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## The Lawlessness of Sackett v. EPA

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# THE LAWLESSNESS OF SACKETT V. EPA

*William W. Buzbee*<sup>†</sup>

## CONTENTS

INTRODUCTION .....	318
I. THE SACKETT SETTING AND RULING, IN BRIEF.....	319
II. STATUTORY NEGLECT AND CONTEXTUAL EVASIONS .....	327
A. <i>Decontextualizing and Omitting the Act's Texts</i> .....	328
B. <i>Disregarding the Act's History and Important Waters Precedents</i> .....	330
C. <i>Avoiding the Statute's Decision Criteria and Amendments Regarding         Wetlands</i> .....	332
D. <i>Judicial Textual Substitutions, Additions, and Deletions</i> .....	333
E. <i>Neglecting the Statute's Express Textual Criteria for Section 404         Permitting</i> .....	335
F. <i>Adding a New Atextual Private-Property-Protecting Substantive         Canon</i> .....	337
G. <i>Statutory History Omissions</i> .....	338
III. SHRINKING FEDERAL WATERS POWER DUE TO ALLEGED ONEROUS CONSEQUENCES AND STATUTORY BREADTH.....	338
A. <i>Skewed Consequences Analysis</i> .....	339
B. <i>Condemning Congress's Textual Choices About Statutory Reach and         Procedures</i> .....	340
C. <i>Disregarding the Record and Highlighting Hypothetical Abuses</i> .....	343
IV. FAILURES TO ENGAGE FRANKLY WITH IMPLICATED SUPREME COURT PRECEDENTS.....	345
V. PROSPECTIVE EFFECTS OF SACKETT'S LAWLESSNESS .....	348
CONCLUSION.....	350

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## INTRODUCTION

When the Supreme Court speaks on a disputed statutory interpretation question, its words and edicts undoubtedly are the final judicial word, binding lower courts and the executive branch. Its majority opinions are the law. But the Court's opinions can nonetheless be assessed for how well they hew to fundamental elements of respect for the rule of law. In particular, law-respecting versus law-neglecting or lawless judicial work by the Court can be assessed in the statutory interpretation, regulatory, and separation of power realms against the following key criteria, which in turn are based on some basic rule of law tenets: analysis of the Court's respect for other branches' constitutional roles and, in particular, congressionally enacted policies; the predictability of statutory interpretation moves by the Court; the rigor and accuracy with which the Justices grapple with other legal actors' actions and contentions; plus the Court's characterization of and honest work with its own precedents. In addition, the Court's opinions are lawlike or less lawlike depending on the clarity of the Court's reasoning and fact-law linkages, so its own prospective effects are clear and knowable.<sup>1</sup>

The Court's ruling in *Sackett v. EPA*,<sup>2</sup> which radically reduces the reach of the Clean Water Act's protected "waters of the United States,"<sup>3</sup> is unusually lawless even for a Court that in the last few years has often shown itself willing to overrule precedents. Overruling unsettles the law but, if done transparently and with full grappling with the old law and clear explanation, it is not necessarily lawless. *Sackett* involves unacknowledged overruling, and further shows lawlessness in its statutory interpretation, its characterization of its past Clean Water Act precedents, and in repeatedly characterizing the stakes and Act's reach without hewing to the case facts, agency records, or balanced work with the Clean Water Act's actual governing texts.

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1. For a few "rule of law" articulations, some specific to statutory interpretation and others more generally discussing meanings of the concept, see, e.g., Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2056–57 (2017) (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1980) (questioning textualists' claim to predictability)) (linking formalism and rule of law tenets); *id.* at 2060, nn.13 & 16–20 (citing work by Bryan Garner, Justice Scalia, Frederick Schauer, Cass Sunstein, and Adrian Vermeule to highlight virtue claims and key rule of law elements including transparency, predictability, stability, knowability, and approaches that reduce uncertainty).
  2. 143 S. Ct. 1322 (2023).
  3. *Id.* at 1344.

This brief Article, which is part of a follow-on paper symposium with scholars analyzing *Sackett*, parses the *Sackett* majority opinion against the backdrop of the statute’s actual provisions, the facts of the dispute, decades of tested and vetted regulatory materials, and key environmental and administrative law precedents. With almost no acknowledgment of the revolution wrought by the opinion, the Court—speaking through the majority opinion of Justice Samuel Alito—leaves a trail of abandoned, undercut, and unsettled bodies of law. Some owners of land-water borderline properties with an eye on new real estate development may have reasons to celebrate, antiregulatory think tanks have been rewarded, plus lawyers may benefit from sorting out new legal confusion. But as a result of *Sackett*, the nation’s waters are far more imperiled, others’ expectations dashed and needs neglected, and the nation’s legal fabric has been harmed. The majority opinion is built on layers of lawlessness.

## I. THE *SACKETT* SETTING AND RULING, IN BRIEF

This Part briefly explains the setting and facts of the *Sackett* case, places it in legal context, and provides a quick distillation of the ruling.

*Sackett* was the latest in a line of cases on the reach of federal power under the Clean Water Act (the Act).<sup>4</sup> The Act’s key jurisdictional provision extends federal power to protect “navigable waters,” with that phrase then defined with the term “the waters of the United States,” often referred to as “WOTUS” or here, as “Waters.”<sup>5</sup> If a disputed water is a jurisdictional Water under the Act, then discharges of pollution into that water are subject to permit requirements. Industrial effluent discharges require permits under section 402’s National Pollution Discharge Elimination System (NPDES).<sup>6</sup> Section 404 permits are triggered when discharges involve dredge or fill material, with the historical focus on wetlands protection.<sup>7</sup> Oil spills are governed by their own separate provisions.<sup>8</sup> Importantly, section 404 permitting has a strongly protective skew, with any avoidable pollution discharges basically prohibited.<sup>9</sup> And because sites at the border of land and water

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4. 33 U.S.C. §§ 1251–1388.

5. *Id.* §§ 1311(a), 1362(7).

6. *Id.* § 1342.

7. *Id.* § 1344.

8. *Id.* § 1321.

9. *See id.* § 1344. *See infra* text accompanying notes 99–115 (reviewing section 404’s criteria for permitting and linked regulations).

are often of great value, court skirmishing over this definition has been recurrent before the Supreme Court.<sup>10</sup>

In contrast, with the exception of the Trump administration, bipartisan stability characterized the political branches' forty-five years of regulatory policies under the Clean Water Act. Regulations broke down the types of Waters and clarified their status and exclusions, Congress and agencies both added new ways to provide site-status guidance and streamlined permitting, and agencies both in specific regulatory proceedings and science surveys illuminated what kinds of Waters provide which particular functions.<sup>11</sup> The Waters-land borders, however, unavoidably give rise to difficult close calls. Perhaps most importantly, the Court's previous two major "waters of the United States" decisions both created new opportunities and raised new questions.<sup>12</sup> Although some types of waters are undoubtedly jurisdictional—most clearly, large rivers and coastal areas—Supreme Court interventions since 2001 have left the answer far less evident for wetlands, smaller streams and tributaries, headwaters, and water features in the vast arid regions of the United States.

Several cases prior to *Sackett* provided the jurisprudential precedents.<sup>13</sup> First, a unanimous Supreme Court in *United States v. Riverside Bayview Homes, Inc.*,<sup>14</sup> upheld federal jurisdiction over wetlands adjacent to larger waters actually navigable for trade, ships, and the like.<sup>15</sup> Such larger waters are often referred to as "traditional navigable waters" or "navigable in fact" waters.<sup>16</sup> Importantly, *Riverside Bayview Homes* seemed to answer several pressing questions with clarity. The Court spoke unanimously. The agencies assessing the line between land and water and protecting wetlands from filling were, the Court stated,

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10. See *infra* text accompanying notes 13–39.

11. For an effective review of the ways the political branches have reduced uncertainties, overreach, and inefficiencies over time in § 404 permitting, see Dave Owen, *Sackett v. Environmental Protection Agency and the Rules of Statutory Misinterpretation*, 48 HARV. ENV'T L. REV. (forthcoming) (manuscript at 9–11, 34) (on file with author) (reviewing the "maturing and evolving" of the § 404 program and later highlighting the majority's perspective through a "caricatured lens offered by anti-governmental litigants" in critical assessment of *Sackett*).

12. *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

13. For a critical assessment of *Sackett*, including review of key earlier Supreme Court precedents and the statute's evolution, see Richard J. Lazarus, *Judicial Destruction of the Clean Water Act: Sackett v. EPA*, U. CHI. L. REV. ONLINE (Aug. 11, 2023).

14. 474 U.S. 121 (1985).

15. *Id.* at 123, 139.

16. *Id.* at 123; *Rapanos*, 547 U.S. at 723.

engaged in an expert, science-laden process and were, therefore, given judicial deference.<sup>17</sup> Despite the Act's use of "navigable," the Court said that term was of "limited import" given the statute's focus on water quality, ecological effects, "integrity" of the nation's Waters, and deterring pollution.<sup>18</sup> The Court concluded that the 1972 Clean Water Act and 1977 amendments extended jurisdiction over types of waters, including "adjacent wetlands," that would not in ordinary parlance be characterized as traditionally navigable.<sup>19</sup> The Court emphasized the Act's focus on Waters protection, need for "ecological judgment[s]," and regulatory consideration of hydrological effects on ecosystems.<sup>20</sup> It affirmed jurisdiction "even when the moisture creating the wetlands does not find its source in the adjacent bodies of water."<sup>21</sup> As with earlier decisions, the Court recognized the ambitious reach and anti-pollution policies that pervade the Act.<sup>22</sup> The Court also emphatically rejected calls for the Court to impose a "clear statement" rule and narrow the statute's reach due to property impingements that could raise issues of regulatory takings.<sup>23</sup>

Since *Riverside Bayview Homes*, the political branches (other than the executive branch during the Trump administration) remained supportive of expansive waters protection and a strong Act, but the Supreme Court in several decisions limited its reach and spawned legal confusion, or at least toeholds, for the arguments later wielded in *Sackett*. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*,<sup>24</sup> the Court rejected federal authority

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17. *Riverside Bayview Homes*, 474 U.S. at 134–35, 139.

