SACKETT V. ENVIRONMENTAL PROTECTION AGENCY AND THE RULES OF STATUTORY MISINTERPRETATION

*Dave Owen**

In May 2023, the United States Supreme Court decided Sackett v. EPA.[1] *Sackett is the most important Clean Water Act case the Court has ever decided, and it probably will be one of the most impactful environmental decisions in the Court's history. As this Essay explains, Sackett also is a deeply flawed decision. The Court systematically deployed a series of tools of statutory misinterpretation, all designed to advance a policy vision held by a majority of the justices but at odds with the Clean Water Act. The Court slanted the facts; distorted definitions and indulged basic logical fallacies; assumed the existence of some Congressional purposes while disregarding others; ignored obvious ambiguities; and grounded its reasoning in a vision of administrative governance rooted in activists' cliches rather than empirical evidence. Sackett thus is flawed in ways that corroborate widely held concerns about the evolution of statutory interpretation and the practices of the Supreme Court.*

Table of Contents

Introduction

Near the end of its 2022–23 term, the United States Supreme Court handed down its decision in *Sackett v. EPA*,[2] a case determining the geographic scope of Clean Water Act protections.[3] *Sackett*, in other words, decided which streams

* Harry D. Sunderland Professor of Law and Associate Dean for Research, University of California College of the Law, San Francisco. I thank the staff members at the Harvard Environmental Law Review for their editorial assistance.

1. 598 U.S. 651 (2023).
2. *Id.*
3. 33 U.S.C. §§ 1251–1387.

and wetlands would be protected by the Clean Water Act and which would not. For environmental lawyers, the case was a blockbuster: it is the most impactful Clean Water Act case the Court has ever decided.[4] But the Court released the decision during a time with no shortage of other controversies—cases addressing student loans,[5] affirmative action,[6] and businesses' ability to discriminate against gay customers[7] came down shortly after, and the lingering shadow of *Dobbs*[8] eclipsed every case of the term—and reactions from the mainstream media were muted.[9] Additionally, the result was unanimous. Justices Kavanaugh and Kagan penned concurring opinions that disagreed, vigorously, with parts of the majority's reasoning, but they concurred in the result and appeared to acquiesce to, if not actively agree with, important parts of the majority opinion.[10] One might think that the case raised issues only of niche concern.

This Essay argues otherwise. *Sackett* is a disturbing decision, and not just for environmental lawyers, for it evinces a seismic shift in the Court's methods of statutory interpretation. For years, judges have endorsed a relatively similar set of principles for statutory interpretation. Legislative supremacy—that is, the idea that the court's task is to figure out the legislature's intended meaning, not to craft statutory interpretation to suit judicial policy preferences—is at the core of that consensus.[11] Courts may have differed about the best techniques for

4. *See infra* notes 132132–136136 and accompanying text (explaining the extent to which *Sackett* reduced Clean Water Act coverage).
5. *See generally* Biden v. Nebraska, 143 S. Ct. 2355 (2023).
6. *See generally* Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).
7. *See generally* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).
8. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
9. Major news outlets covered the decision, but generally only briefly. *See, e.g.*, Adam Liptak, *Supreme Court Limits E.P.A.'s Power to Address Water Pollution*, N.Y. Times (May 25, 2023), https://perma.cc/25HP-6JVX. Liptak's article is just a few paragraphs long and leaves out many important details, like the central role of the Army Corps of Engineers in implementing the Clean Water Act and *Sackett*'s impacts on the protection of streams.
10. Both Justice Kavanaugh's and Justice Kagan's opinions are in some ways baffling. Justice Kavanaugh explains what he thinks the legal standard should be for assessing jurisdiction over "adjacent" wetlands, and under that standard, the Sackett's wetlands probably would be jurisdictional, yet Justice Kavanaugh concurred in the result. *See* Sackett v. EPA, 598 U.S. at 715 (Kavanaugh, J., concurring) (stating that covered wetlands include "wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like"—a description that applies to the Sacketts' property). Meanwhile, Justice Kagan's opinion reads like a dissent and seems to be a complete rejection of the majority opinion. *See id.* at 710–16. Yet she and the other liberals joined Justice Kavanaugh's opinion, which in turn joins in the majority's rejection of the significant-nexus standard for assessing jurisdiction. *See id.* at 715–16 ("I agree with the Court's decision not to adopt the "significant nexus" test for determining whether a wetland is covered under the Act.").
11. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 415 (1989).

honoring that basic principle, but they agreed that it governed,[12] and they also had coalesced around a shared view that close attention to statutory text was the best way to find statutory meaning.[13] Disagreements about statutory interpretation are numerous, nuanced, and sometimes intense, but in recent years, they generally occurred within a broad framework of accepted principles.

Sackett does not square with those principles. The decision professes to be faithful to traditional approaches; indeed, Justice Alito, who authored the opinion for the Court, criticized the concurring justices for their alleged inattention to statutory text.[14] And the opinion goes through some of the motions of traditional statutory interpretation, discussing ordinary usage,[15] dictionary definitions,[16] the use of similar text elsewhere in the statute,[17] and contextual clues suggested by the other statutory provisions.[18] But on close examination, every part of this effort breaks down. The dictionary readings indulge basic logical fallacies.[19] The Court's discussions of ordinary usage rest on definitional sleights of hand.[20] Its efforts at contextual reading zero in on one phrase to the exclusion of the rest of the statute, and the Court interprets that phrase to mean something different from what it says.[21] The textual analysis reads like the brief of a clever advocate whose weak position leaves him stuck grasping at straws. Yet it appears in a majority opinion.

That leaves the remainder of the decision, which emphasizes the sort of policy-driven reasoning that traditional statutory interpreters claimed to abhor.[22] The decision leaves no doubt about the Court's frustration with policy choices made by Congress and by the agencies charged with implementing the statute.[23] Yet absent from the court's critique on the Clean Water Act are efforts to understand the regulatory program the Court chose to criticize.[24] The

12. *See* John F. Manning, *The New Purposivism*, 2011 S. Ct. Rev. 113, 113–14 (2011) (describing classic debates about interpretive techniques).
13. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 2 (2006) (describing "a strong consensus on the interpretive enterprise that dwarfs any differences that remain").
14. *Sackett*, 598 U.S. at 684 ("Textualist arguments that ignore the operative text cannot be taken seriously.").
15. *Id.* at 671.
16. *Id.* at 671–72.
17. *Id.* at 672–73.
18. *Id.* at 675.
19. *See infra* notes 204204–210210 and accompanying text.
20. *See infra* notes 193–193203203 and accompanying text.
21. *See infra* notes 217–217238238 and accompanying text (discussing the Court's misreading of Clean Water Act section 101(b) and its non-discussion of section 101(a)).
22. *See* Massachusetts v. EPA, 549 U.S. 497, 560 (2007) (Scalia, J., dissenting) ("No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.").
23. *See Sackett*, 598 U.S. at 660 (describing the Clean Water Act as a "potent weapon" imposing "crushing consequences" on regulated entities).
24. *See infra* notes 276276-283283 and accompanying text.

decision also leans heavily into a series of substantive canons, each of which reflects policy preferences strongly held by a majority of the justices but rejected by the Congresses that enacted and amended the Clean Water Act.[25] It is, in short, a deeply problematic decision for anyone who thinks Congress's intended meaning should govern.

That may sound like a summary of a sloppy decision. But this Essay's core thesis is that *Sackett* is worse than sloppy. Instead, it is a case study in the systematic application of a series of rules of statutory misinterpretation. Its disregard for evidence, disdain for and lack of interest in agency expertise, convoluted machinations with text, selective attention to and misunderstanding of statutory purposes, unwillingness to acknowledge textual ambiguity, and heavy reliance on policy-laden canons all are strategic choices, designed to justify interpreting a statute so it aligns with the policy preferences of the reviewing court.[26] In other words, the decision applies principles designed to shift rather than find statutory meaning. And those principles are concerning, not just because of what this one case will do to environmental protection, but also because of the signals they send to lower courts and because of what they say about the Supreme Court's evolving role in our legal system. *Sackett* is just one decision, but it adds force to critiques alleging the Court is leaving the boundaries of its traditional and constitutional role.[27]

This Essay proceeds as follows. Parts I and II provide background on the Clean Water Act provisions at issue and the history of the Sackett litigation. Part III sets that background against a broader debate about interpretive theories. Part IV critiques *Sackett*, explaining the opinion's many departures from traditional modes of statutory interpretation and how the Court could have done better. The recommendations from Part IV are not novel. It urges returning to administrative-law norms that were more widely accepted not so long ago. But reforms do not need to be novel to be sensible. *Sackett* provides a compelling illustration of the reasons for returning to administrative-law traditionalism.

I. Waters of the United States

In 1972, Congress overrode President Nixon's veto and passed the Federal Water Pollution Control Act Amendments (the statute officially became the Clean Water Act in 1977).[28] It was a landmark statute, designed, in the

25. *See Sackett*, 598 U.S. at 679–83.

26. In her concurrence, Justice Kagan asserted this same point. *Id.* at 710–715. But she developed only a brief supporting account.

27. *See, e.g.*, Mark A. Lemley, *The Imperial Supreme Court*, 136 Harv. L. Rev. 97 (2022) (arguing that the Court no longer has any principled commitments except conservative ideology and advancing its own power).

28. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C.); Clean Water Act

Supreme Court's apt words, to provide a "complete rewriting" of water pollution regulation.[29]

The act was complicated, detailed, and thoughtful in many ways, yet at its core was a curious ambiguity. Any water-pollution-control statute must define its geographic domain, and that definitional effort necessarily raises difficult questions.[30] Such a statute typically would cover the oceans and major rivers and lakes, and it probably would not cover areas of permanent upland. But in between, the questions arise. What about swamps, small or large? Or vernal pools, which are wetlands that predictably emerge in the same locations for a few months each year, but otherwise are typically dry?[31] Or a southwestern stream that flows only after significant precipitation events, yet in those events can carry enough water to wash away a house?[32] And if a normally dry gully flows into an ephemeral stream, which then grows gradually into an intermittent and then a perennial waterway, where is one to draw the lines?[33]

The 1972 Act's answer to that question was to extend jurisdiction to "navigable waters," which the statute then defined as "the waters of the United States."[34] For years (and as recounted in detail by many other authors), agencies, litigants, and courts have wrangled over the meaning of that definition (which writers often refer to in shorthand as "WOTUS").[35]

The wrangling was initially, and briefly, a conflict between agencies. Immediately after the 1972 Act's passage, the Army Corps of Engineers and the Environmental Protection Agency ("EPA")—the two federal agencies primarily responsible for implementing the law—disagreed about the meaning of "the

---

of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.).

29. Milwaukee v. Illinois, 451 U.S. 304, 317–18 (1981).

30. *See* United States v. Riverside Bayview Homes, 474 U.S. 121, 132 (1985) ("[T]his is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one.").

31. *See, e.g.*, Borden Ranch P'ship v. Army Corps of Eng'rs, 261 F. 3d 810, 812 (2001) (describing vernal pools).

32. *See* Rapanos v. United States, 547 U.S. 715, 769 (2006) (Kennedy, J., concurring) (describing the flows of the Los Angeles River); The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-Arid American Southwest, EPA, 15–16 (2008) (describing large fluctuations in flow). *See generally* Craig Childs, The Secret Knowledge of Water 7 (2001) (describing the southwest's aridity and floods).

33. *See* Dave Owen, *Little Streams and Legal Transformations*, 2017 Utah L. Rev. 1, 6 (describing how small streams flow into larger ones) [hereinafter Owen, *Little Streams*].

34. 33 U.S.C. § 1362(7).

35. A particularly good summary appears in the preamble to the 2023 regulations attempting to define "waters of the United States." Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004, 3007–18 (Jan. 18, 2023). Many secondary sources articles also cover this history. A Westlaw search for secondary source articles containing the phrase "waters of the United States" produces over 10,000 hits, which provides a rough sense of the duration of the controversy and the amount of commentary it has produced.

waters of the United States."[36] The Army Corps was a reluctant environmental regulator,[37] and it sought to limit its jurisdiction to traditionally navigable waters.[38] EPA thought the phrase reached more broadly.[39] In 1975, a federal district court agreed with EPA,[40] and the Army Corps then amended its regulations, extending jurisdiction to "the entire length of rivers and streams."[41] Then, in 1977, Congress, while amending the Clean Water Act, considered and rejected the option of mandating a narrower definition.[42] That ended the interagency conflict and, for a long time, settled regulatory definitions; the agencies would adhere to that basic standard, with some elaboration, for the next four decades.[43] But the battles eventually shifted to the Supreme Court.

In 1985, the Supreme Court decided the first in a series of cases about the geographic scope of the Clean Water Act. In *Riverside Bayview Homes v. U.S. Army Corps of Engineers*,[44] the Court upheld the Corps' application of the Clean Water Act to wetlands in Michigan, near the shore of Lake St. Clair.[45] The decision now reads like the product of a different administrative-law era. A unanimous Court noted that EPA and the Army Corps faced a difficult line-drawing problem and decided that, given the text and broad purposes of the Clean Water Act, the agencies' interpretation was reasonable.[46] On that basis, it ruled in favor of the Army Corps.[47] Shortly thereafter, while Ronald Reagan—no champion of environmental regulation—was still in office, EPA and the Army Corps updated their definitional language, explaining that Clean Water Act jurisdiction would extend to any aquatic feature used by migratory birds.[48]

Riverside Bayview and the 1986 rulemaking might have been the end of the matter, but in 2001, the Supreme Court decided *Solid Waste Agency of Northern*

36. *See* Thomas Addison & Timothy Burns, *Comment, The Army Corps of Engineers and Nationwide Permit 26: Wetlands Protection or Swamp Reclamation?*, 18 Ecology L.Q. 619, 628 (1991).
37. *See* Owen, *Little Streams*, *supra* note 33, at 18–19.
38. *Id.*
39. *Id.*
40. Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D. D.C. 1975).
41. Regulatory Programs of the Army Corps of Engineers, 42 Fed. Reg. 37122, 37129 (July 19, 1977).
42. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended in scattered sections of 33 U.S.C.); *see* Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction over Wetlands*, 69 N.D. L. Rev. 873, 897–905 (1993).
43. Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004, 3005 (Jan. 18, 2023) ("EPA and the Corps have separate regulations defining the statutory term 'waters of the United States,' but their interpretations were substantially similar and remained largely unchanged between 1977 and 2015.").
44. 474 U.S. 121 (1985).
45. *Id.* at 124–26.
46. *Id.* at 133–34.
47. *Id.* at 139.
48. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

Cook County v. Army Corps of Engineers.[49] *SWANCC* has a backstory laden with ironies.[50] It concerned a set of wetlands that a consortium of Chicago-area waste-management agencies wanted to fill.[51] As local governments often will do, the agencies sought to put their disposal site as far as possible from their communities, to the consternation of people closer to the proposed disposal site.[52] Those neighbors, represented in Congress by the then-powerful and deeply conservative Dennis Hastert, saw Clean Water Act permitting requirements as a way to stop the project.[53] Representative Hastert, though normally no friend of government regulation, urged the Corps and EPA to come down on the project with a heavy hand.[54] They did so, and litigation ensued, with the waste-management agencies bringing arguments against perceived federal overreach all the way to the Supreme Court.[55]

In a 5-4 decision, the Court ruled in favor of the local agencies.[56] It also laid the groundwork for decisions to follow, including *Sackett*.[57] The Court grounded its decision partly in statutory text, concluding that the word "navigable" was in the statute for a reason, and that reason, according to the majority, must be to establish some bounds on jurisdiction.[58] It also turned to interpretive canons, arguing that a broader interpretation of jurisdiction would raise constitutional questions about the reach of the Commerce Clause and would significantly affect traditional state authority.[59] And it declined to give *Chevron*[60] deference to the Army Corps' position.[61] *SWANCC*'s most direct consequence was to limit Clean Water Act jurisdiction over isolated wetlands.[62] But the case also

49. 531 U.S. 159 (2001) [hereinafter *SWANCC*].
50. *See generally* Thomas W. Merrill, *The Story of SWANCC: Federalism and the Politics of Locally Unwanted Land Uses*, in Environmental Law Stories 283 (Richard J. Lazarus & Oliver A. Houck eds., 2005).
51. *SWANCC*, 531 U.S. at 162–63.
52. Merrill, *supra* note 50, at 285–93.
53. *Id.* at 295–97.
54. *Id*.
55. *Id.* at 298–300.
56. *SWANCC*, 531 U.S. at 174.
57. The *SWANCC* court's emphasis on the word "navigable," its reliance on substantive canons of construction, and its rejection of *Chevron* deference all would be repeated in *Sackett*. *See infra* Part =s1IV. The Rules of Statutory Misinterpretation *See also* William W. Buzbee, *The Antiregulatory Arsenal, Antidemocratic Can(n)ons, and the Water Wars*, 73 Case W. Rsrv. L. Rev. 293, 307–308 (2022) (explaining how *SWANCC*'s "odd and . . . unspecified" use of canons invited further challenges).
58. *SWANCC*, 531 U.S. at 172.
59. *Id.* at 172–74.
60. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
61. *SWANCC*, 531 U.S. at 172.
62. *See* Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" Appendix A, Joint Memorandum, 68 Fed. Reg. 1995, 1996 (Jan. 15, 2003) ("SWANCC squarely eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable."). Under President George W. Bush, EPA and the Army

foreshadowed additional litigation, for it raised questions about how else the Clean Water Act's reach might be limited.

The Court's next effort to answer those questions was *Rapanos v. United States*.[63] Despite warnings from consultants and state and federal regulators that his land contained jurisdictional waters, John Rapanos had filled streams and wetlands across a property he hoped to develop as a shopping mall.[64] The United States brought a criminal prosecution, and Rapanos defended by arguing that the streams and wetlands were not jurisdictional.[65] The case produced four Supreme Court opinions, none commanding a majority. Justice Scalia delivered the opinion of the Court, in which Justices Roberts, Alito, and Thomas joined.[66] In a sometimes-vitriolic argument[67]—he began by analogizing the Army Corps of Engineers to an "enlightened despot"[68]—Justice Scalia concluded that federal jurisdiction should extend only to aquatic features with a "relatively permanent" connection to navigable-in-fact waters.[69] Justice Kennedy disagreed.[70] Concurring only in the judgment, he argued that jurisdiction should exist wherever protection of the aquatic feature at issue would have a "significant nexus" to water quality in navigable-in-fact waters.[71] Justice Stevens, joined by the other three liberals, would have deferred to the Army Corps and EPA.[72] And Justice Roberts wrote separately to upbraid the agencies for not updating their regulations after *SWANCC*.[73]

In the wake of *Rapanos*, EPA and the Army Corps faced two major questions. The first was which opinion(s) they should follow.[74] In practice, and with the approval of trial and appellate courts, they generally treated waters that met either the significant-nexus standard or the relatively permanent connection standard as jurisdictional.[75] They also needed to determine what, in practice,

---

Corps considered but rejected regulations that would have established much larger limits on jurisdiction. *See* Alyson C. Flournoy, *Section 404 at Thirty-Something: A Program in Search of a Policy*, 55 Ala. L. Rev. 607, 614 (2004).

