

Advancing Judicial Review of Wetlands and Property Rights Determinations: *Army Corps v. Hawkes Co.*

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Introduction

Over the years, the U.S. Supreme Court has established many doctrinal and procedural barriers that landowners must confront in ascertaining and protecting their rights. Some barriers are of Byzantine complexity. Federal statutes, especially those pertaining to the environment, often severely constrain the use of private property. While the text of these laws might be general and somewhat aspirational in tone, the rules issued by agencies charged with administering them often are voluminous, detailed, and interpreted subjectively.

When faced with the possibility that their preferred land use might run afoul of federal environmental agency requirements, landowners have three plausible options. First, they might choose to abandon their plans and steer far clear of possible problems with government regulators. But that choice would reduce the value of the land and might contribute toward reducing economic productivity. Second, landowners might comply with whatever directives the relevant government agency ultimately sets forth. But that often involves drastic cutbacks of owners' plans, great expense, and significant delay. Finally, one might think, the owners could challenge whether the regulatory statute applies to their lands in the first place. And yet, in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, the federal government asked the Supreme Court to foreclose such a challenge to agency jurisdiction.¹

In a modest but important victory for landowners, all eight sitting Supreme Court justices rejected the government's position. The Court

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¹ 136 S. Ct. 1807 (2016).

thus vindicated the principle that the acts of agency regulators are not above speedy and effective judicial review. As the Court observed in 1967, in *Abbott Laboratories v. Gardner*, “judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.”² And as the Court added a decade later, in *Califano v. Sanders*, the Administrative Procedure Act (APA) “undoubtedly evinces Congress’ intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.”³

Hawkes continues the Court’s recent trend toward alleviating unnecessary procedural hurdles that have stymied property owners. It also continues the Court’s recent proclivity to realistically examine the possibility that government will use its superior strength to extort unjustified concessions from landowners.

I. Judicial Review of Wetlands Jurisdictional Determinations

A. *Hawkes*: A Short History

The parcel that was at issue in the *Hawkes* case is located in Marshall County, Minnesota, and is rich in organic peat. As Chief Justice John Roberts explained in his opinion for the Court, peat has many beneficial uses, but its mining has significant environmental consequences that require its regulation under state and federal law.⁴ *Hawkes Co.*, the respondent in the case, had sought permission to mine high-quality peat from the parcel, which it had an option to purchase.

The Clean Water Act (CWA) regulates the discharge of pollutants into “the waters of the United States.”⁵ In December 2010, *Hawkes* applied to the U.S. Army Corps of Engineers for a permit that would authorize “the discharge of dredged or fill material into the navigable waters at specified disposal sites.”⁶ In the course of extensive communications, “Corps officials signaled that the permitting process would be very expensive and take years to complete,” and that *Hawkes* “would have to submit numerous assessments of various features of the property.”⁷

² 387 U.S. 136, 140 (1967).

³ 430 U.S. 99, 104 (1977).

⁴ See *Hawkes*, 136 S. Ct. at 1812.

⁵ 33 U.S.C. §§ 1311(a), 1362(7), (12).

⁶ *Hawkes*, 136 S. Ct. at 1813 (quoting 33 U.S.C. § 1344(a)).

⁷ *Id.*

Hawkes did apply for the permit, and, in February 2012, the Corps ruled that the parcel definitively contained wetlands that were subject to regulation under the CWA. Such a ruling that a parcel does, or does not, contain wetlands over which the Corps has jurisdiction is referred to as an “approved jurisdictional determination,” often called an “approved JD.”⁸ After appeals within the agency, the Corps issued a slightly modified “revised JD,” asserting that the parcel was subject to CWA regulation, since “its wetlands had a ‘significant nexus’ to the Red River of the North, located some 120 miles away.”⁹

B. Judicial Review Litigation in the Lower Courts

The APA, which is Congress’s general law prescribing how federal agencies operate, provides for judicial review of a “final agency action for which there is no other adequate remedy in a court.”¹⁰ In 1997, in *Bennett v. Spear*, the Supreme Court synthesized its precedents on the meaning of this requirement.¹¹

As a general matter, two conditions must be satisfied for agency action to be “final”: First, the action must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.¹²

Applying this standard in *Hawkes*, the district court dismissed the complaint seeking judicial review of the revised JD, holding that the JD was not a “final agency action for which there is no other adequate remedy in a court.”¹³ The court cited other federal courts that had ruled similarly.¹⁴

⁸ See *id.* at 1812.

⁹ *Id.* at 1813 (quoting approved JD).

¹⁰ 5 U.S.C. § 704.

¹¹ 520 U.S. 154 (1997).

¹² *Id.* at 177–78 (quotations and citations omitted).

¹³ *Hawkes Co., Inc. v. U.S. Army Corps of Eng’rs*, 963 F. Supp. 2d 868, 872, 878 (D. Minn. 2013), rev’d, 782 F.3d 994 (8th Cir. 2015), aff’d, 136 S. Ct. 1807 (2016).

¹⁴ See *id.* at 876–78 (citing, inter alia, *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586 (9th Cir. 2008); *Greater Gulfport Props., LLC v. U.S. Army Corps of Eng’rs*, 194 Fed. App’x 250 (5th Cir. 2006) (unpublished); *St. Andrews Park, Inc. v. U.S. Dep’t of Army Corps of Eng’rs*, 314 F. Supp. 2d 1238, 1244–45 (S.D. Fla. 2004)).