18. *Id.* at 132–33.

19. *Id.* at 133–34, 139 (concluding that the enactment of amended section 404 "reflects congressional recognition that wetlands are a concern of the Clean Water Act and supports the conclusion" of the Army Corps defining "waters covered by the Act to include wetlands").

20. *Id.* at 134.

21. *Id.* at 135.

22. *Id.* at 137–38 (reviewing a failed congressional push to narrow the Act, the additions of strengthening language, such as "adjacent wetlands," and stating that this combination of past protective-agency regulation and actual congressional attention to the issue is "at least some evidence of the reasonableness of [the agency's] construction" and, after reviewing legislative history, stating that it "provide[s] additional support for a conclusion that Congress in 1977 acquiesced in the Corps' definition of waters as including adjacent wetlands," despite the Court being "chary of attributing significance" to congressional "failure[s] to act").

23. *Id.* at 126–29.

24. 531 U.S. 159 (2001).

over isolated waters that were visited by migratory birds.<sup>25</sup> Despite numerous commerce links at the disputed site, the Court questioned federal power to assert jurisdiction over a wet site created by past commercial uses that was slated for a new landfill operation.<sup>26</sup> The Court revived the defined term “navigable” as language limiting Waters protections, plus highlighted an Act savings clause and federalism concerns as further support.<sup>27</sup> In part because the *SWANCC* case did not really explain the basis for its concerns and declination to give the agencies deference, it spawned more conflict and opportunity for the Act’s opponents.<sup>28</sup>

Five years later, in *Rapanos v. United States*,<sup>29</sup> the Court split in complicated ways and generated no single majority opinion. But in stating what was protected, what was not, and when and why waters were protected, judicial alignments did create issue-based majorities. Justice Scalia wrote for a plurality in building on *SWANCC*’s limiting language and federalism rationale.<sup>30</sup> That Scalia plurality opinion called for generally limiting federal power to continuously flowing, relatively permanent, and connected waters.<sup>31</sup> In language that may now have importance, and that is further analyzed below, that plurality said that, under this advocated test, jurisdiction could be asserted over “relatively permanent” and sometimes “intermittent” or “seasonal” waters.<sup>32</sup> That opinion also contained an array of strongly worded assertions that basically claimed regulatory overreach and burdens requiring judicial correction.<sup>33</sup> As discussed more below, dictionary parsing and some

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25. *Id.* at 174.

26. *Id.* at 164–65, 173–74.

27. *Id.* at 172–74.

28. For analysis of this use of *SWANCC*, see William W. Buzbee, *The Antiregulatory Arsenal, Antidemocratic Can(n)ons, and the Waters Wars*, 73 CASE W. RES. L. REV. 293, 304–09 (2022).

29. 547 U.S. 715 (2006).

30. *Id.* at 719–57 (Scalia, J.) (announcing the judgment of the Court in a plurality opinion joined by Roberts, C.J., Thomas, J., and Alito, J.).

31. *Id.* at 739.

32. *Id.* at 732 & n.5.

33. Such claims of overreach are throughout the plurality opinion. *See, e.g., id.* at 721 (highlighting costs and legal risks and describing the agencies as “exercis[ing] the discretion of an enlightened despot”); *id.* at 722 (alluding to “immense expansion of federal regulation of land use” and discussing size of areas regulated); *id.* at 722 (calling Waters jurisdiction as extending over “immense arid wastelands”); *id.* at 726–27 (referring to “sweeping assertions of jurisdiction over ephemeral channels and drains”); *id.* at 734 (calling the agencies’ approach “this ‘Land is Waters’” policy and saying it is “beyond parody”); *id.* at 752 (rejecting argument that

judicial supplementation led the plurality to view this outcome as clear and mandated.

In contrast, Justice Kennedy wrote an opinion concurring in the Court's judgment, but strongly rejecting the limiting language in Scalia's plurality test.<sup>34</sup> He instead called for courts to ensure that agencies have established a "significant nexus" between disputed smaller waters or wetlands and larger navigable waters, both alone or in combination with other nearby waters.<sup>35</sup> The nexus rationale built substantially on the Act's goals, decisional criteria, and decades of regulatory policy. Like the unanimous Court in *Riverside Bayview Homes*, the Kennedy opinion weighed heavily the Act's protective goals, water-quality focus, and anti-pollution leaning to assess the effects of discharges and functions of putative waters.<sup>36</sup>

Further, four dissenters, led by Justice Stevens, would have deferred to the agencies and upheld the actions at issue, but they too strongly rejected the Scalia plurality opinion's limiting of federal jurisdiction to continuously flowing, relatively permanent, and connected waters.<sup>37</sup> They largely agreed with the Act at least protecting waters satisfying Kennedy's significant nexus test.<sup>38</sup>

As a result, in *Rapanos* a voting majority expressly rejected the plurality test's limiting language, and a majority wrote in support of at least the protections afforded by the Kennedy significant nexus rationales. The dissenters also agreed with protecting the usually narrower, but slightly different, Scalia-opinion "Waters" defined by relatively permanent connections and continuous flow. The dissenters expressly highlighted this numerical outcome of the Justices' opinions.<sup>39</sup>

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Congress affirmed Waters' jurisdiction policy as a "curious appeal to entrenched executive error").

34. *Id.* at 759–87 (Kennedy, J., concurring in the judgment). He vehemently rejected the Scalia plurality's limiting language and concluded by calling it "inconsistent with the Act's text, structure, and purpose" and "unprecedented." *Id.* at 776, 778.
35. *Id.* at 779–83 (setting forth the "significant nexus" test and its rationales).
36. *Id.*
37. *See id.* at 787–93 (Stevens, J., dissenting) (joined by Souter, J., Ginsburg, J., and Breyer, J.).
38. *Id.* at 786, 810 (finding Justice Kennedy's approach "far more faithful" to precedents and the statute than the Scalia plurality); *Id.* at 807–10 (explaining why the significant nexus test as explicated by Justice Kennedy "will probably not do much to diminish the number of wetlands covered by the Act in the long run" and, in closing, stating that the four dissenters agree with protecting waters falling under both the Scalia plurality approach and the Kennedy test).
39. *Id.* at 810 (tallying votes constituting majorities for the Justices' positions on which Waters are jurisdictional and stating that "on remand each of



Apart from a single outlier court decision<sup>40</sup> and, eleven years later, an attempted Trump administration regulatory rollback built on the Scalia plurality,<sup>41</sup> the Army Corps, Environmental Protection Agency (EPA), the Department of Justice, Republican and Democratic administrations, and most courts agreed that the Scalia opinion's limiting language had been rejected by a Supreme Court majority, but that two Court majorities would protect both the Waters left within federal jurisdiction under the Scalia opinion and Waters that would be jurisdictional under Kennedy's significant nexus test.<sup>42</sup> So the perhaps surprisingly stable policy result, built on these two Court alignment majorities, was to protect both kinds of Waters, but not to apply the Scalia plurality limitation of federal protection to permanently flowing and connected waters.

*Sackett* looked a lot like the fact setting of *Riverside Bayview Homes*, with a mapped wetland complex, and owners of an excavation company who also were site owners who wanted to fill a very wet site with wetlands attributes and build a home.<sup>43</sup> An added wrinkle was the site being bound by a line of homes on one side and a road on the other, thus separating the site from a tributary and a direct connection to nearby Priest Lake.<sup>44</sup> The Sacketts' own consultant and EPA and Army Corps regulators all found the site subject to federal jurisdiction,<sup>45</sup> as did lower courts.<sup>46</sup>

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the judgments should be reinstated if *either* of those tests is met") (emphasis in original).

40. The outlier decision saw significant nexus waters as the only protected waters and did not see Scalia-plurality waters and significant-nexus waters as additive categories. U.S. v. Robison, 505 F.3d 1208, 1221, 1229 (11th Cir. 2007) (applying only the significant nexus test and, upon concluding it was not satisfied, reversing criminal convictions for illegal unpermitted pollution discharges).
41. Scott Neuman & Colin Dwyer, *Trump Administration Cuts Back Federal Protections for Streams and Wetlands*, NPR (Jan. 23, 2020, 10:37 AM), <https://www.npr.org/2020/01/23/798809951/trump-administration-is-rolling-back-obama-era-protections-for-smaller-waterways> [<https://perma.cc/9UQM-NG570>].
42. See Brief for Respondents at 3–13, 31–38, *Sackett v. EPA*, 143 S. Ct. 1322 (2023) (No. 21-454) (reviewing this history and regulatory and judicial responses).
43. *Id.* at 8–9.
44. *Id.* at 9.
45. *Id.*
46. *Sackett v. U.S. EPA*, No. 2:08-cv-00185-EJL, 2019 WL 13026870, at \*7–12 (D. Idaho Mar. 13, 2019); *Sackett v. U.S. EPA*, 8 F.4th 1075, 1092–93 (9th Cir. 2021).

The Sacketts asked the Supreme Court to adopt the Scalia plurality *Rapanos* test as the limit of federal power.<sup>47</sup> Notably, they did not challenge long-standing regulations and policy establishing that human-constructed barriers such as berms, levees, and roads do not destroy jurisdiction over what otherwise would be a jurisdictional water.<sup>48</sup> In fact, they did not challenge any regulations defining what were covered waters. Apart from listing the barrier regulations in their opening, along with other statutory and regulatory provisions at issue, they did not analyze, or challenge, or even mention them again.<sup>49</sup> Despite the Trump administration WOTUS rollback's having been rejected in the courts,<sup>50</sup> plus the Biden administration's being in the middle of its own new WOTUS regulatory process,<sup>51</sup> the Court granted the Sacketts' petition.<sup>52</sup>

The Supreme Court's grant was limited to the following: "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)."<sup>53</sup> Despite this quite focused grant—the test for wetlands jurisdiction—the opinion's analysis, key holding language, and effects are far wider. The Court basically did a bait and switch—a narrow grant, but then a more broadly sweeping ruling that, at times, seems to be discussing Waters of all kinds—writing more broadly than the Court had declared was up for grabs. And as shown below, the ruling actually unsettled even more law, including several long-standing promulgated regulations that were not directly challenged in the case.<sup>54</sup>

The *Sackett* Court largely made the Scalia plurality opinion in *Rapanos* the core of a new majority. But through additional restatements and explanation, plus some unexplained possibly inadvertent language, it may have gone beyond the Scalia plurality opinion's test and shrinking of federal power. The majority key language is the following: "[W]e conclude that the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water "forming geograph-

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47. Petition for Writ of Certiorari at 6, *Sackett v. EPA*, 143 S. Ct. 1322 (2023) (No. 21-454).