63. 547 U.S. 715 (2006).
64. *Id.* at 763 (Kennedy, J., concurring). The Supreme Court decision also addressed a consolidated case. *See id.* at 764–65.
65. *Id.* at 763.
66. *Id.* at 718.
67. As Linda Greenhouse pointed out at the time, Justice Scalia's opinion reads like a dissent and may have originally been written as one. Linda Greenhouse, *Justices Divided on Protections Over Wetlands*, N.Y. Times (June 20, 2006), https://perma.cc/UTZ4-GYHM.
68. *Rapanos*, 547 U.S. at 720.
69. *Id.* at 739, 741.
70. *Id.* at 759 (Kennedy, J., concurring).
71. *Id.*
72. *Id.* at 788 (Stevens, J., dissenting).
73. *Id.* at 757–58 (Roberts, J., concurring).
74. *See* Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 Emory L.J. 1, 59–61 (2011).
75. Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004, 3014 (Jan. 18, 2023). As the preamble explains:

"significant nexus" meant. In interviews for a previous research project, Corps staff told me the phrase initially caused some confusion, but staff believed they soon settled on standardized and relatively predictable interpretations.[76] Regulated industries alleged, however, that the phrase was fraught with uncertainty, and a few Supreme Court opinions on procedural matters suggested that those allegations might resonate with the Justices.[77]

In the years following *Rapanos*, jurisdictional controversies shifted to rulemaking processes and the lower courts. In 2015, while the Obama administration was still in office, EPA and the Army Corps attempted to craft regulations that would bring greater clarity and predictability while still honoring the protective purposes of the Clean Water Act.[78] They engaged in a massive effort, grounding their regulations in extensive reviews of scientific literature on the impacts of streams and wetlands on water quality.[79] But instead of settling jurisdictional questions, the regulations inflamed them. Political opposition was intense;[80] court decisions enjoined implementation of the regulations in some parts of the country;[81] and then-candidate Donald Trump made opposition to the new regulations a key part of his platform.[82] When President Trump

> Since *Rapanos*, every Court of Appeals to have considered the question has determined that the government may exercise Clean Water Act jurisdiction over at least those waters that satisfy the significant nexus standard set forth in Justice Kennedy's concurrence. . . . Some Courts of Appeals have held that the government may establish jurisdiction under either standard.

Id. (citing multiple cases).

76. Dave Owen, *How Much Difference Will the WOTUS Rule Make*, Env't L. Prof Blog (June 4, 2015), https://perma.cc/77D3-VVQA; *see also* Dave Owen, *Regional Federal Administration*, 63 UCLA L. Rev. 58, 95–96 (2016) [hereinafter Owen, *Regional Federal Administration*].
77. *See* Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 602–603 (2016) (Kennedy, J., concurring) ("The Act… continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."); Sackett v. EPA, 566 U.S. 120, 132–33 (2012) (Alito, J., concurring) (castigating Congress for not defining Clean Water Act jurisdiction more clearly).
78. Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37054, 37054 (June 29, 2015).
79. *See generally, e.g.*, EPA & U.S Dept. of the Army, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (2015); Sci. Advisory Bd., SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (2014); Sci. Advisory Bd., Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act" (2014); EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (2015).
80. *See* Owen, *Little Streams*, *supra* note 33, at 2–3.
81. *See* Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004, 3016 (Jan. 18, 2023) (summarizing the cases).
82. *See* Annie Snider, *Trump Set to Gut Water Protections*, Politico (Jan. 14, 2020), https://perma.cc/8MYV-P9TL ("The Obama-era water rule was one of Trump's top targets for rollback on the campaign trail in 2016.").

took office, his administration made repealing the 2015 regulations and replacing them with something akin to Justice Scalia's *Rapanos* standard a priority.[83] The Trump administration did not accomplish these goals until 2020,[84] and court decisions quickly enjoined implementation of the Trump rules in some states.[85] In 2023, EPA and the Army Corps enacted new regulations, which were designed to codify the pre-2015 status quo, including Justice Kennedy's significant-nexus standard.[86] More court injunctions quickly followed.[87]

Meanwhile, over the decades spanned by these jurisdictional controversies, Clean Water Act regulation was maturing and evolving.[88] Part of that evolution involved the development of methodologies for determining where jurisdiction applied.[89] The Army Corps developed a national handbook for wetland delineation and then developed regional supplements designed to explain how to recognize aquatic features in different parts of the country.[90] It spent years training its staff, and private-sector consultants also became experts in wetland delineation.[91] On request, the Corps also provides regulated entities with site-specific assessments of jurisdiction.[92] The result never was, and never could be, complete consistency or certainty; the boundaries between land and water are sometimes more continuum than line, and they evolve over time, making some level of interpretive discretion unavoidable.[93] But through regulations, written manuals, and extensive training, the Corps has tried to standardize the process as much as

83. *See* Mark A. Ryan, *President Trump's Executive Order on the Waters of the United States Rule*, Trends: ABA Section Env't, Energy, and Res. Newsl. (Am. Bar. Ass'n.), May/June 2017, at 7, https://perma.cc/HNU5-JN5X.

84. The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22250, 22250 (Apr. 21, 2020).

85. *See* Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004, 3016 (Jan. 18, 2023) (describing this second round of litigation).

86. *Id.* at 3005–3006

87. West Virginia v. EPA, 669 F.Supp.3d 781, (D. N.D. 2023) (enjoining implementation in twenty-four states); Texas v. EPA, 662 F. Supp. 3d 739 (S.D. Tex. 2023) (enjoining implementation in Texas and Idaho).

88. *See generally* Owen, *Little Streams*, *supra* note 33 (describing this evolution).

89. *See* EPA, How Wetlands are Defined and Identified under CWA Section 404, https://perma.cc/U5FY-DAF4 (explaining how EPA and the Army Corps determine the presence and boundaries of wetlands).

90. Env't Lab., Corps of Engineers Wetlands Delineation Manual (1987); *see* Army Corps Eng'rs, Regional Supplements to Corps Delineation Manual, Army Corps Eng'rs Headquarters, https://perma.cc/3434-4PX2.

91. *See* Owen, *Regional Federal Administration*, *supra* note 76, at 90–91, 94–96 (describing the Corps' efforts to attain consistency); Dave Owen, *Consultants, the Environment, and the Law*, 61 Ariz. L. Rev. 823, 831–32 (2019) (explaining the work done by wetlands consultants).

92. *See* Army Corps of Engineers, Charleston District, Jurisdictional Determinations and Delineations (2023), https://perma.cc/ZX3P-6FV9.

93. *See* United States v. Riverside Bayview Homes, 474 U.S. 121, 132 (1985) (noting this challenge).

possible.[94] The descriptions in some court opinions, which make jurisdictional determinations sound like a haphazard and despotic process, bear little relation to the actual reality.[95]

The regulatory programs for jurisdictional waters evolved as well, generally in two primary ways. The program most directly affected by changes in geographic coverage is the 404 program, which regulates the deposition of dredged or fill material in covered waters,[96] and the discussion below focuses primarily on that program's evolution. The first key change to that program is that the Army Corps' permitting requirements reached more and more projects.[97] In the early days of Clean Water Act implementation, the Corps had allowed many jurisdictional waters to be filled without permits.[98] Through the 1990s and into the 2000s, that changed, and many projects that once would have proceeded without any Clean Water Act compliance needed to go through a permitting process.[99] The second key change was the Corps' implementation of changes designed to promote flexibility and streamlining.[100] Most importantly, in 1977, Congress amended the Clean Water Act to explicitly authorize general permitting, which means providing standardized permits for large classes of low-impact projects.[101] General permitting's appeal is that it is cookie-cutter and, therefore, relatively predictable and fast.[102] It has become the dominant mode of section 404 permitting, particularly for smaller projects.[103] The Corps estimates that the typical general permit costs "from $4,412 to $14,705" to obtain.[104] Individual permits typically take longer and cost more, as one would expect for permits that cover larger projects with greater environmental impacts.

These changes meant that section 404 permitting, for most projects, was not the "crushing" burden described in Supreme Court opinions.[105] But it also was not free, and the obligation to obtain section 404 permits also often carried with it requirements to comply with the National Environmental Policy Act

94. *See* Owen, *Regional Federal Administration*, *supra* note 76, at 90–91, 94–96.
95. *See id.*
96. *See* 33 U.S.C. § 1344 (authorizing the permitting program); Owen, *Regional Federal Administration*, *supra* note 76, at 80–83 (summarizing the program).
97. *See* Owen, *Little Streams*, *supra* note 33, at 20–22, 28–31.
98. *Id.* at 20–22.
99. *Id.* at 28–31.
100. *See id.* at 51 (summarizing these efforts).
101. 33 U.S.C. § 1344(e); *see* Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 Duke L.J. 133, 161 (2014).
102. *See* Biber & Ruhl, *supra* note 101, at 163.
103. *Id.*
104. Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73522, 73569 (Dec. 27, 2021) (providing costs in 2019 dollars). The Army Corps also estimates that the typical nationwide general permit requires forty-five days for the Corps to process. *Id.*
105. *See* Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 602 (2016).