While Hawkes's appeal to the U.S. Court of Appeals for the Eighth Circuit was pending, the Fifth Circuit decided the similar case of *Belle Co., LLC v. U.S. Army Corps of Engineers*.¹⁵ There, the Fifth Circuit held that the plaintiff had not met the second *Bennett* factor since no legal consequences flowed from issuance of the revised JD. It distinguished *Sackett v. Environmental Protection Agency*, where the Supreme Court held in 2012 that an Environmental Protection Agency (EPA) compliance order was a "final agency action" for which there was no adequate remedy other than judicial review, and that nothing in the Clean Water Act would preclude such review.¹⁶

Subsequently, the Eighth Circuit reversed the district court and found for Hawkes. In a 2-1 opinion by Judge James Loken, the court held that both the district court and the Fifth Circuit in *Belle* had misapplied both *Bennett* and the Supreme Court's more recent opinion in *Sackett*. Judge Loken stressed the Supreme Court's admonition in *Califano* that Congress wanted judicial review "widely available to challenge the actions of federal administrative officials."¹⁷ In light of its direct conflict with *Belle*, the Supreme Court granted review in *Hawkes*.¹⁸

C. The Supreme Court Holds Courts May Review Agency Determinations That Private Lands May Be Regulated under the Clean Water Act

1. The Court upholds review under a standard that the Corps' assertion of jurisdiction was both final and consequential

In his opinion for the Court upholding Hawkes's right to judicial review, Chief Justice Roberts based his analysis on the two-prong test developed by the Court in *Bennett*. There,

we distilled from our precedents two conditions that generally must be satisfied for agency action to be "final" under the APA. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."¹⁹

¹⁵ 761 F.3d 383 (5th Cir. 2014), cert. denied, 135 S. Ct. 1548 (2014), denial of cert. vacated, cert. granted, and case vacated and remanded, 136 S. Ct. 2427 (2016).

¹⁶ 132 S. Ct. 1367, 1371-73 (2012).

¹⁷ 782 F.3d at 999 (quoting *Califano*, 430 U.S. at 104).

¹⁸ See 136 S. Ct. 615 (2015).

¹⁹ *Hawkes*, 136 S. Ct. at 1813 (quoting *Bennett*, 520 U.S. at 177-78).

Roberts then stated that the Corps did not dispute that an “approved JD” satisfies the first *Bennett* condition of finality: It is based on extensive factfinding, is typically not reexamined, may be relied upon by the landowner for a period of five years, and was described by the Corps itself as a “final agency action.”²⁰

The chief justice then stated that the second *Bennett* test was satisfied as well since the “definitive nature of approved JDs also gives rise to ‘direct and appreciable legal consequences.’”²¹ He explained this by discussing first what the Corps calls a “negative JD,” which is one in which the Corps has definitively determined that a parcel does *not* contain wetlands subject to its regulation.²² Furthermore, Roberts wrote, the only other federal agency authorized to bring civil enforcement proceedings under the CWA is the EPA.²³ “Under a longstanding memorandum of agreement between the Corps and EPA,” he continued, a determination that a certain property does not contain wetlands subject to regulation would “represent the Government’s position in any subsequent Federal action or litigation concerning that final determination” for the five-year period.²⁴ While private citizens could file lawsuits to enforce the CWA, a court hearing such a suit “cannot impose civil liability for wholly past violations.”²⁵

Roberts thus concluded that if “negative JDs” have legal consequences by affording landowners protections from government lawsuits for five years, affirmative JDs, which state that the parcel *does* contain wetlands subject to regulation, “represent the denial of the safe harbor that negative JDs afford.”²⁶ Therefore, “[b]ecause ‘legal consequences . . . flow’ from approved JDs, they constitute final agency action.”²⁷

²⁰ *Id.* at 1813–14.

²¹ *Id.* at 1814 (quoting *Bennett*, 520 U.S. at 178).

²² *Id.* (citing 33 CFR pt. 331; Corps, Regulatory Guidance Letter No. 05–02, § 1 (June 14, 2005)).

²³ *Id.* (citing 33 U.S.C. § 1319).

²⁴ *Id.* (quoting EPA, Memorandum of Agreement: Exemptions under Section 404(F) of the Clean Water Act §§ IV–C–2, VI–A (1989)).

²⁵ *Id.* (citing 33 U.S.C. §§ 1319(d), 1365(a)).

²⁶ *Id.* (citing 5 U.S.C. § 551(13) (defining “agency action” to include agency rules, licenses, etc., or the “denial thereof”).

²⁷ *Id.* (quoting *Bennett*, 520 U.S. at 178 (internal citation omitted)).