48. 33 C.F.R. 328.3(c) (2022).

49. Petition for Writ of Certiorari, *supra* note 47, at 3.

50. See generally *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164 (D.N.M. 2021); *Pascua Yaqui Tribe v. U.S. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021).

51. See Revised Definition of "Waters of the United States" 86 Fed. Reg. 69372 (Dec. 7, 2021) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120).

52. *Sackett v. EPA*, 142 S. Ct. 896 (2022) (order granting writ of certiorari).

53. *Id.*

54. *Infra* Part V.

ic[al] features” that are described in ordinary parlance as “streams, oceans, rivers, and lakes.”<sup>55</sup> The Court’s conclusory wrap-up language makes the 1977 amendments’ “adjacent wetland” language—language that was central to conclusions in *Riverside Bayview Homes*—into language that now is further reduced in reach:

[T]he CWA extends to only those wetlands that are “as a practical matter indistinguishable from waters of the United States.” This requires the party asserting jurisdiction over adjacent wetlands to establish “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States,’ (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”<sup>56</sup>

Note that some of this language is focused on wetlands, but the key language emphasizing relatively permanent flow and continuous connection appears to apply to all Waters. The Court’s explanation of “relatively permanent” left much unsaid. Waters with the requisite “surface connection” might, it seems, remain jurisdictional despite “temporary interruptions” such as “phenomena like low tides or dry spells.”<sup>57</sup> As further explained below, some nuances of the Scalia plurality, especially about “relatively permanent” waters and possible jurisdiction over waters with “seasonal” flows,<sup>58</sup> are neither embraced nor rejected by the *Sackett* majority. Their status could become a new source of both uncertainty and great importance to how much harm will flow from the *Sackett* ruling.

The Court also drops a footnote about the presence of barriers like levees, berms, and the homes and roads bordering the property in *Sackett*. The Court says jurisdiction might remain over “illegally” blocked waters, but otherwise says nothing about other ways human interventions can block waters or about what happens to federal jurisdiction.<sup>59</sup> In a puzzler, all of the Justices agreed that there was no

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55. *Sackett v. EPA*, 143 S. Ct. 1322, 1336 (2023) (citing *Rapanos v. United States*, 547 U.S. 715, 739 (Scalia, J., plurality opinion)).

56. *Id.* at 1341 (citing *Rapanos*, 547 U.S. at 742, 755 (plurality opinion) (citations omitted) (bracketed language in original)). The *Sackett* majority also states, “Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.” *Id.* at 1339–40.

57. *Id.* at 1341.

58. *Rapanos*, 547 U.S. at 732 & n.5.

59. *Sackett*, 143 S. Ct. at 1341 n.16.

jurisdiction over the Sacketts' property, but no opinion explains why this is so despite the site's location, wetlands features, and Waters connections but for the road and line of homes.<sup>60</sup>

As detailed below with more analysis, Justice Kavanaugh agreed with the result but emphatically criticized the majority for, in effect, swapping the word "adjoining" into the law's key provision when "adjacent"—the statute's actual term—has a broader and more protective ordinary and contextual meaning.<sup>61</sup> Justice Kagan concurred in the outcome, but wrote yet another scorching criticism of the majority's statutory interpretation methodology and disrespect for the political branches' judgments.<sup>62</sup>

Now the Article turns to analysis of the several ways in which the *Sackett* majority is lawless in method and results.

## II. STATUTORY NEGLECT AND CONTEXTUAL EVASIONS

The Court's statutory interpretation methodology is the focus of critiques in opinions by Justices Kagan and Kavanaugh, so it has partly been picked apart in print already. But the majority's statutory cherry-picking and claimed fealty to textualist norms, upon close examination, are notably lacking in statutory interpretation rigor or defensibility in additional ways. This Part focuses on the Court's statutory interpretation moves, highlighting omissions, illogic, and cherry-picking.

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60. *Id.* at 1344 (majority opinion) (calling the Sackett site "distinguishable from any possibly covered waters" but saying nothing about the implications of the barriers for this conclusion); *id.* at 1357–58; (Thomas, J., concurring) (joined by Gorsuch, J.) (in opinion generally calling for limiting CWA jurisdiction to early constitutional approaches to navigable waters protection, stating that "no elaborate analysis is required to know that the Sacketts' *land* is not a *water*, much less a water of the United States."). Justice Kagan, with Justices Sotomayor and Jackson, wrote what reads like a dissent but was "concurring in the judgment." *Id.* at 1359. Justice Kavanaugh similarly concurred in the judgment, joined by Justices Sotomayor, Kagan, and Jackson, and agreed with rejecting the "significant nexus" test and agreed with the "bottom-line judgment" that the Sacketts' "wetlands" are "not covered by the Act." *Id.* at 1362. He later said that the putative waters were not jurisdictional because not "adjacent" in the sense of "contiguous to or bordering a covered water," and also not "separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like." *Id.* at 1369. The record basis for this latter view is unclear.
61. *Id.* at 1362 (Kavanaugh, J., concurring in the judgment) (joined by Sotomayor, J., Kagan, J., and Jackson, J.).
62. *Id.* at 1359 (Kagan, J., concurring in the judgment) (joined by Sotomayor, J., and Jackson, J.).

If the Clean Water Act's only words were "navigable waters" and its definitional clause, "the waters of the United States," then the Court's quick leap to dictionaries and parsing of "the" in "the waters" and the plural usage might make some sense. This is the Court's key language-based move: most of the Court's new shrinking of federal Waters jurisdiction under the Clean Water Act is based on dictionary parsing, subtraction or addition of other elements, and inclusion of words in neither the statute nor the sole or compelled dictionary definition. But the quick turn to the dictionary was not necessary and was arguably inappropriate. The Act provides far more textual illumination and expressly applicable language, most of which the majority disregards.

*A. Decontextualizing and Omitting the Act's Texts*

The Court's approach is a form of what Professors Eskridge and Nourse label "textual gerrymandering."<sup>63</sup> The Court takes a microscope to a few statutory words and views them in isolation, but then averts its gaze from other surrounding statutory words and regulatory history that are at the heart of the case, the Sacketts' grievances, and long-standing lauding of, and fuming over, the Act.<sup>64</sup> By gerrymandering the text under analysis, the majority sidesteps any clashes with surrounding text to achieve its preferred-policy outcome. And by giving impoverished attention to actual surrounding language and materials, but addressing interpretive questions not decisively answered by the disputed operative text, the Justices add other materials and assumptions that are not in the statute.

The Court has in recent cases called for giving statutes a "fair reading" and assessing disputed language with attention to the "legislative plan" and often "context."<sup>65</sup> The *Sackett* majority mentions attention to context, but oddly refers to the statute's express coverage of at least "some wetlands" as WOTUS as a contextual illuminator rather than a textual answer.<sup>66</sup> Still, in its actual work, the majority mostly turns away from many other textual and contextual sources of illumination. Placing the "waters of the United States" language in

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63. William N. Eskridge and Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1732 (2021).

64. *Id.* at 1730 (not analyzing the later *Sackett* case but discussing manipulability of "choice of context" and "judicial fiat" in ignoring materials or failing to explain the textual choosing).

65. *King v. Burwell*, 576 U.S. 473, 486 (2015) ("... we must read words 'in their context and with a view to their place in the overall statutory scheme.'") (quoting *FDA v. Brown & Williamson*, 529 U.S. 120, 132 (2000); *id.* at 497–98 ("A fair reading of legislation demands a fair understanding of the legislative plan.")).

66. *Sackett*, 143 S. Ct. at 1338–39.

operational context should have been the textualists' principled way to make sense of the law's disputed language. If at least some wetlands are protected, and the test to be applied to putative disputed wetlands Waters was the case question, then what does the statute's text indicate about the *why* of wetlands protection? What does the statute say it is meant to do and, in particular, what criteria must agencies, those regulated, and courts consider in assessing legality under the Act?

Here, one ordinarily turns to enacted opening findings or statements of purpose or policy, as well as to criteria provided for deciding on permits and regulations under these key operative provisions. The majority, however, ignores these expressly applicable statutory provisions. If one adds them to the texts under consideration, the tenuous and threadbare nature of the majority opinion's analysis becomes apparent.

The majority puts major emphasis on the words "navigable" and "the waters," which it then links to dictionary definitions' supposed, supportive implications.<sup>67</sup> So the implicit thesis of the majority's interpretative choosing here is that navigability is an overarching focus of the statute. This navigability emphasis in turn undergirds the majority's ultimate focus on and limiting of the Act's jurisdiction to wetlands and other Waters linked directly to large, relatively permanently flowing and connected Waters. A rigorous Court would test this read against the statute's other answers and clues. It doesn't. Here are the omissions and, in one instance, misapprehensions about the Act's other linked express statutory provisions.

First, despite the Supreme Court's many Clean Water Act decisions, the *Sackett* Court neglects what it had long recognized about this statute. The Clean Water Act is not about shipping and river flows; it is a law with several mutually reinforcing and express goals that significantly changed the law. As the Court itself concluded earlier, Congress in its opening provisions made clear since 1972 that "integrity" of waters in their "chemical, physical, and biological" sense was the paramount goal of the 1972 Act; the Act was a "comprehensive" effort to revamp the law and mandate pollution control and protect "ecosystems."<sup>68</sup> The *Sackett* majority never considers this "integrity" provision. The whole statute in all of its provisions is a vast infrastructure designed to limit or preclude polluting of the nation's

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67. *Id.* at 1336–37.

68. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 122, 132 (1985) (quoting Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1251)) (citing the "integrity" goals, emphasis on protecting "ecosystems" and "water quality," and the overarching goal of stopping pollution in a unanimous upholding of federal jurisdiction over a disputed "adjacent wetland" proposed for home development).

waters.<sup>69</sup> It is a major and “comprehensive” piece of new pollution control legislation, as the Supreme Court had earlier stated.<sup>70</sup> Unlike the earlier Rivers and Harbors Act,<sup>71</sup> which was navigation-focused but with secondary pollution control elements, the 1972 Act (and its later amendments) in its key provisions, authorized regulations, and mandated permits is designed to minimize or stop pollution and protect rivers, coasts, and wetlands.<sup>72</sup> Why? Here too, the law is clear and repeatedly consistent. The nation’s Waters were protected from pollution so “water quality” would improve and fishing, swimming, and recreational uses would be protected.<sup>73</sup> Degraded waters require additional extraordinary actions through a raft of water quality-focused and Total Maximum Daily Load provisions.<sup>74</sup>

*B. Disregarding the Act’s History and  
Important Waters Precedents*

When the Court in *Sackett* emphasizes navigability, it reads the Clean Water Act’s language as similar in reach to earlier laws, especially what the majority calls linked “predecessor” statutes.<sup>75</sup> This is puzzling, illogical, and contrary to past Court characterization of the Act and earlier law. The 1972 Act, and even more clearly the 1977 amendments, created an expansive, new anti-pollution law that was far more encompassing, ambitious, and pollution-focused than earlier law. As the Court emphasized in *City of Milwaukee v. Illinois*,<sup>76</sup> earlier law

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69. *Id.*; see *City of Milwaukee v. Illinois*, 451 U.S. 304, 310–19 (1981) (reviewing at length the Act’s comprehensive anti-pollution goals and congressional rejection of the adequacy of earlier law and concluding the Act leaves no room for additional judicial creation of federal common law of public nuisance).

70. *City of Milwaukee*, 451 U.S. at 317 (reviewing the history and substance of the Act and calling it “the establishment of a comprehensive regulatory program supervised by an expert administrative agency” and a “total restructuring” and “rewriting” of earlier water pollution legislation) (citations to legislative history omitted). The Court notes the frequency with which supporters alluded to the law’s “comprehensive” nature and rejection of earlier laws’ adequacy. *Id.* at 318–19.

71. Rivers and Harbors Act of 1899 (codified as amended at 33 U.S.C. §§ 401, 403–404, 406–409, 411–416, 418, 502).

72. Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972).

73. See, e.g., 33 U.S.C. §§ 1312–1315 (setting forth requirements for action if water quality is impaired).

74. *Id.*

75. *Sackett v. EPA*, 143 S. Ct. 1322, 1337–38 (2023).

76. 451 U.S. 304 (1981).

was found inadequate.<sup>77</sup> And the need for a stronger federal law was also driven by the view that the states were not doing what was needed.<sup>78</sup> In fact, the Act's newly comprehensive anti-pollution focus was key to the Court's *City of Milwaukee* finding in 1981, that the Act left no space for additional federal common law covering water pollution despite earlier precedent upholding its ongoing viability.<sup>79</sup> Harmonizing the Act with earlier statutes to limit the Clean Water Act's reach in *Sackett* hence was contrary to the text, to Court precedents about the Act, and to usual textualist care to compare texts and respect legislative differences in linked laws as passed and amended over time.

Relatedly, the Court mentions one Act savings clause, which is certainly an important provision of the Act.<sup>80</sup> But it is one among several federalism-linked provisions, all within a law that created a major, new federal anti-pollution regime. Furthermore, that state roles are important, if not most important, is correct given states' land use primacy, ability to take over delegated programs, common law regimes, and Act-preserved authority to be more protective than federal law.<sup>81</sup> But states were not given the right to do less, or allow laxity.<sup>82</sup> And to affirm that states have important roles says nothing about the federal statutory power and roles. The Court in *Sackett*, however, highlights the savings clause and uses it to further limit the statute's reach. It does not respect the reticulated federalism choices but highlights the one provision it finds supportive.

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77. *City of Milwaukee*, 451 U.S. at 317–19 (reviewing language in the Act, legislative history, and other court decisions emphasizing the Act's new reach and critical views of earlier law's adequacy).

78. *Id.*

79. *Id.*

80. *Sackett*, 143 S. Ct. at 1338, 1342 (referencing the Act preserving the states' "primary" role in protecting the nation's waters as important and also justifying judicial imposition of a "clear statement" rule if federal power were to extend to more wetlands).

81. For discussion of this point, see Owen, *supra* note 11, at 26–27.

82. Many provisions make clear that state actions are welcome, and can go beyond federal requirements, but must conform to federal requirements and cannot be "less stringent" than federal law. *See, e.g.*, 33 U.S.C. § 1342(b) (welcoming state delegated program assumption of Act permitting but setting forth procedural and substantive requirements); § 1365(e) (preserving other statutory and common law rights); § 1370 (further preserving state authority but with the caveat that it must not be "less stringent" than federally required).



*C. Avoiding the Statute's Decision Criteria  
and Amendments Regarding Wetlands*

But perhaps most important, and also least rigorous in statutory interpretation methodology, is the majority's cherry-picked and mostly text-averting approach to the question of the scope of wetlands protection. Wetlands were generally viewed as protected after 1972, but after interagency regulatory skirmishing over the reach of such protections and some legislative calls to shrink the statute, Congress stepped in. In 1977 it rejected these weakening efforts, strengthened the Act, and added an inartful, but contextually clear provision—section 404(g).<sup>83</sup> This provision is part of a cooperative federalism delegated program option. It allows state governments with adequate state law commitments to take over implementing, permitting, and enforcing environmental law obligations.<sup>84</sup> The new 1977 delegated program amendment for section 404's dredge and fill disposal permitting contains a carveout that preserves federal power over “navigable waters” used “as a means to transport interstate or foreign commerce,” as well as “including wetlands adjacent thereto.”<sup>85</sup>

Section 404(g) packs a lot into its text. Note that implicit in this provision is that “navigable waters” extend beyond waters used for “transport” or “foreign commerce.”<sup>86</sup> That is clearly a subset of what is protected. Second, the provision is explicit that at least some wetlands are covered by the Act, as the *Sackett* majority concedes late in its opinion.<sup>87</sup> Third, when the federal government, under this provision, can delegate to states primacy over section 404 permitting, it must be over something other than traditional navigable-in-fact waters and the “wetlands adjacent thereto.”<sup>88</sup> What would be left? All other Waters that, through pollution, would be degraded in the ways that section 404 focuses on: dredge or fill disposals that convert wetlands to land—as the Sacketts were doing—or perhaps that block or fill other smaller water categories such as streams and tributaries.<sup>89</sup> Were this not the meaning of section 404(g)—that “adjacent” wetlands remained federally protected, and states could assume federal law's required protections of other wetlands and small federally protected waters even less connected to actually navigable waters—then states would have

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83. 33 U.S.C. § 1344(g).

84. Buzbee, *supra* note 28, at 316.

85. 33 U.S.C. § 1344(g).

86. *Id.*

87. *Sackett v. EPA*, 143 S. Ct. 1322, 1338–39 (2023).

88. 33 U.S.C. § 1344(g)(1).

89. *Id.* § 1343(c).

little to nothing to protect under the delegated program option.<sup>90</sup> The *Sackett* majority, however, somehow turns this provision into a limitation.

*D. Judicial Textual Substitutions, Additions, and Deletions*

Furthermore, the Court does additional violence to the statute, giving section 404(g)'s "adjacent" a meaning other than either its ordinary meaning or a meaning informed by that statute's section 404 program decision criteria. The majority effectively swaps in the meaning of a different term, "adjoining."<sup>91</sup> It largely sidesteps and refuses to use the multiple meanings of "adjacent" or more expansive meanings of "waters" found in dictionaries or other ordinary usage. Justices Kavanaugh and Kagan, in their opinions rejecting the Court's limitations, at length highlight the error of the Court's misconstruction of "adjacent."<sup>92</sup>

In effect, the Court majority concludes that the outermost protective reach of the Act is adjacent wetlands if, as newly defined by the Court, they *adjoin* larger actually navigable waters through a continuous and relatively permanent flowing surface connection that makes them "indistinguishable" from covered "traditional" navigable federal waters.<sup>93</sup> The Court says being "nearby" is not enough, despite dictionaries including "nearby" (and other synonyms of "nearby") as a meaning of the actual statutory term, "adjacent."<sup>94</sup> Through this language substitution, the Court illogically creates a null or tiny set of delegable wetlands subject to federal law, but with state-implementation primacy. Ordinarily, interpreting a statutory amendment so it becomes "surplusage" and of no effect is disfavored.<sup>95</sup>

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90. *Id.* § 1344(g)(1).

91. *Sackett*, 143 S. Ct. at 1339–40.

92. The Kavanaugh opinion is almost entirely about the majority effectively substituting "adjoining" for the statute's "adjacent" and other Act provisions using "adjoining" with its different, more closely connected connotation. He also notes how dictionary definitions of "adjacent" include terms like "near," "close to," and "neighboring," which provided strong support for the forty-five years of regulatory protections for "adjacent wetlands" without any requirement like the new majority addition of a "continuous surface connection" and "relatively permanent" flow. *Id.* at 1362–69 (Kavanaugh J., concurring in the judgment) (joined by Sotomayor, J., Kagan, J., and Jackson, J.).

93. *Id.* at 1341 (majority opinion).

94. *Id.* at 1363–64 (Kavanaugh J., concurring in the judgment) (joined by Sotomayor, J., Kagan, J., and Jackson, J.) (criticizing this neglect of the dictionary meaning of "adjacent").

95. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 698–701 (1995) (construing terms "take" and "harm" as informed by a statutory amendment which the Court states "we presume . . . to have

And if the Court really wanted to focus on dictionaries and ordinary meaning, instead of statute-focused contextually informed meaning, long-standing more expansive views had abundant support. In fact, the term “waters” itself by no means only reaches large, flowing, continuously connected waters. As Professor Owen notes, other non-statutory sources that might illuminate ordinary meaning, including dictionaries, the Bible, and other illuminators of ordinary parlance, do include the very features at issue, namely swamps and wetlands.<sup>96</sup> The “continuous” and “connected” and not just “nearby” edicts of the *Sackett* majority simply are judicial creations. They are not in the statute, not required by dictionaries, and not limitations found in ordinary linguistic usage about waters. They are substituted, added, or adjusted by the *Sackett* majority, while also neglecting other statutory textual language and logic.

For example, the emphasis on flow and navigability just does not fit the statute’s express protection of wetlands. Wetlands, by definition, rarely flow in the way the Court now makes necessary for federal power; they often exist because of barriers that lead to water retention, and perform critical functions that the statute highlights as criteria for permit decision-making under section 404.<sup>97</sup> They are often near larger Waters, and functionally can and will have effects on these larger Waters, and vice versa when larger navigable Waters may flow over and into nearby wetlands and smaller water features.<sup>98</sup> The permanent flow and continuous connection criteria are hence inconsistent with usual key attributes of wetlands. The permanent/continuous connection test also is hard to reconcile with the nature of land and water features across much of the arid West and Southwest. Basically, the Court’s newly created limiting language clashes with both the very

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real and substantial effect”) (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)). For materials on this anti-surplusage presumption, see JOHN MANNING & MATTHEW STEPHENSON, *LEGISLATION AND REGULATION* 359–61 (4th ed. 2021).

96. See Owen *supra* note 11, at 22–23.

97. See, e.g., EPA, *CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF THE SCIENTIFIC EVIDENCE*, at ES-6 (2015) (reviewing peer-reviewed science regarding functions of diverse types of Waters and building on peer-reviewed science to illuminate types of waters, including wetlands, and their connectivity forms and functions).

98. The most directly similar precedent, *United States v. Riverside Bayview Homes, Inc.*, discussed how water flows both into wetlands from larger navigable waters and from wetlands into larger waters, as well as dampening of such flows and filtering of pollutants, were acceptable science-based rationales for federally protecting such wetlands. 474 U.S. 121, 134–35 (1985).

nature of wetlands and the Act's effectiveness as uniform, nationally applicable legislation.

*E. Neglecting the Statute's Express Textual Criteria  
for Section 404 Permitting*

What about the statute's criteria for granting, denying, or shaping section 404 permits?<sup>99</sup> Such criteria obviously illuminate the Court's certified question focused on the test for wetlands protection. The reasons for Waters protection Congress chose in section 404 logically should shape the test that decides if wetlands are worthy of protection. Here too, the statute's answer is far different from the *Sackett* Court's focus on navigability, largeness, and relatively permanent, continuously flowing connectedness. The Court majority utterly declines to engage what the statute says.

Notably, congressionally enacted criteria for section 404 permitting are, as the Court precedents held and forty-five years of administration by presidents of both parties also respected, all about protecting Waters for their functions and water quality.<sup>100</sup> In effect, these express statutory provisions add more precise criteria that illuminate the Act's opening emphasis on limiting pollution and protecting the nation's waters' "integrity."<sup>101</sup> For example, section 404(c)'s empowering of EPA to veto an Army Corps section 404 permit is all about ecological impacts and Waters' functions. EPA may "prohibit" a discharge with an "unacceptable adverse effect" on "water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."<sup>102</sup> Similarly, section 404(e) allows agencies to use a streamlined "general permit" option for "categor[ies] of activities," but only if they have a "minimal cumulative adverse effect on the environment."<sup>103</sup>

Section 404's most detailed criteria for wetlands permitting and protection are incorporated by cross-reference from section 403(c).<sup>104</sup> These criteria are even more emphatically focused on ecological impacts and water quality.<sup>105</sup> These linked provisions provided the backbone for

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99. 33 U.S.C. § 1344(g).

100. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 175 (2001).

101. 33 U.S.C. § 1251(a).

102. *Id.* § 1344(c).

103. *Id.* § 1344(e).

104. *Id.* § 1343(c).

105. In these provisions, Congress instructs the EPA, "in conjunction" with the Army Corps, to develop "guidelines" for protection of dredge or fill "disposal sites" regulated under section 404 "based upon criteria comparable

decades of regulations and adjudicatory determinations protecting wetlands.<sup>106</sup> Section 403(c)(1) focuses on preventing “degradation” from pollution discharges that would cause environmental harm or impair “human health” or “welfare.”<sup>107</sup> Subsection A mandates a protective water quality and functions focus, requiring regulation of “disposal of pollutants” that would cause “degradation” to, inter alia, “plankton, fish, shellfish, [and] wildlife.”<sup>108</sup> Subsection B prioritizes safeguarding “biological, physical, and chemical processes,” and “ecosystem diversity, productivity, and stability.”<sup>109</sup> Subsection C protects “esthetic, recreation, and economic values.”<sup>110</sup> And subsection F prohibits filling if there is a “land-based alternative.”<sup>111</sup> Section 403(c)(2) also emphasizes that the statute requires science-based judgments, but with a protective skew: if there is “insufficient information” to make a judgment about the specific ecological effects under the required guidelines, “no permit shall be issued.”<sup>112</sup>

This law is, hence, expressly about protecting Waters’ integrity for their functions, and the functions of concern are ecological, biological, recreational, and to protect fisheries. It requires scientific confirmation of the lack of ecological impairments and expressly makes this the underpinning of regulatory judgments. Instead, the *Sackett* majority not only ignores science and these statutory criteria, but also belittles the congressional decision to make permitting and regulatory protections hinge on these textually specified scientific and functional findings. The majority alludes to them as “open-ended” factors and a “freewheeling inquiry” that “provides little notice to landowners.”<sup>113</sup>

What about navigability? Navigability is part of the Act, but the Act’s actual references to navigability make clear that it is a subsidiary goal. After specifying environmental criteria and anti-fill presumptions, section 404(b) adds that regulators can “*additionally*” take into account

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to” those set forth in section 403(c) to prevent harms from ocean discharges. *Id.* § 1344(b).

106. *See generally* 33 C.F.R. § 328 (2014) (regulations providing “Definition of Waters of the United States”); 33 C.F.R. § 230 (2014) (regulations setting forth guidelines for assessing dredge or fill disposal). For a review of regulatory actions and judicial responses that have left pre-2015 law most relevant, see Brief for the Respondents at 12–13, *Sackett v. EPA*, 143 S. Ct. 1322 (2023) (No. 21–454) (reviewing this history).

107. 33 U.S.C. § 1343(c)(1)(A).

108. *Id.*

109. *Id.* § 1343(c)(1)(B).

110. *Id.* § 1343(c)(1)(C).

111. *Id.* § 1343(c)(1)(F).

112. *Id.* § 1343(c)(2).

113. *Sackett*, 143 S. Ct. at 1342.

“navigation and anchorage” concerns.<sup>114</sup> The Act’s water quality provisions similarly state that navigation is a secondary “consideration.”<sup>115</sup> A Court grappling honestly with the statute would have dealt with these provisions, which are in considerable tension with the Court’s conclusions. Instead, the Court never mentions them.

*F. Adding a New Atextual Private-Property-Protecting Substantive Canon*

Also critical to the majority’s outcome is a view that regulatory burdens on private property owners must be alleviated. The Court never tries to ground this concern in any text in the statute. In contrast, the Act was clearly intended to restrict harmful private activities that degrade waters.<sup>116</sup> Rights to pollute with impunity were, under the Act, flipped to a prohibition on water pollution discharges unless subject to a permit.<sup>117</sup> This private property owner solicitude is, thus, a wholly invented construct of the Court. This concern with private property burdens is the core justification for the Court’s requirement of a super “clear statement” authorizing the agencies’ authority asserted.

Not only is this new substantive canon unmoored from any textual or legislative history support, but this move is also almost directly contradicted by the Court’s analysis and conclusions in *Riverside Bayview Homes*. In that case too, the Court was asked to adopt a presumption against federal Waters jurisdiction over “adjacent wetlands” out of concern for property owners’ burdens.<sup>118</sup> There the focus was on regulatory takings risks. The *Riverside Bayview Homes* Court, however, said no. It concluded that regulatory judgments under the Act deserved deference and observed that the permit-based process would alleviate regulatory uncertainties and burdens and reveal when, if ever, regulation in a specific application might rise to the level of a taking.<sup>119</sup> The Court described this constitutionally rooted call for a “narrowing construction” as having “spurious constitutional overtones.”<sup>120</sup> This unanimous precedent’s contrary methodology and conclusions are ignored by the *Sackett* majority.

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114. *Id.* § 1344(b) (emphasis added).

115. *See Id.* § 1313(c)(2)(A) (adding, after listing environmental, health, and welfare factors for water quality-based regulation, “and *also taking into consideration* their use and value for navigation”) (emphasis added).

116. *Id.* § 1311(a) (declaring discharges without permits illegal).

117. *Id.*

118. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 125–26 (1985).

119. *Id.* at 126–29, 139.

120. *Id.* at 128–29.

*G. Statutory History Omissions*

As noted by others, the *Sackett* Court also altogether ignores legislative history about the jurisdictional reach of the Act. As Professor Lazarus recounts, the history reveals an intent to rectify inadequacies in preceding law and protect Waters to the limit allowed under the Commerce Clause.<sup>121</sup> And, similarly, this history provides no support for ship-linked navigability as the focus and intended limit of the Act. It likewise contains nothing supporting the continuous, flowing, and indistinguishably connected test the *Sackett* Court makes into new Supreme Court law. Instead, the legislative history of the 1972 and 1977 enactments reveals sensitivity to the need to protect smaller water bodies for their functions and to prevent pollution from moving downstream.<sup>122</sup> Thus, intermittent or rarely flowing waters logically could be protected based on statutory language and confirmatory legislative history the *Sackett* majority ignores. However, by leaping to dictionaries, adding limiting language, and mostly adopting language from the *Rapanos* plurality opinion penned by Justice Scalia, the Court never has to reconcile its new shrinking of the Act with this history. The *Sackett* majority sidesteps these many provisions that make clear that water quality, integrity, and an anti-fill and anti-pollution skew are the statute's express decision criteria and goals.