("NEPA")[106] and the Endangered Species Act ("ESA"),[107] both of which apply to discretionary federal decisions.[108] For these reasons, many regulated entities spent years advocating for narrower Clean Water Act jurisdiction.[109] Their legislative efforts have been consistently unsuccessful (as have environmentalists' efforts to respond to the Supreme Court's decisions by expanding jurisdiction).[110] Until the Trump Administration's short-lived efforts, the agencies also had declined to make major regulatory changes.[111] They did so partly because a growing body of scientific research revealed that protecting small streams and wetlands had major benefits for downstream water quality, which meant that Justice Kennedy's significant-nexus standard often favored jurisdiction.[112] But major changes would come, and they ultimately came from the Court.

II. The *Sackett* Litigation

In 2007, Chantelle and Michael Sackett began filling wetlands on a property near Priest Lake in Idaho.[113] They hoped to eventually build a house. Aerial photos and maps reveal that the property was probably once part of a major wetland complex that reached from the shores of Priest Lake deep into the surrounding forest.[114] But lots immediately surrounding the Sacketts' property had been developed, and a road ran along the shore of the lake, separating the wetland from the open water.[115] The Sacketts did not obtain Clean Water Act permits, and when EPA staff told them to restore the wetlands and to obtain

106. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).

107. 16 U.S.C. §§ 1531–1544.

108. *See* 16 U.S.C. § 1536(a)(2); 42 U.S.C. § 4332(C).

109. *See, e.g.*, *Waters of the United States*, Am. Farm Bureau Fed'n, https://perma.cc/GNP8-DMGW (describing the Farm Bureau Federation's opposition to broad jurisdiction); Thomas M. Sullivan, *Stopping the WOTUS Rule Is a Win for Small Business*, U.S. Chamber of Com. (July 12, 2023), https://perma.cc/2TDU-6SQL.

110. *See, e.g.*, Matthew Daly, *Biden Vetoes Bill that Sought to Toss EPA Water Protections*, Assoc. Press (Apr. 6, 2023), https://perma.cc/8TVZ-5969; Clean Water Restoration Act, S. 787, 111th Cong. (2009) (an unsuccessful bill that would have eliminated the troublesome word "navigable" from the statute).

111. Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004, 3005 (Jan. 18, 2023) (noting that the definition had remained stable from 1977 to 2015). Even the 2015 rulemaking, which provoked furious controversy, would have made quite modest adjustments. *See* Owen, *Little Streams*, *supra* note 33, at 3.

112. *See generally* EPA., Connectivity of Streams and Wetlands to Downstream Waters, *supra* note 79 (describing numerous ways in which protecting streams and wetlands influences downstream water quality).

113. Sackett v. EPA, 622 F.3d 1139, 1141 (9th Cir. 2010).

114. *See* Felicity Barringer, *Wetlands? What Wetlands?*, N.Y. Times (Apr. 20, 2011), https://perma.cc/G67C-ULAL.

115. *Id.*

permits if they wanted to proceed, they instead sued.[116] They were represented by the Pacific Legal Foundation, a conservative-activist law firm focused on opposing and undoing government regulatory programs.[117]

The procedural history of that litigation is convoluted, and the 2023 decision came from the Sacketts' second trip to the United States Supreme Court.[118] For present purposes, the most important detail is that the lower courts consistently upheld EPA's jurisdictional determination.[119] But they did so on a significant-nexus theory that, though plausible to a wetland scientist, lent itself to the ridicule of attorneys, reasoning that the Sacketts' wetland, in combination with the other nearby wetland, had a significant nexus to Priest Lake through an unnamed tributary stream, which flowed across the road from the Sacketts' property and into the lake.[120]

For the Sacketts and their advocates, that theory presented a golden opportunity. Even before Justice Kennedy's retirement, the agencies' application of the jurisdictional standards had come under withering attack, with Justice Alito arguing, in a 2012 concurring opinion supporting the Sacketts, that those standards were so vague that they risked due process violations.[121] Strikingly, Justice Kennedy, who had authored the significant nexus standard, had joined the attacks; in a concurring opinion, joined by Justices Alito and Thomas, he argued that the Clean Water Act "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."[122] Then Justice Kennedy retired and the Court shifted further and further to the right, leaving the significant-nexus standard, and any decision resting upon it, seeming highly vulnerable. EPA tried to reduce its risk by withdrawing its administrative consent order and thus mooting the case,[123] but the Sacketts and their attorneys had their eyes on a bigger prize.[124] They continued to litigate; the Court granted cert;[125] and in May of 2023, it issued its decision.[126]

As with *Rapanos*, *Sackett* produced four separate opinions, but this time the outcome was clear. Justice Alito's opinion for the Court reversed the Ninth Circuit, jettisoned the significant-nexus standard, and held that aquatic features

116. *Sackett*, 598 U.S. at 661–63.
117. *See What We Do*, Pac. Legal Found., https://perma.cc/EQ4Y-YL6Q.
118. *See generally* Sackett v. EPA, 566 U.S. 120 (2012) (holding that EPA's administrative compliance order was final agency action and could be challenged).
119. Sackett v. EPA, 8 F. 4th 1075, 1093 (9th Cir. 2021); Sackett v. EPA, 2019 WL 13026870, at *9 (D. Idaho 2019).
120. *Sackett*, 8 F. 4th at 1092–93.
121. *Sackett*, 566 U.S. 120, 132–33 (2012) (Alito, J., concurring).
122. Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 602–03 (2016).
123. *Sackett*, 8 F. 4th at 1082.
124. The Ninth Circuit concluded that the case was not moot. *Id.* at 1086.
125. Sackett v. EPA, 8 F. 4th 1075 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 896 (2022).
126. *See generally* Sackett v. EPA, 598 U.S. 651 (2023).

could be jurisdictional only if they had a relatively permanent surface connection to navigable-in-fact waters.[127] It also held that adjacent wetlands could only be covered if they were "indistinguishable" from navigable-in-fact waterways.[128] Justice Thomas penned a lengthy concurring opinion, which Justice Gorsuch joined, raising questions about whether Congress's Commerce-Clause authority should allow protection of any non-navigable-in-fact waterway.[129] Justice Kavanaugh, joined by the liberal justices, concurred in the judgment and in rejecting application of the significant-nexus standard, but disagreed with the majority's narrow interpretation of the word "adjacent."[130] And Justice Kagan, joined by Justices Sotomayor and Jackson, added an additional concurring opinion—though it reads much more like a dissent—blasting the majority's interpretive methodology.[131]

Discerning the precise impact of *Sackett's* new jurisdictional standard is difficult, partly because the opinion's relatively-permanent-surface-connection standard will be difficult to apply.[132] But the case clearly has monumental importance for environmental law. One can develop a rough lower-end estimate by looking at studies of the impacts of the Trump administration's short-lived WOTUS regulations, which defined jurisdiction *more* expansively than the *Sackett* decision. Those studies found massive reductions in the numbers of aquatic features with Clean Water Act protection.[133] In the West, where aridity means that most streams are seasonal, the changes were significantly greater; most streams and wetlands lost protection.[134] With those changes come reductions in NEPA and Endangered Species Act coverage. Both NEPA and section 7 of the Endangered Species Act apply only when federal agencies make discretionary decisions, and the end of Clean Water Act permitting requirements for many stream and wetland fills means that NEPA and ESA section 7 will also no longer apply.[135] Those studies suggest that *Sackett*—which, again, will have a

127. *Id.* at 678 ("In sum, we hold that the CWA extends to only those 'wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right,' so that they are 'indistinguishable' from those waters.") (quoting Rapanos v. United States, 547 U.S. 742, 755 (2006)).

128. *Id.*

129. *Id.* at 684–710.

130. *See id.* at 715–16 (Kavanaugh, J., concurring) ("I agree with the Court's decision not to adopt the "significant nexus" test for determining whether a wetland is covered under the Act. . . . I write separately because I respectfully disagree with the Court's new test for assessing when wetlands are covered by the Clean Water Act.").

131. *See id.* at 1359–62 (Kagan, J., concurring).

132. The Court did not specify what counts as "relatively permanent," and the questions are obvious. Does that mean six months out of the year? Nine? Three, if the flows are predictable and substantial for those three months?

133. *See* EPA & Dept. of the Army, Technical Support Document for the Revised "Waters of the United States" Rule 82–98 (2022).

134. *See id.* at 97–107 (focusing on Arizona and New Mexico).