This holding did not bring the Court's analysis to an end, however. To be reviewable under the APA, not only must an order be final, but there must also be no adequate alternatives available to the landowner other than judicial review.²⁸ In *Hawkes*, the government asserted that respondents had two adequate alternatives: simply discharging fill material without a permit, or applying for a permit and seeking judicial review if displeased with the results.²⁹

The Court found that discharging fill without a permit would be an inadequate alternative since landowners who are mistaken in thinking their property not to be within CWA jurisdiction would be liable for heavy civil penalties and possible criminal sanctions. Applying for a permit and seeking judicial review only after an unfavorable decision would be inadequate as well, since "the permitting process can be arduous, expensive, and long."³⁰ Chief Justice Roberts added that, for the type of permit sought by *Hawkes*, "one study found that the average applicant 'spends 788 days and \$271,596 in completing the process,' without 'counting costs of mitigation or design changes.'"³¹ Roberts also noted that just because landowners can obtain judicial review of a permit denial, this does not imply that courts are barred from reviewing other final agency decisions earlier in the process, including approved JDs.³²

In sum, the thrust of Chief Justice Roberts's analysis is that an approved JD satisfies the two prongs of *Bennett* because it is final and—since it is binding on the government as a whole—has independent legal consequences.

Unlike the rest of the Court, Justice Ruth Bader Ginsburg did not accept that the memorandum of agreement between the Corps of Engineers and the EPA was binding on the government. She stated that the Court had received "scant briefing" about the memorandum and that the government had argued in its brief that a "reading of the memorandum to establish that JDs have binding effect in litigation

²⁸ See 5 U.S.C. § 704.

²⁹ *Hawkes*, 136 S. Ct. at 1815.

³⁰ *Id.* (noting civil penalties of up to \$37,500 for each day in violation, 33 U.S.C. § 1319(c), (d)).

³¹ *Id.* at 1812 (quoting *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality op.)).

³² *Id.* at 1816 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)).

does not ‘reflec[t] current government policy.’”³³ Furthermore, she added, “*Bennett* dealt with finality quickly,” and did not “displace or alter the approach to finality established by” two much earlier cases on that topic, *Abbott Laboratories* and *Frozen Food Express v. United States*.³⁴ Because she agreed that JDs are “definitive” and have “an immediate and practical impact,” however, Justice Ginsburg concurred in the judgment of the Court in favor of *Hawkes*, just not in the reasoning that the memorandum of agreement binds the government.³⁵

Abbott Labs, *Frozen Food Express*, and Justice Ginsburg’s opinion in *Hawkes* shared one common characteristic. They all took an expansive view of the right of individuals who are injured by an administrative decision to seek prompt recourse in the federal courts. The circumstances under which they could do so would be determined under the facts of each case, in accordance with common law principles of justice, and not by a rigid formula.

In *Abbott Laboratories*, the Court upheld judicial review of food and drug regulations that “purport[ed] to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies, the promulgation of which puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.”³⁶ Likewise, in *Frozen Food Express*, the Court permitted immediate judicial review of an Interstate Commerce Commission order that did nothing more than state the commission’s view of how a regulatory statute should be interpreted, but which nevertheless had the practical effect of putting transportation companies on notice that they faced criminal penalties if they transported certain goods.³⁷ Justice Ginsburg cited *Frozen Food Express* as supporting her view that the approved JD in *Hawkes* had “an immediate and practical impact.”³⁸

³³ *Hawkes*, 136 S. Ct. at 1817 (Ginsburg, J., concurring in part and concurring in the judgment).

³⁴ *Id.* at 1817 n.* (citing *Abbott Labs.*, 387 U.S. at 149–151; *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956)).

³⁵ *Id.* at 1817–18.

³⁶ *Abbott Labs*, 387 U.S. at 152.

³⁷ *Hawkes*, 136 S. Ct. at 1815 (discussing *Frozen Food Express*, 351 U.S. at 44–45).

³⁸ *Id.* at 1817–18 (2016) (Ginsburg, J., concurring in part and concurring in the judgment) (citing *Frozen Food Express*, 351 U.S. at 44).

Perhaps in an attempt to assuage Justice Ginsburg's concerns, Chief Justice Roberts added that his analysis based on *Bennett* "tracks the 'pragmatic' approach we have long taken to finality,"³⁹ and briefly noted *Abbott Labs* and *Frozen Food Express*.

2. The trend toward removal of procedural barriers

By rejecting the government's claim that approved JDs are not judicially reviewable, the Supreme Court in *Hawkes* struck down a significant barrier hindering owners' vindication of their property rights. In so doing, the Court continued a trend in its recent environmental and property rights cases.

The case on which *Hawkes* found most direct support was *Sackett*, where, four years earlier, the Court had held that an EPA compliance order was subject to judicial review. The fact that a property owner would be subject to substantial civil and criminal penalties for failing to undertake environmental remediation compelled by the compliance order, or by using his land in a manner inconsistent with it, made it crystal clear that the order had an independent and crucial effect. *Hawkes* dealt with the subtler issue of whether an approved JD legally and practically affected the landowner's property rights, even without a direct mandate ordering him to engage or refrain from specified acts. But *Sackett* paved the way for the Court to decide *Hawkes* in the landowner's favor.

