to address it. In particular, it is a mistake to assume that we can always use criminal sanctions to accomplish social goals. The common law could do so because of factors—viz., a very limited number of offenses, all of which violated then-contemporary homogeneous religious precepts—that were unique to a time that no longer exists. Today, by contrast, legislatures use statutes instead of the common law to regulate problems created by industrialization and urbanization. In general, statutes with civil remedies might be a reasonable response to the advent of social ills that arose only when the nation was no longer predominantly rural and its economy principally agricultural.[151] But we might not be able to use criminal statutes to address every problem we face because of the difficulty of finding language broad enough to cover its scope but specific enough to allow a law-abiding person to remain one. The term "waters of the United States" well illustrates that conundrum.

There is another point to keep in mind. There is more going on here than Congress's decision to pass an indecipherable statute (along with its subsequent refusal to shoulder the burden of clarifying it) and the Executive's attempt to use it to reach "270–to–300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States."[152] For the last 50 years, we have become accustomed to reflexively using the criminal law as our go-to regulatory device without stopping to ask whether it should be used to tamp down every type of conduct we dislike. As the result, we have created a forest of criminal laws when only a copse might be necessary, making it impossible for anyone to know everything that is forbidden.[153] We also have forgotten to consider the potential limits that the Constitution imposes on using criminal law as a fire extinguisher. Could Congress require every interstate traveler to know how to perform CPR or to carry aspirin in case a fellow traveler has a heart attack? Perhaps, though it would take some explaining. Could Congress require everyone to know how to perform a tracheostomy or to, better yet, remember the contents of a medical school pharmacology text? No, not unless Congress can make it a crime to flunk organic chemistry. Granted, the

150. *See* Paul J. Larkin, Jr., *The "Waters of the United States" Rule and the Void-for-Vagueness Doctrine*, HERITAGE FOUND., LEGAL MEMORANDUM No. 207 (June 22, 2017).

151. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 253–56 (1952); Graham Hughes, *Criminal Omissions*, 67 YALE. L.J. 590, 595 (1958); Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause,* 37 HARV. J.L. & PUB. POL'Y 1065, 1072–79 (2014); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56–67 (1933).

152. Rapanos v. United States, 547 U.S. 715, 722 (2006) (plurality opinion).

153. *See, e.g.,* Larkin, *supra* note 65, at 345–69; Larkin, *supra* note 142, at 719–55 (both discussing that phenomenon).

USACE *Wetlands Delineation Manual* contains only 100-plus pages, while medical school pharmacology textbooks are ten times as long,[154] so committing the former to heart is not as big a lift as memorizing the latter. But there is a limit on what a legislature can demand that an average person know, or else the notice requirement enforced by the Void-for-Vagueness Doctrine is not even worth the label of a legal fiction. And if that is true, then the Supreme Court owes it to the public to admit as much, or else it is just as guilty as Congress and the Executive Branch for the lie that the criminal law is not Shirley Jackson's lottery.[155]

B. Remedy 2: Adopt a Canoe Rule

Alternatively, the Court could construe "waters of the United States" in a manner that would enable an average person to understand its scope and respect its historical meaning to boot. In 1787, land transportation was primitive and inadequate for bulky goods or large quantities of items, even by Conestoga wagon,[156] so they often had to be shipped over water to reach a port or market.[157] Believing that domestic and international commerce were critical to success of the fledgling nation,[158] the Framers sought to protect shipping and navigation.[159] To do so, they empowered Congress to keep states from disrupting the economy via state-

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154. *See, e.g.*, BERTRAM G. KATZUNG, BASIC AND CLINICAL PHARMACOLOGY (Bertram G. Katzung & Todd W. Vanderah eds., 15th ed. 2021) (1235 pages long).

155. Shirley Jackson, *The Lottery*, NEW YORKER (June 26, 1948), http://www.newyorker.com/magazine/1948/06/26/the-lottery [https://perma.cc/8BLD-CQFW].