135. *See supra* notes 106–108 and accompanying text.

larger and more lasting impact than the Trump-era rule—is perhaps the largest regulatory rollback in the history of U.S. environmental law.[136]

III. The Unraveling Statutory-Interpretation Consensus

Sackett came down while long-settled statutory-interpretation principles were destabilizing. For decades, judges across a variety of spectrums have agreed that the core goal of statutory interpretation is to discern the meaning conveyed by the enacting legislature.[137] While there are some quibbles about what exactly this means—some judges describe this process as seeking the legislature's intended meaning,[138] while others argue that the better way to characterize statutory interpretation is as a search for the meaning of the text[139]—all seemed to agree about what proper statutory interpretation was not. Judges were not supposed to use interpretation to impose their own policy preferences.[140]

Judges also seemed increasingly to agree, at least in principle, about the techniques that would best accomplish this task. For years, the primary interpretive debates centered around the use of interpretive tools like legislative history and purpose-based arguments.[141] For some judges and commentators, these were important tools; they argued that contextual indicators were often more familiar to legislators, and therefore better indicators of intended meaning, than the details of statutory text.[142] Textualists countered that legislative history and purpose-based reasoning were minefields of indeterminacy, and they therefore emphasized close textual readings as the best or even only interpretive tools.[143]

136. This is not hyperbole. I cannot think of any court case that comes close. Congress, while generally reluctant to add new environmental laws, also has not enacted repeals of this scale. And even ambitious deregulatory rulemakings, like the Trump administration's attempts to limit the scope of Clean Water Act coverage, were more modest in their impacts than the Supreme Court's opinion.

137. *See* Sunstein, *supra* note 11, at 415.

138. *E.g.* Steadman v. Sec. Exch. Comm'n, 450 U.S. 91, 97 (1981) ("The search for congressional intent begins with the language of the statute.").

139. *E.g.* Bostock v. Clayton Cnty., 590 U.S. 644, 654 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

140. *See Bostock*, 590 U.S. at 654 ("If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."); *id.* at 683 (Alito, J., dissenting) (blasting the majority for issuing "legislation… in the form of a judicial opinion interpreting a statute."); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 5 (2021) ("In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents.").

141. *See generally* Manning, *supra* note 12 (describing these debates).

142. *See, e.g.*, West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 113 (1991) (Stevens, J., dissenting) (warning against putting on "thick grammarian's spectacles and ignor[ing] the available evidence of congressional purpose").

143. *See* Sunstein, *supra* note 11, at 416 ("[A]n emphasis on the primacy of the text serves as a salutary warning about the potential abuses of judicial use of statutory 'purpose' and of legislative history.").

Even at their height, these debates mattered in relatively few cases; judges who emphasized legislative history and purpose-based arguments also cared about text, and many judges used an all-of-the-above interpretive approach.[144] But in recent years, the differences seemed even smaller. Uses of legislative history had become increasingly rare,[145] and Justice Kagan's famous quip that "we are all textualists now" seemed to summarize the prevailing consensus.[146]

The last few terms have stirred doubts about whether that consensus is real. The most salient source of doubts has been the rise of "major questions doctrine," which most judges and commentators understand as a substantive canon.[147] In its gentler form, major questions doctrine counseled against deferring to agency statutory interpretations on questions of great political and economic significance.[148] Decisions also emphasized the doctrine's relevance where an agency interpretation was novel or pushed beyond that agency's traditional competence and expertise.[149] The canon's stronger form demanded an unambiguous congressional authorization for agency interpretations that raised major questions.[150] Opponents of the canon have charged that in practice, either form of the doctrine turns hostility to agency regulation into an interpretive principle, though the latter form does so with much more vigor.[151] They also have charged

144. *See, e.g.*, King v. Burwell, 576 U.S. 473 (2015) (grounding an important statutory interpretation in a variety of interpretive tools (but not discussing legislative history)).

145. *See* Manning, *supra* note 12, at 128 (noting widespread acknowledgment of this decline).

146. Harv. L. Sch., The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes, YouTube (Nov. 25, 2015), https://perma.cc/9P9J-MHL6; *see* Manning, *supra* note 12, at 118. *But see* Anita Krishnakumar, *Backdoor Purposivism*, 69 Duke L.J. 1275, 1279 (2020) (arguing that self-described textualists still use purposive reasoning, and often do so without consulting actual evidence of purposes).

147. Following convention, I use the singular form of "doctrine," but, as other scholars have pointed out, more than one version of major questions doctrine is at play in the courts. *See* Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 S. Ct. Rev. 1, 5 ("We can discern in the case law three different versions of the MQD."); Cass R. Sunstein, *There are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475 (2021). For an argument that the major questions doctrine should not be understood as an interpretive canon, *see* Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring).

148. *See, e.g.*, King v. Burwell, 576 U.S. 473, 485–86 (2015) (declining to give *Chevron* deference to the IRS's interpretation of part of the Affordable Care Act).

149. *Id.*; *see* Nat'l Fed'n of Indep. Bus. v. Occupational Safety and Health Admin., 595 U.S. 109, 117–20 (2022) (questioning OSHA's authority to impose COVID-related mandates that the Court saw as straying beyond OSHA's traditional focus on workplace safety).

150. *E.g.*, West Virginia v. EPA, 597 U.S. 697, 723 (2022) ("The agency instead must point to 'clear congressional authorization' for the power it claims.") (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); *see* Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 264 (2022) (describing how the stronger version of major questions doctrine has displaced the more restrained one).

151. *See* Lisa Heinzerling, *The Power Canons*, 68 WM. & Mary L. Rev. 1933, 1938 (2017) (arguing that major questions doctrines "mask a judicial agenda hostile to a robust regulatory state"); Freeman & Stephenson, *supra* note 147, at 22 ("[I]t empowers unelected judges to decide

that the indeterminacy of the "major questions" category means the canon will be applied in haphazard ways.[152] Nevertheless, in recent years, the Court has gone all-in on the stronger form of the canon.[153] And in a series of high-profile dissents, liberal justices have echoed the critiques,[154] with Justice Kagan arguing that the canon functions as a "get-out-of-text-free card[]" and that perhaps her "[w]e're all textualists now" remark was spoken too soon.[155]

The major-questions debate is a key part of a broader societal debate about the Supreme Court. As anyone following politics knows, with the ascendance of a conservative supermajority has come a series of controversial decisions, some involving administrative governance and statutory interpretation and others involving constitutional law.[156] The Court has positioned itself as a powerful counterweight to the policy initiatives of progressive administrations and has been willing, even eager, to reverse old, famous and popular precedents.[157] It also has greatly accelerated use of the "shadow docket," which allows it to take cases out of lower courts' hands and decide matters with minimal deliberation and reason-giving.[158] At the same time, it has resisted ethical reforms, even as a series of scandals has raised questions about the justices' behaviors.[159] That resistance coincides with plummeting public opinion of the Court,[160] widespread

---

significant public policy issues, likely in ways that are influenced, consciously or subconsciously, by the judges' policy preferences.").

152. *See* Sohoni, *supra* note 150, at 266 (borrowing from *Alice's Adventures in Wonderland* and describing the doctrine as "so malleable that, at present, it can be said only to mean 'just what [the Court] choose[s] it to mean—neither more nor less.'").

153. *See* Sohoni, *supra* note 150, at 273–76 (describing the doctrine's unacknowledged transformation).

154. Biden v. Nebraska, 143 S. Ct. 2355, 2384–85 (2023) (Kagan, J., dissenting); West Virginia v. EPA, 597 U.S. 697, 753–56 (2022) (Kagan, J., dissenting); Nat'l Fed'n of Indep. Bus. v. Occupational Safety and Health Admin., 595 U.S. 109, 127 (2022) (Breyer, J., dissenting); Ala. Ass'n of Realtors v. Dept. of Health & Human Servs., 141 S. Ct. 2485, 2490–91 (2021) (Breyer, J., dissenting).

155. *West Virginia*, 597 U.S. at 778–81.

156. *See supra* notes 4–5 and accompanying text.

157. *See* Lemley, *supra* note 27, at 113 ("[A] newfound conservative majority is simply doing whatever it wants in the cases before it.").

158. *See* Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting) (critiquing her colleagues' overreliance on the shadow docket).

159. *See* Charlie Savage, *Tightening Supreme Court Ethics Rules Faces Steep Hurdles*, N.Y. Times (May 5, 2023), https://perma.cc/J3L5-7GNJ. In November 2023, the Court did adopt an ethical code. Sup. Ct. U.S., Code of Conduct for the Justices of the Supreme Court of the United States (2023). Commentators have criticized that code for being anemic. *See, e.g.*, Charles Geyh, The New SCOTUS Code of Conduct, SCOTUSblog (Nov. 24, 2023), https://perma.cc/7T3L-JNFH.

160. Devan Cole, Supreme Court Approval Rating Declines Amid Controversy over Ethics and Transparency: Marquette Poll, CNN (May 24, 2023), https://perma.cc/9QSY-SV7J.

negative media attention,[161] and critiques alleging that—in President Joe Biden's relatively gentle words—"this is not a normal Court."[162]

The purpose of this Essay is not to opine broadly on these controversies. But *Sackett* is relevant to them. A key question in all the debates is whether the Court is just engaged in the traditional business of judging, which will sometimes mean rendering unpopular decisions, or whether something different and more problematic is taking place. Unfortunately, and as the discussion below will explain, *Sackett* is consistent with claims that the Court has gone off the rails.

IV. The Rules of Statutory Misinterpretation

The discussion that follows critiques the *Sackett* decision, providing a broader and deeper analysis than appeared in the concurring opinions from the Court. The main point is not just that the decision was sloppy, though it was. Instead, the key point is that the decision departed from traditional rules of statutory interpretation in structured and strategic ways. *Sackett* is, in other words, a decision grounded in principles, and they are principles of misinterpretation.