Hawkes also likely builds on the saga of Marvin and Laura Horne, who produced and later distributed California raisins for table consumption. Under a New Deal-era federal marketing order, the Hornes were required to turn over a portion of their crop to a government-sponsored "Raisin Administrative Committee" as part of a scheme to control raisin prices. When they refused to do so, the agency ordered them to pay a substantial administrative fine based on the value of the raisins it claimed the Hornes wrongfully retained. The Hornes countered that the Fifth Amendment to the U.S. Constitution states that if government takes private property it must pay "just compensation," (the "Takings Clause") and that they should be able to raise their Takings Clause claim as an affirmative defense in the U.S. district court case in which the agency sought to collect the administrative fine. The Ninth Circuit ruled against the Hornes,

³⁹ *Id.* at 1815 (quoting *Abbott Labs*, 387 U.S. at 149).

stating that they would have to defend against the fine in federal district court in California, and would have to sue separately on their takings claim in the U.S. Court of Federal Claims in Washington.⁴⁰

Justice Clarence Thomas subsequently held for a unanimous Supreme Court that the district court reviewing the administrative fine should also hear the Hornes' offsetting takings claim.⁴¹ The case was sent back to the Ninth Circuit, which subsequently ruled that because raisins are personal property rather than real property (such as land or buildings), the requirement that part of the crop be transferred to the government was only a restriction on the use of personal property, and hence not governed by stricter rules pertaining to the taking of real property.⁴² The Supreme Court again accepted the case for review. In his 2015 opinion for the Court, Chief Justice Roberts cut to the heart of the matter, defeating the personal-versus-real-property distinction by observing, "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."⁴³

Despite the positive trend of which *Hawkes* is the latest example, several procedural barriers to the protection of property rights still remain. Doubtless the most important procedural quagmire for landowners attempting to vindicate their property rights in federal court is a Catch-22 situation that the Court itself (perhaps inadvertently) created with its 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.⁴⁴ That decision applied only to "regulatory takings" claims, in which landowners assert that ostensible regulations of their property are in fact so draconian as to run afoul of the Takings Clause. In *Williamson County*, the Court held that a regulatory takings claim against a state or local government is not "ripe" for review in federal court unless the claimant first sued in state court and had been denied compensation.

One might think that the requirement that property owners must "ripen" their federal claims in state court simply means that in many

⁴⁰ *Horne v. U.S. Dep't of Agric.*, 673 F.3d 1071 (9th Cir. 2011), rev'd, 133 S. Ct. 2053 (2013).

⁴¹ *Horne v. Dep't of Agric.* (Horne I), 133 S. Ct. 2053 (2013).

⁴² *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128 (9th Cir. 2014), rev'd, 135 S. Ct. 2419 (2015).

⁴³ *Horne v. Dep't of Agric.* (Horne II), 135 S. Ct. 2419, 2426 (2015).

⁴⁴ 473 U.S. 172 (1985).

cases they must run the gauntlet of litigation in two sets of courts rather than one. But it is worse than that.

In 2005, in *San Remo Hotel v. City and County of San Francisco*, the Court considered the effect on regulatory takings claims of a federal statute requiring all courts within the United States to give “full faith and credit” to proceedings in other American courts.⁴⁵ The Court held that the statute precluded the litigation in federal court of issues that previously were heard in a state court. Since regulatory takings issues tend to be almost identical under the federal and state constitutions, the effect of *San Remo* is to bar property owners from asserting their takings claims under the federal Constitution in federal court.⁴⁶ The very act of satisfying the “ripeness” requirement by suing in state court destroys the possibility that federal courts could grant relief on property owners’ Fifth Amendment takings claims.

The Full Faith and Credit statute at issue in *San Remo Hotel* emanated from Congress. However, *Williamson County* is a creation of the Supreme Court. There is no clear rationale for its requirement that regulatory takings plaintiffs, and no others, are required to sue in state court before going to federal court to vindicate a constitutional right. Four members of the *San Remo Hotel* Court concurred in the judgment so as to uphold the statute, but explained that the Court’s decision in *Williamson County* “may have been mistaken.”⁴⁷ Further consideration of this issue, and the removal of the procedural barriers to federal litigation of one set of constitutional rights, might be the most important extension of the *Horne*, *Sackett*, and *Hawkes* cases.

In addition to the *Williamson County* problem, there is another procedural difficulty for property-rights cases that has now been lurking for nearly 40 years. In 1978, in *Penn Central Transportation Co. v. City of New York*, the Court promulgated the multi-factor, ad hoc test that has governed most regulatory takings cases ever since.⁴⁸ I have

⁴⁵ 545 U.S. 323 (2005) (considering 28 U.S.C. § 1738).

⁴⁶ See generally R.S. Radford & Jennifer Fry Thompson, The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court under *Williamson County* Has Yet to Be Made, 67 *Baylor L. Rev.* 567 (2015).

⁴⁷ *San Remo Hotel*, 545 U.S. at 348 (Rehnquist, C.J., joined by O’Connor, Kennedy, and Thomas, JJ., concurring in the judgment).

⁴⁸ 438 U.S. 104, 124 (1978) (establishing as factors that have “particular significance” the economic impact of the regulation on the claimant, the “investment-backed expectations” of the claimant, and the character of the regulation).

argued elsewhere that each of *Penn Central's* three principal factors is defined largely with reference to the others, and that courts slight the importance of determining the specific property (termed the "relevant parcel") that courts should consider.⁴⁹ I also have argued that the *Penn Central* doctrine is not based on a coherent theory and is manipulated by federal courts to avoid hearing property rights cases.⁵⁰ If *Penn Central* is to be an ad hoc test based on all relevant circumstances, it hardly makes sense for the Court to depart from its underlying jurisprudential principle by countenancing a completely arbitrary rule to determine what the relevant parcel is.