III. SHRINKING FEDERAL WATERS POWER DUE TO ALLEGED  
ONEROUS CONSEQUENCES AND STATUTORY BREADTH

Perhaps the key move of the *Sackett* majority shares attributes with the Court's recent embrace and strengthening of the major questions doctrine (MQD). The *Sackett* Court does not expressly base its opinion on this doctrine, probably because a key element of the MQD was lacking here—no one could claim the case involved a novel regulatory action or new claim of agency power. Here, the power asserted had been largely consistent over forty-five years and presidential administrations of both parties.<sup>123</sup> Still, like the recent MQD cases, the Court's key move

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121. See Lazarus, *supra* note 13, at 16–18.

122. See *id.* at 13 (discussing this history and the *Riverside Bayview Homes* decision's emphasis on the history as confirming the anti-pollution, water quality, and hydrological cycle focus); *Riverside Bayview Homes*, 474 U.S. at 462–465 (reviewing the Act's language, policies, and enactment history from 1972 and 1977 to uphold federal jurisdiction over adjacent wetlands sometimes due to their “affect [on] the water quality of adjacent lakes, rivers, and streams” and affirming the logic of considering how such wetlands “filter and purify water”).

123. Only the administration of Donald J. Trump pursued efforts to weaken the Act's reach and definitions of WOTUS. Lisa Friedman & Coral Davenport, *Trump Administration Rolls Back Clean Water Protections*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/climate>

seems to be an extensive list of ways the Act's regulatory regime, mostly under section 404, creates problematic consequences, here identified as great burdens and costs, especially for property owners or those seeking to avoid its strictures, as well as impingements on state power.<sup>124</sup> Consequences, in the form of regulatory burdens and even the statute's very breadth, are so awful (in the Court's view) that its interpretation must provide relief, mainly through a heightened demand for a congressional "clear statement"—calling for "exceedingly clear language"—authorizing the challenged conduct.<sup>125</sup>

*A. Skewed Consequences Analysis*

So, for example, the *Sackett* Court goes on for pages highlighting the possibility of permitting delays, costs, "crushing" consequences, risks of criminal liability, and difficulty of knowing prior to regulatory investigation or commencing of a permit process if a borderline putative water might be protected.<sup>126</sup> The Court repeatedly emphasizes the burdens imposed on private property owners.<sup>127</sup> It also quantifies the huge breadth of the statute, apparently seeing the vast acres and miles of waters protected not as just a reality of major national environmental policy, but something needing correction or facially untenable.<sup>128</sup> Despite no actual cited agency action engaged in the overreach it sees as possible, it talks about the risk that the agencies will regulate "puddles."<sup>129</sup> Permitting risks and burdens? The Court calls violation penalties "crushing" and linked permit investigation and process costs huge.<sup>130</sup> Without any citations, it claims that the protected or unprotected status of a disputed site is subject to "freewheeling" agency science and cannot be known in advance.<sup>131</sup> Federal regulators are

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[/trump-administration-rolls-back-clean-water-protections.html](https://trump-administration-rolls-back-clean-water-protections.html) [https://perma.cc/5JZ4-TMK7].

124. The *Sackett* majority's selective attention to the Act's federalism choices is discussed above, *supra* notes 75–90 and accompanying text, and not reviewed again here.

125. *Sackett v. EPA*, 143 S. Ct. 1322, 1341–42 (2023) (stating "the EPA must provide clear evidence that it is authorized to regulate in the manner it proposes" and later calling for "exceedingly clear language" in light of the large scope of claimed jurisdiction and federalism concerns) (citation omitted).

126. *Id.* at 1330–36.

127. *Id.* at 1330, 1335–36, 1342–43.

128. *Id.* at 1330, 1341–43.

129. *Id.* at 1329.

130. *Id.* at 1330.

131. *Id.* at 1342–43.



painted as overzealous,<sup>132</sup> but not with citation to anything in this actual case or any record. The support is mostly earlier hyperbolic language of Justice Scalia and a few case cites; the Court does not even attempt to assess overall numbers, timing, costs, use of general nationwide permits, or frequency of agency assistance in examining sites. It assumes the worst of agency behavior, with no documentation of agency abuses, either generally or in this particular case.

And, of huge importance, the majority utterly ignores record materials regarding the statute's benefits. It does not discuss how wetlands protection and small or intermittent Waters' protections, as in place for forty-five years, had protected the nation's waters. Its focus is all about costs and regulatory burdens of compliance with the Act, presented from the perspectives of its opponents and, now, allied Justices. Apart from a few opening lines about the Act's successes, it ignores the very reasons the statute exists, namely, to clean the nation's waters and prevent avoidable pollution.<sup>133</sup>

*B. Condemning Congress's Textual Choices About  
Statutory Reach and Procedures*

But the problems with the Court's analysis go even further. It is not just imbalanced or lacking in factual support. What the Court sees as in need of curative judicial relief are, in reality, fundamental choices that Congress put into the Act. First, the Act is (or at least was, before *Sackett*) national legislation with a huge impact. The Court had earlier lauded and recognized the breadth and the significance of the Act.<sup>134</sup> How is this relevant at all? National law regulating water pollution generated by private land uses necessarily has a huge effect, especially since it was in part designed to stop states from competing for business by engaging in races to the bottom.<sup>135</sup> This is undoubtedly true. Yet the Court cites the breadth of the Act's reach as a reason for trimming it.<sup>136</sup>

Disrespect for statutory choices as grounds for limiting the statute's reach go further. Consider the *Sackett* majority's extensive litany of the

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132. See *id.* at 1335–36 (stating that landowners are in a precarious position under the CWA because they can be prosecuted for mundane activities, such as moving dirt, under the EPA's interpretation of “waters of the United States”).

133. *Id.* at 1329.

134. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 317–18 (1981); see also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132–133 (1985).

135. Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 603–04 (1996) (reviewing rationales for strengthened federal regulation, among them concern with races to the bottom).

136. See *Sackett*, 143 S. Ct. at 1341–42.

burdens, costs, delays, and difficulties of section 404 permitting.<sup>137</sup> Even assuming for the sake of argument that there was some basis for some of these views, how was it appropriate for the majority to use these Act attributes to justify new jurisdictional limitations? After all, Congress chose in section 404 to adopt a science-based permitting regime, with authorization of regulations that further guide the permitting process.<sup>138</sup> Congress also paired roles for EPA and the Army Corps, further complicating things, but also adding waters protections through the complementary roles of two agencies.<sup>139</sup> Thus, the Court's aggrievement for property owners and subsequent narrowing of the reach of WOTUS jurisdiction is mostly rooted in judicial condemnation of the process and criteria that Congress unquestionably chose. There is no claim that the agencies erred in their procedural decisions. The Court uses its dislike of this textually clear statutory design to justify radically shrinking the Act's jurisdictional reach. This majority move is irregular and contrary to several fundamental legal tenets.

First, when it comes to policy substance, Congress has primacy in its statutory enactments. Whatever the substantive or procedural choices, our constitutional system does not grant the Supreme Court power to sit as the arbiter or umpire, able to reject statutory choices it dislikes. As Chief Justice Burger famously stated for a Supreme Court majority in *Tennessee Valley Authority (TVA) v. Hill*,<sup>140</sup> courts cannot recast statutes where Congress has made contrary policy choices in light of the Court's view of "common sense and the public weal."<sup>141</sup> Courts cannot adjust the statute based on judicial "appraisal of the wisdom or unwisdom of a particular course."<sup>142</sup> The policies selected by Congress cannot "be put aside in the process of interpreting a statute."<sup>143</sup> In fact, one of the Court's foundational Clean Water Act cases, *City of Milwaukee*, extensively explained why respect for statutes' primacy precluded the Court's adding a federal common law of public nuisance right: courts "have no power to substitute their own notions" of policy or to "supplement" Congress' answer."<sup>144</sup> Should there be constitutional infirmity, things change. But here, the Court did not point to anything

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137. *See id.* at 1330–1336, 1341–42.

138. 33 USC § 1344.

139. *See* 33 U.S.C. § 1344(c)–(e).

140. 437 U.S. 153 (1978).

141. *Id.* at 195.

142. *Id.* at 194.

143. *Id.*

144. *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) (quoting *Arizona v. California*, 373 U.S. 546, 565 (1963) and *Mobil Oil Corp. v. Higgensbotham*, 436 U.S. 618, 625 (1978)).

about the Act's key operative-design choices in section 404 that were unconstitutional. This was a statutory interpretation case, raised in a statutorily authorized permit action, observing congressionally devised procedures, and rooted in a particular permit denial.

Second, long-standing and ostensibly unquestioned administrative law doctrine has long held that the courts have no power to second-guess the procedural or regulatory mode choices of Congress in enabling act statutes like the Clean Water Act, the rules of the Administrative Procedure Act, or an agency's own promulgated procedural commitments. Courts are hence especially precluded from second-guessing procedural-design choices made by the political branches. A string of cases, from the *Chenery* cases,<sup>145</sup> to *Vermont Yankee*,<sup>146</sup> to *Kisor v. Wilkie*<sup>147</sup> (and many more in between), demand judicial respect for the political branches' choices of process. Here, however, a majority uses dislike of a science-based adjudicatory process to drive a narrowing super "clear statement" demand and jurisdiction-shrinking construction.<sup>148</sup>

Relatedly, as part of this body of law that precludes judicial procedural second-guessing, the Court for decades has recognized that while some actions benefit from rule-like legal forms, especially notice-and-comment regulations, other policy concerns and goals are sometimes better addressed on a case-by-case basis through adjudicatory actions.<sup>149</sup> Adjudicatory modes, such as permit-based regulatory reviews, leave greater room for individualized inquiry, tailoring, and assessment than would more rigid and broadly crafted rules. The Act's section 404 process is such an adjudicatory, science-driven, and site-specific adjudicatory permit regime. This was indisputably Congress's express choice and statutory design.