A. Slanting the Facts

I will start, as the Court did, with its framing for the case. Often, in a statutory-interpretation decision, a court will provide some context, explaining in general terms what a statute says and how it functions.[163] Courts sometimes will provide some historical context.[164] But they normally profess to remain studiously neutral about whether the statute is good or bad,[165] or they write with some implied deference to the policy judgments of Congress.[166] The factual summary also typically would be grounded in evidence before the court, not in the unsubstantiated allegations of party and amicus briefs.

161. *See, e.g.*, Justin Elliott et al., *Justice Samuel Alito Took Luxury Vacation with GOP Billionaire Who Later Had Cases Before the Court*, ProPublica (June 20, 2023), https://perma.cc/Z5ZS-G8T9.

162. Kelly Garrity, 'This Is not a Normal Court': Biden Blasts Affirmative Action Ruling, Politico (June 29, 2023), https://perma.cc/7X2G-CSUC; see Lemley, supra note 2727, at 97 (arguing that the current Court's guiding principle is increasing its own power).

163. *See, e.g.*, King v. Burwell, 576 U.S. 473, 478–83 (2015).

164. *Id.* at 478–81.

165. *See, e.g.*, Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute.").

166. *See, e.g.*, *Burwell*, 576 U.S. at 478–83 (describing the reasons for enactment of the Affordable Care Act and the goals of the statute).

Sackett opens with some general statements about the Clean Water Act's successes,[167] but the opinion then quickly dispenses with these norms. It describes the Clean Water Act—a democratically-enacted statute that legislators thought necessary to protect the public—as "a potent weapon."[168] It then repeatedly describes the Act's consequences for violators as "crushing,"[169] states that compliance processes can be "arduous, expensive, and long,"[170] laments the fact that the Army Corps' jurisdictional determinations often find aquatic features to be protected,[171] warns that the statute puts "a staggering array of landowners . . . at risk of criminal prosecution or onerous civil penalties,"[172] and repeatedly describes the Act's penalties as "severe."[173] With the exception of the remark about the outcomes of jurisdictional determinations, these statements are unaccompanied by citations to actual data on implementation or enforcement. To further build the impression of an overreaching statute, the opinion poses, as though these are serious questions, hypotheticals about whether regulation might extend to "puddles" and "swimming pools."[174] Yet nowhere in its account did the Court explain why Congress might have wanted EPA and the Army Corps to protect streams and wetland.[175] The slant is extreme.

The Court's summary also is striking for its failure to engage with the realities of Clean Water Act permitting. Notwithstanding the Court's allegations and Justice Scalia's earlier rhetoric about despotism,[176] Congress, EPA, and the Army Corps of Engineers have spent years trying to create an applicant-friendly process that still meets environmental-protection goals.[177] Most importantly, they have created a system in which the vast majority of section 404 permitting actions involve general permits, which are standardized permits designed to quickly authorize particular categories of activity.[178] These permits

167. Sackett v. EPA, 598 U.S. 651, 658 (2023) ("By all accounts, the Act has been a great success.").
168. *Id.* at 660.
169. *Id.*
170. *Id.* at 661 (quoting Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 601 (2016)).
171. *Id.* at 670.
172. *Id.*
173. *Id.* at 661, 681.
174. *Id.* at 658–59. Agency regulations have never covered swimming pools, and the agencies have taken pains to clarify that they do not regulate puddles. *E.g.* Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004, 3131 (Jan. 18, 2023) ("Puddles may periodically contain water, but they are not lakes, ponds, streams, or wetlands and they are not 'waters of the United States.'").
175. *Compare, e.g.*, *Sackett*, 598 U.S. at 725–28 (Kavanaugh, J., concurring) (explaining how the Court's novel understanding of "adjacent" will negatively impact water quality), *with* Rapanos v. United States, 547 U.S. 715, 774–75, 777–78 (2006) (Kennedy, J., concurring) (explaining why protection of wetlands is important).
176. *Rapanos*, 547 U.S. at 721.
177. *See* Owen, *Little Streams*, *supra* note 33, at 51 (summarizing these efforts).
178. *See* Biber & Ruhl, *supra* note 101, at 163 (describing the prevalence of general permitting).

are issued on a nationwide, regional, or state basis,[179] and to obtain authorization, a prospective permittee typically just needs to provide notice and allow a little over a month for review.[180] Some general permits require no notice at all.[181] Approximately 97 percent of section 404 activities are authorized under general permits,[182] and the Army Corps' statistics show that the average estimated cost for obtaining coverage under a general permit is "from $4,412 to $14,705."[183] Additionally, the Army Corps and its state regulatory partners hardly ever deny permits.[184] Some projects get modified in ways designed to reduce environmental impacts, but they routinely proceed.[185] Though this information was in the case record, none of these facts made it into the Court's opinion, which, despite purporting to describe the program, uses the words "general permit" only once, buried deep in a footnote, and never grapples with the relevance of real-world permitting practices to the Court's critiques of the statute.[186]

Likewise, the Court's purported concern with the economic burdens of Clean Water Act compliance again reveals a severe slant. Though the Court did not mention it, water pollution also creates economic burdens and negatively impacts property rights.[187] So too does filling streams and wetlands even if it does not release pollutants downstream; the water that once would have pooled in those locations then must go to someone else's property, and that property

179. *See* Regional and Programmatic General Permits, Army Corps of Eng'rs, https://perma.cc/8NX4-HT8L.

180. *See, e.g.*, Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744, 2743–44 (Jan. 13, 2021) (describing pre-construction notification conditions for 2021 Nationwide Permits).

181. *See, e.g.*, Army Corps of Eng'rs, Summary of the 2021 Nationwide Permits (Dec. 7, 2021) (indicating that pre-construction notification is not required for 19 of the 59 Nationwide Permits issued in 2021).

182. Nicole T. Carter, Cong. Rsch. Serv., 97-223, The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments 2 (2017).

183. Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73522, 73569 (Dec. 27, 2021) (providing costs in 2019 dollars).

184. *See* Nicola Ulibarri & Jiarui Tao, *Evaluating Environmental Permitting Process Duration: The Case of Clean Water Act Section 404 Permits*, 62 J. Env't Planning & Mgmt. 2124, 2140 (2019) ("A final implication of this work is how rarely projects were simply refused a permit: there were only two denials (both with an invitation to re-apply) in our entire dataset."); Owen, *Little Streams*, *supra* note 33, at 41 (quoting a state regulator's statement that "there is no stopping things, with very, very, very limited exceptions").

185. *See* Ulibarri & Tao, *supra* note 184, at 2132 (quantifying the rarity of denials); Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. at 73524 (describing modifications); Dave Owen, *The Negotiable Implementation of Environmental Law*, 75 Stan. L. Rev. 137, 172–73 (2023).

186. Sackett v. EPA, 598 U.S. 651, n.15 (2023).

187. *See* Sarah Nichols & John Crompton, *A Comprehensive Review of the Evidence of the Impact of Surface Water Quality on Property Values,* Sustainability, Feb. 2018, at 26 ("The studies reviewed consistently demonstrate that property price premiums are associated with surface water quality.").

owner may not want to be flooded.[188] EPA and the Army Corps had studied the balance of economic impacts and had concluded that the economic benefits of extending protection to small streams and wetlands outweighed the associated economic burdens.[189] That work should have been directly relevant to the Court's assessment of the Clean Water Act; indeed, it is the sort of technical analysis in which agencies have expertise and the Court does not, and to which the Court therefore would traditionally defer.[190] But even as it complained about the economic burdens of regulation, the Court said nothing about these economic benefits.

The upshot of this discussion is that when the Court came to what it presented as the beginning of its statutory analysis—when it said, "we start, as we always do, with the text,"[191] it had already stacked the deck. It had done so by simply crediting the accusations lodged by a regulatory program's opponents, and by disregarding compelling facts presented by the agencies and their defenders.

B. Machinations with Text

When the Court turned to textual analysis, it appeared, at first blush, to use standard interpretive techniques. It focused in on the key language at issue—"the waters of the United States"—and consulted dictionary definitions, ordinary usage, and usage in other laws to discuss what that phrase might mean.[192] But its reasoning rests on logical fallacies and sleights of hand.

1. Misunderstanding "wetlands"

Take the Court's use of definitions. The Court sought to contrast two terms—"wetlands" and "the waters"—and argued that it is implausible for the latter to encompass the former.[193] One reason for that implausibility, the Court

188. *See Wetland Functions and Values: Water Storage for Storm Water and Flood Runoff*, Vt. Agency Nat. Res., Dep't Env't Conservation, https://perma.cc/K2NJ-UFSK ("In watersheds where wetlands have been lost, flood peaks may increase by as much as 80 percent."). *See generally* Charles A. Taylor & Hannah Druckenmiller, *Wetlands, Flooding, and the Clean Water Act*, 112 Am. Econ. Rev. 1334 (2022) (estimating the economic value of wetland flood mitigation).

189. EPA & Dep't of the Army, Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule xvi (2022) ("Net benefits could thus range from $854 million . . . to $1,972 million . . .").

190. *See* Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.").

191. Sackett v. EPA, 598 U.S. 651, 671 (2023).

192. *Id.* at 671–79.