156. *See, e.g.*, EARL E. BROWN, COMMERCE ON EARLY AMERICAN WATERWAYS 7 (2010) ("Early colonists moving inland in the early 1700s had no highways, railroads or other means of conveyance to move their household goods and tools. The only mode of transportation to and from the frontier was by pack animals, or by using canoes on the rivers and creeks like we use highways today."); DOUGLASS C. NORTH, THE ECONOMIC GROWTH OF THE UNITED STATES, 1790–1860, at 18 (1966).

157. *See, e.g.*, BROWN, *supra* note 156, at 1, 3–4, 7–9, 17–18, 33, App'x. 193–217; NORTH, *supra* note 156, at 18. *See generally* Larkin, *supra* note 150, at 11–12 ("To reach an entrepôt or destination, food and timber generally had to be transported by river. Land transport was very costly, especially before invention of the Conestoga wagon, so only rural locations near navigable waterways could market raw materials and foodstuffs. In Pennsylvania, for example, the only way farmers, millers, miners and lumbermen could move their products to market was to use the creeks and rivers. The colonists were familiar with the process of waterborne transportation, however, having learned it from the Swedes, Germans, and French, who developed the technique of moving heavy loads downstream, a practice that the early settlers brought with them to the New World. Rafts, arks, and Durham boats were commonly used for transport; even dugout canoes could be brought into service if need be.") (footnotes and punctuation omitted).

158. *See*, *e.g.*, BERNARD BAILYN, THE NEW ENGLAND MERCHANTS IN THE SEVENTEENTH CENTURY (1955); T.H. BREEN, THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE (2004); JOHN J. MCCUSKER & RUSSELL R. MENARD, THE ECONOMY OF BRITISH AMERICA, 1607–1789 (1985); GARY B. NASH, THE URBAN CRUCIBLE: THE NORTHERN SEAPORTS AND THE ORIGINS OF THE AMERICAN REVOLUTION (1986).

159. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190–92, 193–94 (1824) (ruling that the Commerce Clause "comprehends navigation in the word commerce" and reaches "every species of commercial intercourse"); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 124 (2001) ("[I]f anyone in the Constitutional Convention or the state ratification conventions used the term 'commerce' to refer to something more comprehensive than 'trade' or 'exchange,' they either failed to make explicit that meaning or their comments were not recorded for posterity.").

protective laws.[160] That is important. The Framers understood that the term "interstate commerce" meant *commerce*, *not pollution*—and certainly not pollution whose source was more than 100 miles away from a particular area. The Framers would never have thought that the terms "Commerce . . . among the several States," "navigable waters," or "waters of the United States" could be defined using a *pollution-focused* substantial-nexus test, as Justice Kennedy believed.[161]

Equally important, a commerce-based test offers a person of "common intelligence" a ready go-by for interpreting the CWA. How? He or she can ask whether a particular water body would allow use of a canoe, raft, or ark to transport produce, animal meat or hides, and other commercial goods. Those waterborne devices were the ones that colonists most often used to ship heavy goods downstream.[162] At a time when there were few roads and transportation of heavy goods by land was cumbersome and slow, if not impossible, canoes, rafts, and arks were the primary shipment means. Those carriers enabled settlers to transport to the wilderness goods needed for survival, and later to ship to market whatever produce they could raise or items they could make wherever they landed. Americans from the late 18th to early 19th centuries would readily have associated navigability with such types of ferries because settlers could and did use them regularly for water transportation. Americans in the 21st century would be able to make the same sort of determination. Rain gutters, isolated ponds, man-made rivers, lakes, and swimming pools not connected to, say, the Mississippi River or Lake Superior, and entirely underground water sources, like aquifers—none of them would qualify because none would support using a canoe for transportation.

That historical phenomenon is important for this issue. If someone can use a canoe to go from one water body (*Water Body A*) to another (*Water Body B*) and the latter clearly is a "water of the United States" (or a settlement or port en route), then the former also qualifies as one under the CWA, because the average person could readily understand it as a navigable water. Accordingly, what I will call the "Canoe Rule" (since canoes were then and are still smaller than arks or similar boats) would be a two-fer: It would provide a useful go-by for an average person to identify a navigable water, while also respecting what the Framers understood to fall within federal regulatory authority.