But the Court will have a chance to address this problem soon. In *Murr v. Wisconsin*, siblings inherited a lakeside home from their parents, as well as an adjoining lot that was acquired as an investment and titled in the name of the parents' business.⁵¹ When their parents died, the Murrs took title to both lots in their own names. A state appellate court upheld a subsequent county zoning ordinance requiring that two separately deeded contiguous parcels under common ownership must automatically and conclusively be treated as one parcel for *Penn Central* analysis. The effect is that the Murrs might be allowed to build only one house on both lots, despite the fact that if a different owner had held the second lot instead, an additional home could be built there. The state's goal is that loose and impressionistic *Penn Central* standards should prevail where they favor government regulation, and that a rigid and arbitrary rule should govern where it detracts from landowner rights. The Supreme Court will hear argument in *Murr* during its October 2016 term.

II. Clean Waters and Murky Regulation

In *Sackett and Hawkes*, the Supreme Court declared that landowners have a right to go to court to challenge determinations by the

⁴⁹ Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 Pa. St. L. Rev. 601 (2014).

⁵⁰ Steven J. Eagle, *Penn Central and Its Reluctant Muftis*, 66 Baylor L. Rev. 1 (2014).

⁵¹ No. 2013AP2828, 2014 WL 7271581 (Wis. Ct. App. 2014) (unpublished), cert. granted, 136 S. Ct. 890 (Jan. 15, 2016), No. 15-214. The author has submitted an amicus brief supporting the Murr family for The Reason Foundation, while the Cato Institute filed its own brief.

Corps of Engineers that affect their property rights. But the right to challenge the Corps' compliance orders, as in *Sackett*, or its "approved jurisdictional determinations," as in *Hawkes*, is of little avail if courts subsequently uphold agency interpretations of the Clean Water Act that are arbitrary or overly broad. Justice Anthony Kennedy wrote a separate concurring opinion in *Hawkes* largely to adumbrate that "the reach and systemic consequences of the Clean Water Act remain a cause for concern."⁵²

A. *The Clean Water Act*

The Clean Water Act was passed by Congress in 1972.⁵³ Its stated purpose was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁵⁴ The CWA provided that "the discharge of any pollutant by any person shall be unlawful," and defined the "discharge of a pollutant" broadly.⁵⁵ It also, as an exception to this prohibition, authorized the EPA and the Army Corps of Engineers to issue discharge permits.⁵⁶ Most important for present purposes, the CWA defined, without any explication whatsoever, "navigable waters" as "the waters of the United States, including the territorial seas."⁵⁷

Laws regulating bodies of water have a lengthy history. Under the common law, the king possessed sovereign authority over *navigable* waters, including those in the colonies. After the American Revolution, that power devolved upon the newly independent states.⁵⁸ However, the federal Constitution's Commerce Clause limits the states' powers, by granting Congress the power to regulate commerce *among* the states.⁵⁹ In the seminal 1824 case

⁵² *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring).

⁵³ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

⁵⁴ *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality op.) (quoting 33 U.S.C. § 1251(a)).

⁵⁵ See *id.* (quoting 33 U.S.C. § 1311(a) and noting the term includes "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), and that "pollutant" includes not only traditional contaminants but also solids such as "dredged spoil, . . . rock, [and] sand," § 1362(6)).

⁵⁶ *Id.* (citing 33 U.S.C. § 1342(a); § 1344(a), (d)).

⁵⁷ *Id.* (quoting 33 U.S.C. § 1362(7)).

⁵⁸ See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

⁵⁹ U.S. Const. art. I, § 8, cl. 3.

Gibbons v. Ogden,⁶⁰ Chief Justice John Marshall concluded that Congress could regulate both interstate commerce and intrastate activities affecting interstate commerce, and that “commerce” clearly comprehended navigation.⁶¹ Later in the 19th century, in the leading case *The Daniel Bell*, the Supreme Court limited federal power over navigable waters to those that were “navigable in fact,”⁶² and held that this power extended to all navigable waters that were accessible from another state.⁶³

As used in connection with the CWA, the term “waters of the United States” effectively means nothing more than “areas subject to federal regulation under the Clean Water Act.” How extensively the phrase “waters of the United States” is interpreted is the key to whether federal agencies can control the use of most lands in the nation.

B. The Court’s Interpretations of Lands Subject to Regulation under the Clean Water Act

In interpreting the CWA, the Court first ventured beyond the traditional “navigable in fact” standard in 1985, in *United States v. Riverside Bayview Homes, Inc.*⁶⁴ There, it considered the denial of a permit to fill a lakeside marsh that “was adjacent to a body of navigable water,” in an area characterized by “saturated soil conditions and wetland vegetation extend[ing] beyond the boundary of respondent’s property to . . . a navigable waterway.”⁶⁵ The Court noted “that ‘the transition from water to solid ground is not necessarily or even typically an abrupt one,’ and that ‘the Corps must necessarily choose some point at which water ends and land begins.’”⁶⁶ Because it found that the Corps’ interpretation of this ambiguous dividing line was reasonable, the Court “upheld the Corps’ interpretation of ‘the waters of the United States’ to include wetlands that ‘actually abut[ted] on’ traditional navigable waters.”⁶⁷

⁶⁰ 22 U.S. (9 Wheat.) 1 (1824).

⁶¹ *Id.* at 186–98.

⁶² 77 U.S. (10 Wall.) 557 (1870).