193. *Sackett*, 598 U.S. at 671–72 (arguing that it is difficult to "classif[y] lands, wet or otherwise, as waters") (internal quotation marks omitted) (quoting Rapanos v. United States, 547 U.S. 715, 740 (2006) (plurality opinion) and United States v. Riverside Bayview Homes, 474 U.S. 121, 132 (1985)). While both Sackett and Rapanos tried to trace this observation to *Riverside*

claimed, is that it is odd to describe "land" as "waters"; the implication is that "wetland" carries the same meaning as "land that is wet."[194] That implication is false. Wetland, in the English language, is a synonym for swamp or marsh; it does not refer to just any land that got some water on it.[195] As Justice Kennedy pointed out in his *Rapanos* opinion, in which he responded to a similar argument from Justice Scalia, "wetlands are not simply moist patches of earth."[196] And as Justice Kennedy's *Rapanos* opinion also pointed out, EPA and the Army Corps had gone to great lengths to define wetlands, and those definitions avoid defining any old piece of land that has gotten wet as a jurisdictional wetland.[197]

2. Narrowing "the waters"

The definitional games also involved the phrase "the waters." That phrase, the Court argued, must exclude many wetlands because that phrase only connotes relatively permanent geographic features that encompass water.[198] That premise seems reasonable enough; one would expect places marked by the routine presence of water to be classified as "waters." But the Court's conclusion does not follow; instead, the Court simply declined to follow its own definition. Many wetlands are relatively permanent geographical features characterized by the presence of water, even if they are not directly connected to other surface waterways,[199] yet the Court concluded that these must fall outside the phrase "the waters."[200] Similarly, ponds and lakes that are too small to be navigable for purposes of commerce, and that lack permanent surface connections to navigable-in-fact waterways, still are permanent geographic features characterized by the normal presence of water; no one would think it odd to say something like "the waters of the pond."[201] But the Court's understanding of "the waters of the United States" would exclude those waters as well.[202] Likewise, as Justice Kennedy pointed out in his *Rapanos* opinion, many streams without permanent flow also are geographic features that contain water and are relatively

---

Bayview Homes, neither mentioned that in the very next sentence, the *Riverside Bayview Homes* Court had dismissed this reasoning as "simplistic." *Riverside Bayview Homes*, 474 U.S. at 132.

194. *See Sackett*, 598 U.S. at 671–72.

195. *See Wetland (noun)*, Merriam-Webster, https://perma.cc/5S5C-R86R (defining "wetland" as "land or areas (such as marshes or swamps) that are covered often intermittently with shallow water or have soil saturated with moisture") (parentheses in original); *What is a Wetland?*, EPA, https://perma.cc/3Q6K-8KTA.

196. *Rapanos*, 547 U.S. at 761 (Kennedy, J, concurring).

197. *Id.*

198. *Sackett*, 598 U.S. at 670–74.

199. *See generally Classification and Types of Wetlands*, EPA, https://perma.cc/Y6NS-44T6.

200. *See Sackett*, 598 U.S. at 673–74.

201. *See, e.g.*, Bailey v. Inhabitants of Woburn, 126 Mass. 416, 417–21 (1879) (repeating the phrase five times).

202. *Sackett*, 598 U.S. at 673–74.

permanent.[203] The category of features the Court has said count as "the waters" simply does not match the Court's own claimed understanding of that phrase.

The Court's analysis of dictionary definitions and conventional usage contains a similar logical fallacy. According to the Court, because dictionary definitions and both ordinary and legal speech routinely use "the waters" in association with larger waterways, like rivers, lakes, and oceans, the phrase must refer exclusively to those larger features.[204] But again, the conclusion does not follow from the premise. The fact that a word is used *often* to refer to a few things does not mean it *exclusively* encompasses those things.[205] For example, the word "fruit" is normally associated, in speech and in definitions, with examples like apples and pears, but that does not mean a kumquat or papaya is not a fruit. For that reason, a better way to test whether the phrase "the waters" is *exclusive* of wetlands or ephemeral or intermittent streams would be to show definitions that specifically say that an ephemeral or intermittent stream or wetland is *not* "the waters." The Court did not identify any such definitions. Failing that, an alternative would be to show the absence of use of the phrase "the waters" in association with wetlands and in streams that lack permanent flow. The Court appears to have done only a cursory search for such evidence.

If it had done even a modestly careful search, the Court would have found multiple examples, in both legal speech and in ordinary parlance, of the phrase "the waters" being used more expansively. Some states, for example, set water quality standards for "swamp waters."[206] Criminal cases discuss bodies pulled from "swamp waters."[207] The builders of the Erie Canal faced potential liability when their waterworks caused "the waters of [a] swamp" to flood a large area of land.[208] Indeed, the phrase "the waters of the swamp" arises repeatedly in nineteenth- and twentieth-century case law.[209] It also arises in non-legal writing. Perhaps the most widely-read chronicle of living in desert lands—the Bible—repeatedly uses the phrase "the waters," sometimes in connection with larger waterways, but sometimes in reference to springs and to desert washes.[210] The Court's attempt to cleave wetlands and temporary streams from the phrase "the waters" was a linguistic novelty.

---

203. Rapanos v. United States, 547 U.S. 715, 770–71 (2006) (Kennedy, J., concurring).
204. *Sackett*, 598 U.S. at 671.
205. *See* Smith v. United States, 508 U.S. 223, 230 (1993) ("It is one thing to say that the ordinary meaning of 'uses a firearm' *includes* using a firearm as a weapon…. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use.") (emphasis in original).
206. *See, e.g.*, State Water Control Bd., 9 VAC 25-260 Virginia Water Quality Standards 5 (2011), https://perma.cc/5LRT-H8F7; *Classifications*, North Carolina Environmental Quality, https://perma.cc/4AYW-8S93.
207. State v. McDowell, 224 S.E.2d 889, 890 (S.C. 1976).
208. Com. v. Reed, 34 Pa. 275, 275 (Pa. 1859).
209. *E.g.*, Porter v. Armstrong, 39 S.E. 799, 799 (N.C. 1901).
210. *E.g.* Judges 5:19 (referring to "the waters of Meggido"); Exodus 15:22 (referring to springs in the Sinai desert as "the Waters of Marah and Elim").

3. Ignoring Linguistic Conventions and Structural Cues

The Court's final move, in its focused discussion of the phrase "the waters of the United States," was to argue that the phrase should be interpreted in light of the term it defines. Because "navigable waters" traditionally connotes navigability, the Court argued, the phrase "waters of the United States" also should be interpreted to encompass things that are navigable, or at least are sort of close to being navigable.[211] There is some initial intuitive appeal to this argument, but it again faces two major problems, neither of which the Court acknowledged.

The first is that this assumption overlooks the ways the Congresses of the 1970s wrote environmental statutes. To the occasional and reasonable frustration of present-day law students, Congress routinely took terms that had accepted and traditional meanings and then, if those meanings didn't fit with the goals of the statute, defined the terms to mean something else. So, for example, "species" in the Endangered Species Act includes "subspecies" and "distinct population segments."[212] "Solid waste," in the Solid Waste Disposal Act, includes "liquid, semisolid, or contained gaseous material."[213] The Clean Water Act itself defines "radioactive material" as a pollutant, yet the Supreme Court has concluded, based on piles of legislative history evidence, that Congress understood that definition to exclude many radioactive materials.[214] The Court's assumption that the defined term must narrow the definition is at odds with the linguistic conventions of the Congresses whose work the Court purported to interpret.

The second problem is that provisions elsewhere in the statute belie this interpretation. As the Court itself has repeatedly acknowledged, section 404(g) of the Clean Water Act, which gives states the option of assuming permitting authority for non-navigable-in-fact waters, makes sense only if Clean Water Act jurisdiction extends to waters that are not traditionally navigable.[215] In other words, that section indicates that "navigable" is not the act's operative jurisdictional term. The Court's answer to this, in *SWANCC*, *Rapanos*, and *Sackett*, has been to suggest that even if Congress rejected using navigability as a dividing line, the term "navigable" remains in a sort of half-operable limbo state, vaguely signaling the presence of jurisdictional boundaries somewhere upstream of where commercial navigability ends.[216] A simpler interpretation, however, would be that when Congress defined the phrase "navigable waters" as "the waters of the United States," it meant the definition, not the defined term, to govern.

---

211. Sackett v. EPA, 598 U.S. 651, 672 (2023) ("This reading also helps to align the meaning of 'the waters of the United States' with the term it is defining: 'navigable waters.'").
212. 16 U.S.C. § 1532(16).
213. 42 U.S.C. § 6903(27).
214. Train v. Colo. Pub. Interest Res. Group, Inc., 426 U.S. 1, 11–25 (1976).
215. *See* Rapanos v. United States, 547 U.S. 715, 730–31 (2006) (plurality opinion); *id.* at 768 (Kennedy, J., concurring).
216. *See Sackett*, 598 U.S at 672; *Rapanos*, 547 U.S. at 731; *SWANCC*, 531 U.S. 159, 172 (2001).

To be clear, all these critiques do not mean that the phrase "waters of the United States" clearly does encompass geographic features like vernal pools or ephemeral streams. The use of "the waters" in association with larger waterways might be a tell, as might Congress's retention of the word "navigable" in the statutory language. But there are equally strong, if not stronger, reasons to reject those clues, and there is no good reason to think they produce clarity. The Court's certitude about linguistic meaning was misplaced.

C. Selective Reading of Purposes

Throughout the grand debates of statutory interpretation, one particularly prominent question has been how reviewing courts should treat statutory purposes.[217] For some interpreters, they are crucially important.[218] For others, they are sometimes helpful clues to understand specific terms but are not to be elevated above those terms.[219] Yet nearly everyone would agree that it is a mistake to take some purposes that emerge from a statute and elevate them above others, unless there is compelling evidence that the elevated purpose was of primary importance.[220] Likewise, to the extent a reviewing court discerns a purpose from statutory text, it should take pains to read that text accurately. The Court's *Sackett* decision, however, fails these tests. It zeroes in on one statement of purpose and ignores others, and it misreads the one statement upon which it does focus.