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160. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"). *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979) ("The few simple words of the Commerce Clause—'The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . '—reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation. . . . The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation.") (citation and footnote omitted).

161. *See* Rapanos v. United States, 547 U.S. 715, 759–61, 774–76, 780–81 (2006) (Kennedy, J., concurring in the judgment).

162. *See* BROWN, *supra* note 156, at 1, 3–4, 7–9, 17–18, 33, App'x. 193–217.

C. Remedy 3: Adopt a Mistake of Law Defense

The final remedy would be to adopt a mistake-of-law defense. Historically, the Supreme Court has rejected any such defense by repeatedly endorsing the inverse common law maxim that ignorance of the law is no excuse.[163] But the Court's decisions have done no more than repeat the same "legal cliché"[164] in dicta. The Court has never inquired whether, as Justice Oliver Wendell Holmes would have asked, it makes sense today to apply that ancient rule in light of our massive federal criminal code and widely heterogeneous community moral sensibilities.[165] Given the changes in law and society since 1787, it is time for the Supreme Court to reconsider the contemporary sensibility of its oft-repeated statements. The *Sackett* case might force the Court's hand.[166]

If the Court were to agree and adopt a mistake-of-law defense, it would operate as follows: if no reasonable person would have thought that a particular body of water or parcel of land is a "water of the United States," and if a party did not know that it is, then that party would not be guilty of a criminal CWA violation.[167] That defense is not a "*Get Out of Jail Free*" card. A court could place at least the burden of production on a defendant, if not the burden of persuasion.[168] Such burdens are commonplace in criminal law. While making a mistake-of-law defense available would not be as valuable to the average person as a ruling that the CWA cannot be enforced criminally, it would reduce the risk of convicting a morally innocent party. That is a grave risk in CWA prosecutions today, and the perfect should not be the enemy of the good.

CONCLUSION

The pending *Sackett* case raises the issue of whether and how the Supreme Court will address the vague nature of the term "waters of the United States."

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163. *See supra* note 82 and accompanying text (collecting sources).

164. Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009).

165. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

166. I have often argued that a Mistake of Law defense is necessary in the case of non-common law crimes, like CWA violations. *See, e.g.*, Larkin, *supra* note 142, at 777–81; Paul J. Larkin Jr., *Taking Mistakes Seriously*, 28 BYU J. PUB. L. 71, 100–15 (2013); Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 726–27, 727 n.14 (2012).

167. *See* Larkin, *Taking Mistakes Seriously*, *supra* note 166, at 108. For an elaboration of how the defense would work, see *id.* at 107–09.

168. *See, e.g.*, Simopoulos v. Virginia, 462 U.S. 506, 510 (1983); Cnty. Ct. of Ulster Cnty. v. Allen, 442 U.S. 140, 157 n.14 (1979); Sparf v. United States, 156 U.S. 51, 63–64 (1895). The defense might even require a defendant to bear the burden of proof. *See* Larkin, *supra* note 166, at 109. *See generally* Smith v. United States, 568 U.S. 106, 109–14 (2013) (ruling that the defendant can be made to bear the burden of proof on withdrawal from a conspiracy); Martin v. Ohio, 480 U.S. 228, 231–36 (1987) (same, for self-defense); Patterson v. New York, 432 U.S. 197, 205–16 (1977) (same, for the defense of extreme emotional disturbance); 4 BLACKSTONE, *supra* note 93, at *201 (same, for all defenses).

That term cries out for a limiting construction "ordinary people" can understand. Private and government experts and lawyers could readily differ over how to apply it, which means that no lay person should be held criminally liable for mistakenly deciding that a particular body of water or plot of land meets the definition. The Court has several options for how to address this problem and ensure that the average person does not wind up imprisoned for making a reasonable mistake. The Court should endorse one of them.