⁶³ *Id.* at 564 (quoting *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724 (1865)).

⁶⁴ 474 U.S. 121 (1985).

⁶⁵ *Id.* at 131.

⁶⁶ *Rapanos*, 547 U.S. at 724–25 (plurality op.) (quoting *Riverside Bayview*, 474 U.S. at 132).

⁶⁷ *Id.* at 725 (quoting *Riverside Bayview*, 474 U.S. at 135).

After *Riverside Bayview*, the Corps, as the Court later characterized it, “deliberately sought to extend the definition of ‘the waters of the United States’ to the outer limits of Congress’s commerce power.”⁶⁸ With that backdrop, the Court next considered *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC).⁶⁹ There, the government asserted that “an abandoned sand and gravel pit in northern Illinois” had become part of the “waters of the United States.”⁷⁰ The government’s justification was that the pit, which had become filled with water, fell under its “Migratory Bird Rule,” since birds and birdwatchers traveled across state lines to visit the isolated pit.

Writing for the Court, Chief Justice William Rehnquist rejected the government’s contention that “the next ineluctable step after *Riverside Bayview*” was to hold “isolated ponds, some only seasonable,” to be covered by the CWA because they were a “habitat for migratory birds.” He added that the Court’s extension of “waters of the United States” to “nonnavigable wetlands adjacent to open waters” in *Riverside Bayview* was not a basis for “reading the term ‘navigable waters’ out of” the CWA.⁷¹

SWANCC thus set the stage for the Court to provide a more comprehensive definition of “waters of the United States,” and two Sixth Circuit cases soon provided the Court with that opportunity. In *United States v. Rapanos*, the Sixth Circuit had ruled that wetlands connected to navigable waters by only 20 miles of non-navigable tributaries were subject to the Corps of Engineers’ jurisdiction.⁷² And in *Carabell v. U.S. Army Corps of Engineers*, the Sixth Circuit had held that wetlands separated by an artificial berm from a ditch that led to navigable waters were jurisdictional waters.⁷³ Since the two cases presented similar questions, the Supreme Court consolidated them for review under the name *Rapanos v. United States*.⁷⁴

⁶⁸ *Id.* at 724 (citing 40 Fed. Reg. 31324–25 (1975); 42 Fed. Reg. 37144 (1977)).

⁶⁹ 531 U.S. 159 (2001).

⁷⁰ SWANCC, 531 U.S. at 162.

⁷¹ *Id.* at 171–72.

⁷² 376 F.3d 629 (6th Cir. 2004), vacated and remanded, 547 U.S. 715 (2006).

⁷³ 391 F.3d 704 (6th Cir. 2004), vacated and remanded sub nom. *Rapanos v. United States*, 547 U.S. 715 (2006).

⁷⁴ 547 U.S. 715 (2006).

Unfortunately, the Court in *Rapanos* split 4-1-4, and the Court's fractured opinions did not result in a clear definition of "waters of the United States." Thus, among lands that arguably are wetlands, there is still no clear understanding of which can be used as the landowner wishes and which are subject to strict controls by the Corps under the CWA.

The Court's plurality opinion in *Rapanos*, which vacated the Sixth Circuit's decisions and returned the cases to it, was written by Justice Antonin Scalia, joined by Chief Justice Roberts and Justices Thomas and Samuel Alito. Justice John Paul Stevens filed a dissent, joined by Justices Ginsburg, David Souter, and Stephen Breyer. Justice Kennedy wrote the controlling opinion, in which he agreed that the cases should be sent back to the Sixth Circuit, but otherwise went off on his own.

Justice Scalia's plurality opinion declared that, under the "only plausible interpretation," CWA jurisdiction extended to "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[.] . . . oceans, rivers, [and] lakes.'"⁷⁵ Correspondingly, "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall" were not included.⁷⁶

Justice Stevens's dissent focused on the "quality of our Nation's waters," and regarded the Corps' determination as "a quintessential example of the Executive's reasonable interpretation of a statutory provision."⁷⁷ Justice Breyer's separate dissent went one step further, asserting that the Corps' authority under the CWA "extends to the limits of congressional power to regulate interstate commerce."⁷⁸ On that basis, Breyer had "no difficulty finding that the wetlands at issue in these cases are within the Corps' jurisdiction."⁷⁹

Justice Kennedy, concurring only in the judgment, took an intermediate position. Although he gave the Corps considerable deference, he also strived to give "the term 'navigable' some meaning,"

⁷⁵ *Id.* at 739 (quoting Webster's New International Dictionary 2882 (2d ed. 1954)).

⁷⁶ *Id.*

⁷⁷ *Id.* at 788 (Stevens, J., dissenting) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)).

⁷⁸ *Id.* at 811 (Breyer, J., dissenting).