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145. See generally *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80 (1943); *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947) (declining to require the SEC to make policy through notice and comment rulemaking and discussing reasons political branches might choose to make process through adjudicatory actions).

146. See generally *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (precluding courts from adding procedural requirements not in the enabling act, the Administrative Procedure Act, agency regulations, or required by the Constitution).

147. See generally *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (declining to preclude agency use of guidance and policy documents or deference to such documents in light of their express allowance in the Administrative Procedure Act, among numerous factors).

148. *Sackett v. EPA*, 143 S. Ct. 1322, 1342 (2023).

149. See *Chenery II*, 332 U.S. at 207–08.

*C. Disregarding the Record and Highlighting Hypothetical Abuses*

And, it should be added, the *Sackett* case itself was not a challenge to any particular regulation linked to this section 404 process that the *Sackett* majority so vociferously criticizes. Had it been, then all parties would have had to focus on the whole record, including supportive and detracting evidence about those regulations in all possible settings. Instead, this case was a challenge to the Sacketts' permit denial. And the facts of the case did not support the majority's litany of woes about a burdensome and unknowable law.<sup>150</sup> The Sacketts had received consistent science-based advice about the land from their own consultant and from federal regulators explaining why the Sacketts' property was subject to Act protections against fill.<sup>151</sup> The Sacketts did not like the answer received, but they could not claim that they were left in the dark about their site's status and the applicable law. So, lacking abuses and unknowability in the Sacketts' actual facts, or any rulemaking records parsed by the litigants, the *Sackett* Court simply declares a litany of problems and burdens it sees, buttressed here and there by past Justices' similar hyperbole, disregarding the record that should have governed.<sup>152</sup>

The Court provides one partly traditional substantive canon move linked to consequences, mentioning risks of criminal liability for violations of the Act and need for clarity about legal lines.<sup>153</sup> The Court does not call this the doctrine of lenity, perhaps to avoid highlighting another incongruous element in its decision.<sup>154</sup> This was not a case where the property owners did not know what regulators thought. The case was not before the Court on a criminal appeal. Further, all environmental laws have civil and criminal liability provisions, yet the Court has never imposed an across-the-board rule of shrinking the jurisdictional reach of all laws with civil and criminal liability overlap. And criminal charges are, in reality, rarely brought for environmental law violations, and usually only then in egregious settings of willful and knowing wrongdoing.<sup>155</sup> In fact, in one of the Court's most famous

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150. See Brief for Respondents at 8–11, *Sackett v. EPA*, 143 S. Ct. 1322 (2023) (No. 21-454).

151. *Id.* at 9–10; see also Joint Appendix, *Sackett v. EPA*, 143 S. Ct. 1322 (2023) (No. 21-454) (providing photographs of the site and area and showing wetlands features).

152. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (emphasizing the requirement and importance of record-based judicial review).

153. *Sackett*, 143 S. Ct. at 1342.

154. Professor Lazarus analyzes this case element well. See Lazarus, *supra* note 13, at 14–15.

155. See generally David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENV'T L. REV. 159 (2014) (compiling a database of

environmental law cases under the Endangered Species Act, *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*,<sup>156</sup> the Court declined to use lenity concerns to adjust the statute's meaning.<sup>157</sup> The *Sackett* majority does not even cite the case.

A quick reading of the majority's opinion also might lead one to overlook a repeated eliding of different sorts of regulatory challenges. A theme in the opinion is the burdensome unknowability of legal obligations, but the statute's design and amendments, plus decades of regulatory work by the agencies, create layer after layer of illumination and clarification. In reality, a disputed site's owner has recourse to the following: the statute's statement of goals and water quality criteria;<sup>158</sup> permitting divisions between sections 402 and 404;<sup>159</sup> the section 404 criteria for permit assessments;<sup>160</sup> long-standing regulations and linked rulemaking preambles in the Federal Register specifying types of waters protected and excluded, as well as scientific criteria relied on by agencies for such outcomes and why;<sup>161</sup> regulatory manuals further explaining grounds for usual coverage and exclusion;<sup>162</sup> so-called nationwide general permits usually available for certain low-impact actions;<sup>163</sup> the Connectivity Report's detailing of types of Waters and their functions;<sup>164</sup> past advance (and optional) jurisdictional determinations; and past grants and denials of permits. That site stakeholders

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criminal environmental prosecutions and, despite statutes' breadth and overlap of civil and criminal violation provisions and linked prosecutorial discretion, finding presence of one or more aggravating circumstances in over 96 percent of criminal cases). Likewise, Clean Water Act provisions provide broad charging latitude, including possibly for negligence, but actual charging data shows their rare use, and usually in the setting of intentional misconduct. David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1441-43 (2011) (citing cases and past studies with this conclusion).

156. 515 U.S. 687 (1995).

157. *Id.* at 704 n.18.

158. *See* 33 U.S.C. § 1251(a)-(g).

159. *See id.* §§ 1342, 1344.

160. *See id.* § 1344(e)-(h).

161. *See, e.g.*, Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110-401).

162. *See, e.g.*, U.S. ARMY CORPS OF ENG'RS, U.S. EPA, U.S. FISH AND WILDLIFE SERV. & U.S.D.A. SOIL CONSERVATION SERV., FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (1989).

163. 33 U.S.C. § 1344(e).

164. *See* EPA, *supra* note 97.

might choose or need consultants to figure out their options is mentioned as reason for judicial correction.<sup>165</sup> In a paradoxical twist, the Army Corps and EPA’s rulemakings expressly explained their desire to create greater clarity, especially in the wake of unsettling Supreme Court cases; the *Sackett* majority turns this concession into yet another rationale for judicially trimming the statute’s reach.<sup>166</sup> The political branches had worked with the significant nexus test because it appeared to be the governing test after *Rapanos*; the *Sackett* Court finds fault with this too.<sup>167</sup>

The Court engages in a somewhat bizarre closing discussion of consequences. It has for pages identified alleged burdensome consequences of the Act and its section 404 permitting. And, as mentioned above, solicitude for private property owners’ burdens is nowhere in the Act but nonetheless prioritized by the Court. Those burdensome consequences are identified as requiring the Court to demand a clearer statutory statement authorizing the federal power claimed and, lacking requisite clarity, leads the Court to craft its new jurisdiction-shrinking test. But the Court then belittles consideration of consequences. It says it cannot consider them and, in particular, cannot assess “policy” arguments and “ecological consequences” or “importance.”<sup>168</sup> As a result, with glaring inconsistency, consequences linked to the Act’s express statutory criteria and design—the science-based permitting regime and the environmental focus of its criteria—are viewed as needing judicial correction. Ecological and water quality effects, however, which are expressly part of the Act and prioritized in section 404’s criteria as well as the opening “integrity” goal provisions—all in a statute designed to produce “Clean Water”—are announced as legally irrelevant.

The opinion thus lacks rigorous attention to context, avoids a “fair reading” of the statute, and is mostly built on judicial dislike of both the substance and process Congress expressly set forth in the Act. This is all highly irregular, especially for Justices who often view themselves as textualists.

#### IV. FAILURES TO ENGAGE FRANKLY WITH IMPLICATED SUPREME COURT PRECEDENTS

At the heart of Supreme Court power and legitimacy is the web of law created by its own precedents. *Sackett*, however, is odd in that it

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165. *Sackett v. EPA*, 143 S. Ct. 1322, 1335–37 (2023) (discussing need for consultants).

166. *Id.* at 1335, 1341–42.

167. *Id.* at 1342–43.

168. *Id.* at 1343.

effectively overrules or diminishes the Court's own precedents, yet does so with no concession that any such legal shifts are occurring.

The majority concedes one legal change. Since 2006, other than during the Trump years, EPA, the Army Corps, and the Department of Justice had often protected waters if found to have a "significant nexus" to larger, clearly jurisdictional waters.<sup>169</sup> The majority now rejects that test<sup>170</sup> and the test appears to no longer be defended by anyone on the Court.<sup>171</sup> However, to get there and justify the new test, the majority mischaracterizes past cases to distort their actual facts and conclusions.

The biggest and most similar precedent to *Sackett* was *Riverside Bayview Homes*. It too dealt with adjacent wetlands, and it too involved discussion of navigability, traditional navigable waters, and the limits of waters jurisdiction.<sup>172</sup> It also extensively discussed the history and import of section 404(g) with its "adjacent wetlands" language.<sup>173</sup> The Sacketts' physical-site attributes tracked most of the legal and hydrological characteristics at issue in *Riverside Bayview Homes*, except that the Sackett property's connections to other waters were, at the surface, blocked by the presence of a road and line of houses nearby. But the issue of human-built barriers to waters connections was not part of the Court's certiorari grant, so a question was how the Court would reconcile these seemingly similar cases. But for the barriers, *Sackett* seemed ruled by *Riverside Bayview Homes*, at least if the Court felt constrained by precedent.

The Court's response was to vaguely describe the earlier case, never concede the similarities and one main difference (the human-built barriers), and then just ignore *Riverside Bayview Homes*' emphasis on deference, expertise, hydrological connections, and Congress's intent to expand the Act's protections in 1977.<sup>174</sup> The *Sackett* Court also sidesteps that its new "exceedingly clear statement" requirement clashed with *Riverside Bayview Homes*, which rejected a similar plea, also rooted in claims of property owner burdens.<sup>175</sup> Instead, *Riverside*

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169. See *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring in the judgment).

170. *Sackett*, 143 S. Ct. at 1342.

171. *Id.* at 1362 (Kavanaugh, J., concurring in the judgment, joined by Sotomayor, J., Kagan, J., and Jackson, J.).

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

173. *Id.* at 130.

174. *Sackett*, 143 S. Ct. at 1333, 1338, 1340.

175. See *supra* notes 118–20 and accompanying text (discussing the *Riverside Bayview Homes*' rejection of the argument that regulatory takings concerns justified a narrowing judicial statutory construction of the Act).

*Bayview Homes* called for and showed deference to expert agency judgments.

*SWANCC* and *Rapanos* set in motion the legal shifts leading to *Sackett's* new shrinking of federal waters jurisdiction, but the Court also deals oddly with both cases. The Court ignores actual underlying case and actions' records and any rigorous work with the record of the *Sacketts'* case, but then pulls out language from these earlier cases that makes claims about abuses and problems with the Act. Basically, it presents judicial hyperbole and invective as established facts of regulatory abuse, overreach, and federal disrespect for state authority.

The *Sackett* Court would have been correct to say that in *Rapanos* no single opinion spoke for a majority of Justices. Instead, the *Sackett* majority says “no position commanded a majority of the Court.”<sup>176</sup> This is erroneous. In fact, the opinions and mere counting of heads shows that there were, in fact, three *Rapanos* majority-view positions. First and most importantly, five Justices expressly rejected the legality of the Scalia plurality opinion's limiting of federal waters jurisdiction to relatively permanent, connected, indistinguishable waters (as more fully quoted above). Justice Kennedy rejected this view, as did the four dissenters.<sup>177</sup> That previously rejected Court view is, after *Sackett*, overruled and now the majority rule. This the *Sackett* Court does not concede. Second, eight Justices agreed with protecting at least the waters left protected by the Scalia test.<sup>178</sup> And a third majority of five Justices agreed that the Kennedy significant nexus test—an extensively explained “position”—was consistent with the Act's protective criteria.<sup>179</sup> Stevens, in his opinion joined by three other dissenters, could not have been more clear about these head-counting realities about which tests should apply.<sup>180</sup>

*Sackett*, of course, could have overruled one or all of these views anyway, but to pretend that the majority positions did not exist is odd. It is especially odd since regulatory views, briefs, and court opinions

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176. *Sackett*, 143 S. Ct. at 1334.

177. *See Rapanos v. United States*, 547 U.S. 715, 759–87 (2006) (Kennedy, J., concurring in the judgment); *id.* at 787–812 (Stevens, J., dissenting, joined by Souter, J., Ginsburg, J., and Breyer, J.).

178. *Id.* at 810 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, J.) (concluding that Court majorities voted to protect both “significant nexus” Waters and the less-protective but differently framed plurality Waters).

179. *See id.* 759–87 (Kennedy, J., concurring in the judgment); *id.* at 787–812 (Stevens, J., dissenting, joined by Souter, J., Ginsburg, J., and Breyer, J.).

180. *Id.* at 810 (counting heads constituting majorities and saying that jurisdiction therefore exists if “either of those tests is met”) (emphasis in original). *See supra* notes 178–80 and accompanying text (recounting substance and divisions in *Rapanos*).



since *Rapanos* was issued in 2006 all were rooted in this analysis of the splintered votes in *Rapanos*. Perhaps the Justices in the majority now think that cross-cutting majority positions should be weighed less heavily, but the majority's calling the Kennedy opinion the view of "one justice" is simply wrong. Four other Justices explained why they found it legally sound.<sup>181</sup> That added up to five.

The tensions with hundreds of opinions about congressional primacy in setting policy and devising procedural means to achieve policy goals are reviewed above. The Court nowhere even tries to explain how it has legitimate authority to shrink a law because it dislikes its breadth and congressional procedural choices. This author is unaware of any case that would support such a proposition.

## V. PROSPECTIVE EFFECTS OF *SACKETT*'S LAWLESSNESS

Due to the *Sackett* Court's partial and inaccurate work with its own precedents, with no claim to having overruled anything, Court precedents will now, for years, require sorting out. But the Court did more than just evade direct, clear work with its own opinions. It also opted to hear a case with a particular posture—a permit denial—and with a narrowly defined grant of certiorari about the test for "wetlands" as *Waters*. The opinion goes big, however, but with little care in being clear about what is left, what is meant, and what is now illegal. By relying on hyperbole and counterfactuals, and with few record references or recourse to actual agency science, *Sackett*'s reach is hard to determine.

In particular, the majority speaks dismissively and critically of several long-standing regulations that remain validly promulgated and that have underlying records and rationales that are long past timely challenge. This case was not a review of a new agency regulation, nor did the case involve judicial review of an agency's denial of a petition for revision of a regulation. Nonetheless, the majority writes dismissively, almost angrily, of several long-standing regulations, or casually throws in language that seems to undercut them.<sup>182</sup> Their uncertain status matters.

For example, because the United States is now filled with built environments that abut and sometimes block waters, the status of *Waters* blocked by various barriers, especially due to human construction, is hugely important. The Court says the *Sacketts*' property was not subject to jurisdiction but does not say why. The Court simply sidesteps the long-standing regulatory position that

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181. *Id.* at 807–08 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, J.).

182. *Sackett*, 143 S. Ct. at 1332–34 (reviewing regulatory changes along with cases about those regulations).

jurisdictional Waters, even if blocked, drained, or modified by human action, retain their jurisdictional status.<sup>183</sup> Other regulatory language makes clear how once-jurisdictional waters can lose that status, but roads, houses, levees, berms, or diversions do not automatically undo the waters' protected status.<sup>184</sup> The majority provides a bit of clarity only in footnote sixteen, which says that a landowner who “illegally construct[s] a barrier” remains subject to federal jurisdiction.<sup>185</sup> Long-standing regulations are far stronger in retaining federal jurisdiction. Where do they stand now?

Another huge issue and source of future uncertainty is the Court's declination to engage with Waters science. In building its opinion on dictionary definitions and past Justices' hyperbolic statements—and with zero analysis of agency science, or wetlands or river science of any kind, let alone reference to actual records of past agency actions—the Court's focus on continuous connections and permanence raises many questions of massive import about types of Waters protected. A New Jerseyan like Justice Alito might have most frequently encountered waters like huge rivers and wetlands and features found in water-abundant regions in the Northeast, often formerly carved by glaciation. What about the many areas in the Southeast and Midwest where levees create a break between wetlands and other water features and larger, indisputably navigable rivers used for shipping? The levees are generally the result of past legally authorized projects but do sometimes sever direct connections. What about arid areas of the country where critically valuable waters flow rarely, but during infrequent heavy rains flow through riverbeds and other channeling land features? Did the Court mean to remove federal protections under the Act from much of the states of the West and Southwest? Scientific analyses of the Trump administration's Waters rollback substantially track effects of the new *Sackett* majority; in some arid states, almost all previously federal jurisdictional Waters are now lost from protection.<sup>186</sup> Nothing in any part of the Act or its history would support such a view. It would be illogical to unprotect the most precious of waters where scarce, yet the Court's language could be claimed to do so.

What about headwaters? Even in water-rich regions, most streams, rivers, lakes, and wetlands get their water from upland or mountain headwaters. Water predictably moves from these headwaters to other types of Waters, but such headwater-linked flows are often seasonal or

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183. 33 C.F.R. § 328.5 (2022) (stating that “man-made” changes can only alter jurisdiction after the Army Corps' “examin[ation]” and “verif[ication]”).

184. *Id.* § 328.3(c).

185. *Sackett*, 143 S. Ct. at 1341 n.16.

186. S. Mažeika Patricio Sullivan, Mark C. Rains, Amanda D. Rodewald, William W. Buzbee & Amy D. Rosemond, *Distorting Science, Putting Water at Risk*, 369 SCI. 766, 767 (2020) (analyzing effects of the Trump rule and documenting resulting shrinkage in waters protected).

periodic. Is the intent to eliminate all of them from protection? What counts as jurisdiction-destroying intermittency of flow? Do only surface connections count, or could shallow subsurface flows ever suffice? It appears that only surface flows count, but on what grounds? Are storm and flood and pollution-absorbing water features that lack permanent connections and flow now utterly lost from protection? What if regulators could show certainty of direct harmful effects on larger navigable waters?

Much will hinge on another omission in *Sackett*. *Sackett* repeatedly says it is basically adopting the Scalia plurality approach in *Rapanos*, but of great importance to Waters protection is what *Rapanos* and now *Sackett* mean with the phrase “relatively permanent.”<sup>187</sup> The *Rapanos* plurality did not preclude protection of “seasonal” flowing waters or waters subject to intermittency in drought settings.<sup>188</sup> *Sackett* is not clear whether it is embracing or refining this language. Scientific studies by EPA and the Army Corps, especially the “Connectivity Report,” provided an extensive distillation of peer-reviewed science on Waters types and functions.<sup>189</sup> The Court could at least have worked a bit with actual science and made clear what it meant about what was protected and when.

Another question has to do with the word “interstate.” The case also did not involve any overt effort to rewrite Commerce Clause jurisprudence or overrule cases that have long upheld federal environmental protection powers due to the many commerce linkages implicated. The Court majority, however, inserts the word “interstate” and once “intrastate” in discussing the reach of “navigable waters” protections.<sup>190</sup> Many large water bodies, especially lakes, are arguably within single states. Did the Court mean to set the stage for a new and different future undercutting of federal power? Again, the Court says nothing about this, and the case grant did not open up this question, but it will attract attention and new opportunistic uses.

## CONCLUSION

That the Supreme Court tilts in light of its Justices’ political proclivities is no surprise. The *Sackett* majority opinion, however, does not just reflect a tilt, but a wholesale rejection of fundamental law-based constraints. It neglects what the statute’s text says, adds and

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187. *Sackett*, 143 S. Ct. at 1336.

188. *Rapanos*, 547 U.S. at 732 n.5.

189. See generally EPA, *supra* note 97.

190. *Sackett*, 143 S. Ct. at 1331–35 (tracing use of “interstate” and “intrastate” in regulatory materials); *id.* at 1332 (calling Priest Lake “an intrastate body of water”); *id.* at 1341 (summing up its new limited jurisdictional reach of the Act to “a relatively permanent body of water connected to traditional interstate navigable waters”).

substitutes language, demands clear congressional authorization mostly because of dislike of the express Act policy choices about substance and procedure. It neglects to root its decision in actual agency records. Balance is altogether missing. Court precedents are misrepresented, and its own ruling leaves crucial questions unanswered. And, undoubtedly, one of the nation's most effective environmental laws has been radically shrunk in ways contrary to almost fifty years of political-branch policy. Teaching this case will be difficult for anyone who ordinarily argues that law matters and constrains and, especially, that policy in this nation is made principally through the legislative process.