⁷⁹ *Id.*

and therefore added that CWA wetlands jurisdiction “depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”⁸⁰ Kennedy explained that whether the required nexus exists depends on whether the wetlands at issue, perhaps in connection with others, significantly affect the integrity of waters “more readily understood as ‘navigable.’”⁸¹

Justice Kennedy’s approach is heavily fact-based, and requires lower courts to engage in a case-by-case analysis to determine whether a “significant nexus” between the asserted wetlands and navigable waters actually exists. Professor Erin Ryan recently wrote that because Kennedy wrote the swing opinion in the 4-1-4 *Rapanos* case, and because he placed the burden of establishing a “sufficient nexus” on the government, “the United States gave up on thousands of enforcement actions rather than invest scarce agency resources in trying to prove jurisdiction.”⁸² She also noted that *Rapanos* was “[n]otoriously among the least helpful Supreme Court decisions of all time,” and that it “brims with competing rationales that failed to establish meaningful guidance for decision makers.”⁸³

In an attempt to fill this void, the Corps of Engineers and the EPA issued a new final “Clean Water Rule” in June 2015, which the EPA stated would clarify and simplify implementation of the CWA through clearer definitions and increased use of bright-line boundaries.⁸⁴ Among other things, this rule identified several situations where a case-by-case analysis would be used to determine wetlands to which the CWA applies. These included “waters within the 100-year floodplain of a traditional navigable water,” and “waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water.”⁸⁵

Since its promulgation, this rule has had many detractors from all sides. Environmentalists have attacked the bright-line boundary

⁸⁰ *Id.* at 779 (Kennedy, J., concurring in the judgment).

⁸¹ *Id.* at 779–80.

⁸² Erin Ryan, *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, 46 *Env'tl. L.* 277, 282–83 (2016).

⁸³ *Id.* at 282.

⁸⁴ Clean Water Rule: Definition of “Waters of the United States,” 80 *Fed. Reg.* 37054, 37054 (June 29, 2015) (codified at 30 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401) (noting that the rule would be effective on August 28, 2015).

⁸⁵ *Id.* at 37059.

provision as “arbitrary.”⁸⁶ On the other hand, property-rights advocates have attacked the rule’s new concept of “adjacent waters”⁸⁷ and other “vague categories” as extending jurisdiction to “massive amounts of land[that] are either automatically covered or covered on a case-by-case basis (depending on factors the agencies will determine later).”⁸⁸ Similarly, the rule’s “significant nexus standard,”⁸⁹ which was derived from Justice Kennedy’s concurrence in *Rapanos*, was criticized for being “so expansive that it is hard to conceive of any wet area, if combined with all other supposedly similar areas in the region, which would not meet the definition.”⁹⁰ Likewise, use of the 100-year floodplain was castigated since it “necessarily includes vast amounts of land that are dry 99.9 years out of 100. Because flood plain maps are not fixed or definite, agency bureaucrats can assert sweeping authority over many new areas of the Country.”⁹¹

At least 31 states have sued to stop the Clean Water Rule as overstepping Corps of Engineers and EPA jurisdiction under the CWA and Supreme Court cases.⁹² In October 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay against its enforcement.⁹³

⁸⁶ See Patrick Parenteau, *A Bright Line Mistake: How EPA Bungled the Clean Water Rule*, 46 *Envtl. L.* 379, 379 (2016) (objecting particularly to the “‘bright line’ rule excluding all lakes, ponds, and wetlands lying more than 4,000 feet from the ordinary high water mark or mean high tide line of jurisdictional waters” as “arbitrary for both procedural and substantive reasons”).

⁸⁷ See 80 Fed. Reg. at 37058 (“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. However, it is important to note that ‘adjacent waters’ do not include waters that are subject to established normal farming, silviculture, and ranching activities as those terms are used in Section 404(f) of the CWA.”).

⁸⁸ Todd Gaziano & M. Reed Hopper, *Final “Waters of the U.S.” Rule Is More Overreach by EPA*, *Forbes.com*, Aug. 3, 2015, <http://onforb.es/1P0AZNm>. Mr. Hopper represented the petitioner in *Rapanos*.

⁸⁹ See 80 Fed. Reg. at 37060–61.

⁹⁰ Gaziano & Hopper, *supra* note 88.

⁹¹ *Id.*

⁹² Brief for Petitioner State of Ohio, et al. at 1, *In re EPA*, 803 F.3d 804 (6th Cir. 2015) (Nos. 15-3799, 15-3822, 15-3853, 15-3887).

⁹³ *In re EPA*, 803 F.3d at 809.

During the stay, the court added, the regime that has been in place since the *Rapanos* decision will remain in place, although the court expressed no certainty as to how the question “What is the status quo?” should be answered.⁹⁴

III. Practical Problems for Landowners

A. *The Clean Water Act Is a Perfect Storm*

The Clean Water Act presents a potentially dire juxtaposition for landowners, in that it combines far-reaching consequences for land use, a complex and largely subjective regulatory scheme, and substantial civil and criminal penalties for even unknowing violations. In her Eighth Circuit concurring opinion in *Hawkes*, Judge Jane Kelly acknowledged “just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction.”⁹⁵ She added that this is “a unique aspect of the CWA[since] most laws do not require the hiring of expert consultants to determine if they even apply to you or your property.”⁹⁶ With some understatement, Chief Justice Roberts also noted that “[i]t is often difficult to determine whether a particular piece of property contains waters of the United States.”⁹⁷

All of the Supreme Court justices agreed that *Hawkes* was entitled to relief from the untenable procedural situation in which the Corps of Engineers had placed it. Quoting Justice Alito’s concurrence in *Sackett*, Justice Kennedy declared that the CWA’s reach is “‘notoriously unclear’ and the consequences to landowners even for inadvertent violations can be crushing.”⁹⁸

B. *Wetlands Regulation and Government Extortion*

The Corps of Engineers, along with state and local regulators, often condition the granting of permits needed for development upon the landowner’s agreement to make expensive alterations to the land, and to limit its use and thereby reduce its value. These demanded changes

⁹⁴ *Id.* at 806.

⁹⁵ *Hawkes*, 782 F.3d at 1003 (Kelly, J., concurring).

⁹⁶ *Id.*

⁹⁷ *Hawkes*, 136 S. Ct. at 1812.

⁹⁸ *Id.* at 1816 (Kennedy, J., concurring) (quoting *Sackett*, 132 S. Ct. at 1374–75 (Alito, J., concurring)).

may benefit other lands, including those owned by the regulator itself. But in a trilogy of cases, *Nollan v. California Coastal Commission*,⁹⁹ *Dolan v. City of Tigard*,¹⁰⁰ and *Koontz v. St. Johns River Water Management District*,¹⁰¹ the Supreme Court has developed the doctrine that the exaction of property by government as a condition for granting development permits might violate the U.S. Constitution. As Justice Alito wrote for the Court in *Koontz*, “[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”¹⁰²

The story of *Koontz* exemplifies the potential severity of such burdens. The permit applicant there owned 14.7 acres along a four-lane Florida highway and wanted to build on 3.7 acres facing the road. He offered the water-management district a conservation easement over the rest of his land. The district refused, and informed Koontz that he could have his permit only if he limited the project to one acre and made expensive improvements, or, alternatively, “agreed to hire contractors to make improvements to District-owned land several miles away.”¹⁰³ This demand was enough for the Court to intervene, because “[a]s in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.”¹⁰⁴

The Court’s recent CWA jurisdictional waters cases are similarly replete with recognition of the possibility of regulatory abuse. In *Sackett*, Justice Alito asserted that, under the EPA’s expansive

⁹⁹ 483 U.S. 825 (1987) (holding that there must be an “essential nexus” between the exaction upon which a development permit is conditioned and the agency’s regulatory powers).

¹⁰⁰ 512 U.S. 374 (1994) (holding that there must be “rough proportionality” between the exaction demanded of a permit applicant and the added police power burden that the development would impose, and that this should be ascertained through an “individualized determination”).

¹⁰¹ 133 S. Ct. 2586 (2013) (holding that an exaction demanded might be of money in addition to real property rights, and that the denial of a permit because of the owner’s refusal to tender the exaction might “impermissibly burden” Takings Clause rights).

¹⁰² *Id.* at 2596.

¹⁰³ *Id.* at 2593.

¹⁰⁴ *Id.* at 2596.

reading of the CWA, “any piece of land that is wet at least part of the year” may be classified by the EPA as jurisdictional wetlands, so that “the property owners are at the agency’s mercy.”¹⁰⁵ Likewise, in *Rapanos*, Justice Scalia’s plurality opinion complained that, in deciding whether to grant CWA permits, “the U.S. Army Corps of Engineers . . . exercises the discretion of an enlightened despot.”¹⁰⁶ In language borrowed from *Sackett*, Chief Justice Roberts observed in *Hawkes* that respondents need not assume the risk of civil and potential criminal liability “while waiting for EPA to ‘drop the hammer’ in order to have their day in court.”¹⁰⁷

More broadly, Justice Scalia stated in *Rapanos* that “[t]he enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations.”¹⁰⁸ He added that, in the Corps’ view, “the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a ‘water of the United States.’”¹⁰⁹ Furthermore, the Corps has “assert[ed] jurisdiction over ‘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.’”¹¹⁰

And perhaps most salient of all these pronouncements is Justice Alito’s warning that “the combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA’s tune.”¹¹¹ The stage is thus set, both in the CWA context and others, for the Court to give serious consideration to the unconstitutional nature of unjust permit denials.

¹⁰⁵ *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring).

¹⁰⁶ *Rapanos*, 547 U.S. at 721 (plurality op.).

¹⁰⁷ *Hawkes*, 136 S. Ct. at 1815 (quoting *Sackett*, 132 S. Ct. at 1372).

¹⁰⁸ *Rapanos*, 547 U.S. at 722 (plurality op.).

¹⁰⁹ *Id.*

¹¹⁰ *Hawkes*, 136 S. Ct. at 1811–12 (quoting *Rapanos*, 547 U.S. at 722 (plurality op.)).

¹¹¹ *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring).

IV. Conclusion

As Justice Alito observed in *Sackett*, “[t]he reach of the Clean Water Act is notoriously unclear.”¹¹² He added that since Congress passed the Clean Water Act in 1972, it has done “nothing to resolve” the lack of a clear definition of the wetlands over which the Corps of Engineers and the EPA have jurisdiction.¹¹³ As discussed earlier, it does not seem likely that the 2015 Clean Water Rule will solve the need for clear and objective rules either. Ideally, Congress will enact laws limiting and clarifying the CWA, but at present that seems implausible. Thus, it will likely remain the task of the courts to try to shape as clear and logical an interpretation of the Clean Water Act as possible.

In that endeavor, *Hawkes* is the latest in a string of cases that the Court might build upon in making the law more clear and fair. In that process, the case makes a small, but important, step toward protecting property not only from overreaching claims pertaining to environmental regulation, but also from attempts to limit other important aspects of property rights.

¹¹² *Id.*

¹¹³ *Id.*