In reaching its decision, the Court leaned heavily on Congress's statements that it intended to "protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources."[221] That statement does appear in the statute, and it was perfectly appropriate for the Court to consider it.[222] But that statement is just part of a long list of statutory purposes and policies.[223] Indeed, as the lettering of that statement indicates, it appears far down the list; the core objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters" comes first, as do six policies designed to achieve that objective.[224] Yet the Court did not mention any of the other

217. *See* Manning, *supra* note 12, at 113–15 (describing the classic debates).
218. *See id.* at 119–21.
219. *See* Kloeckner v. Solis, 568 U.S. 41, 55 n.4 (2011) ("[E]ven the most formidable argument concerning the statute's purposes could not overcome the clarity we find in the statute's text.").
220. *See* King v. Burwell, 576 U.S. 473, 512 (2015) (Scalia, J., dissenting) ("No law pursues just one purpose at all costs.").
221. *Sackett*, 598 U.S. at 672 (quoting 33 U.S.C. § 1251(b)).
222. *See* New York St. Dept. of Social Servs. v. Dublino, 413 U.S. 405, 419–20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").
223. 33 U.S.C. § 1251(a).
224. *Id.*

purposes or policies.[225] It chose only the one it thought would support the goal of limiting the statutory scope.

The Court also read the statement to say something it does not actually say. Read fairly and in context, section 1251(b) says only that states should be heavily involved in water pollution control and should retain authority for land use planning and for allocating water.[226] Justice Alito responded to this statement by saying, "It is hard to see how the States' role in regulating water resources would remain 'primary' if the EPA had jurisdiction over anything defined by the presence of water."[227] Leaving aside the obvious hyperbolae—no one was suggesting that EPA did have jurisdiction over anything defined by the presence of water—the statement shows a lack of attention to the statutory text. To understand how states might have primary responsibility even where Clean Water Act jurisdiction exists, one just needs to read the rest of the statute.

The entire Clean Water Act is built on a consistent principle: that states will be key participants in a shared national project of improving water quality in the waters that *are* covered by the Act. The act's substantive provisions provide consistent evidence of that principle. States set water quality standards, subject to federal approval, and monitor compliance with those standards.[228] States can assume permitting authority under all of the act's major permitting programs, and in fact nearly every state has assumed primacy for implementation of the National Pollutant Discharge Elimination System, which commentators describe as the "heart" of the statute.[229] States have nearly exclusive responsibility for regulating nonpoint sources.[230] The act expressly preserves state authority to set standards that are more protective than federal baselines.[231] Indeed, in multiple ways, the statute gives states authority over the federal government. Section 401 allows states to impose water-quality-protecting conditions on projects that involve discharges and receive federal authorizations.[232] Section 404(t) likewise subjects federal activities to state oversight.[233] And section 313 gives states authority to impose water quality requirements on federal lands and

225. The majority opinion cites 33 U.S.C. § 1251(b) three times and never cites § 1251(a).

226. 33 U.S.C. § 1251(b).

227. Sackett v. EPA, 598 U.S. 651, 672 (2023).

228. 33 U.S.C. § 1313; *see State-Specific Water Quality Standards Effective under the Clean Water Act (CWA)*, EPA, https://perma.cc/AR3E-YG26.

229. NPDES Permit Writer's Course, NPDES Program Authorizations (as of July 2019), https://perma.cc/N55N-L9SX; Nat'l Wildlife Fed. v. Gorsuch, 530 F. Supp. 1291, 1304 (D.D.C. 1982), *rev'd on other grounds*, 693 F.2d 156 (D.C. Cir. 1982) ("There is no question but that Congress regarded the NPDES program as the heart of the Act and the most effective means of controlling water pollution.").

230. *See* Dave Owen, *Field Notes from an Alternative Water Quality Reality*, 73 Case W. Rsrv. L. Rev. 441, 445–46 (2022) (describing state primacy in nonpoint source regulation).

231. 33 U.S.C. § 1370.

232. *See* PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 707–708 (1994).

233. 33 U.S.C. § 1344(t).

federal facilities.[234] Importantly, these are not minor or ancillary parts of the statute. They are the core of the law, and they all make very clear exactly how states can—and in fact do—assume primacy in water quality protection where federal jurisdiction exists.

Additionally, the Act is notable for what it does *not* say about states. The statute does not preempt state land use authority. It does not cover uplands at all. Because section 404 permits are routinely issued, and because states can be heavily involved in crafting those permits (and can take over issuance themselves), states retain sweeping authority to plan land uses even in areas with aquatic features.[235] Similarly, states still can allocate water resources. Water rights are primarily created and managed by state law, and, except for groundwater rights, most of those rights apply to water sources covered by the Clean Water Act.[236] Calling a waterway jurisdictional thus does not undermine state water-allocation authority. If anything, it supports it, for protecting water quality is often a necessary step toward making sure that water is useful when allocated.

Of course, the Clean Water Act does establish some limits on states. They cannot authorize unpermitted discharges of pollutants to navigable waters, even if they might like to do so.[237] But, as the Clean Water Act's other stated purposes and policies make clear—as do its substantive provisions—those limits are fundamental to the statutory design.[238] They are not reasons why Congress would have wished to limit the statute's scope.

D. Canons, Pop-up and Otherwise

Many of the mistakes described so far involve misreading statutory text. Those misreadings are problematic for the Clean Water Act, but someone more concerned with broader trends in statutory interpretation might dismiss some of them as flaws of execution rather than of approach. The Court's use of interpretive canons, however, is a different story, for those canons involve the unapologetic substitution of judicial policy preferences for the power of Congress.

A substantive interpretive canon, as most law students learn, is an interpretive rule of thumb that reflects some sort of policy preference.[239] And if the canon

234. 33 U.S.C. § 1323.

235. *See* Ryan W. Taylor, Federalism of Wetlands 88 (2013) (describing the issuance of over 80,000 permits per year); *see also* Owen, *Regional Federal Administration*, *supra* note 76, at 98–99 (describing heavy state involvement in section 404 permitting, even where the state has not assumed primacy).

236. *See generally* Barton H. Thompson Jr. et al., Legal Control of Water Resources (6th ed. 2018) (explaining how state laws allow the development of water rights).

237. 33 U.S.C. § 1311 (prohibiting unpermitted discharges of pollutants).

238. *See* 33 U.S.C. § 1251(a) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

239. *See* John F. Manning & Matthew C. Stephenson, Legislation and Regulation: Cases and Materials 382 (4th ed. 2021).

has any bite, it leads the reviewing court to an interpretation it would not have reached through textual tools alone.[240] For these reasons, interpretive canons have long raised concerns, particularly but not only for judges with textualist leanings.[241] The basic concern is that an interpretive canon threatens to elevate policy concerns above statutory text, and the policy concerns may be those of the reviewing judge rather than the Congress that enacted the statute.[242] And rather than treating this possibility with caution, the *Sackett* opinion enthusiastically embraces it, offering two powerful canons without even considering whether the policy preferences they embody align with the policies embedded in the Clean Water Act.

The first canon is a muscled-up version of what commentators often describe in shorthand as "the federalism canon."[243] This canon presumes that Congress cares about maintaining traditional balances of federal and state authority and probably would not alter those balances, at least to the detriment of the states, through ambiguous statutory statements.[244] If modestly stated, the canon seems plausible (though perhaps lacking in empirical support[245]). But in *Sackett*, there is no modesty in the canon's assertion. Justice Alito's opinion states: "this Court require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[246] The word "require" is telling, as is the expansion of the canon to cover regulation of property. What might be justifiable, if it were just a rule of thumb describing the Court's assumptions about Congressional intentions, instead is a drafting requirement, and that drafting

240. *Id.* at 383.

241. *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 110 (2010) ("The courts' adoption of more aggressive substantive canons… poses a significant problem of authority, however, for textualists, who understand courts to be the faithful agents of Congress.").

242. *See* Heinzerling, *supra* note 151, at 1990 ("[T]hey substitute a one-size-fits-all presumption for meaningful engagement with the details of the underlying statutory scheme."). *But see* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. Chi. L. Rev. 825 (2017) (presenting empirical results suggesting that the Roberts Court had not systematically used substantive canons to advance judges' policy goals).

243. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 942 (2013) (describing "the eponymous 'federalism canon'").

244. *See* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

245. *See* Gluck & Bressman, *supra* note 243, at 959 ("If anything, our respondents' answers indicate that they would expect, and prefer, any ambiguities to be resolved in favor of the reach of federal, not state, law—the exact opposite of the way in which judges usually apply these canons.").

246. Sackett v. EPA, 598 U.S. 651, 679 (2023) (quoting United States Forest Serv. v. Cowpasture River Preservation Assn., 140 S. Ct. 1837, 1850 (2020)).

requirement is imposed by a body to which the Constitution gives no legislative authority.[247]

That alone would be concerning, but the Court's application of that requirement also is flawed. Initially, the Court applied its new requirement without examining the text or structure of the Clean Water Act to determine whether the values advanced by the canon were reflected in the statute itself.[248] Clearly, they are not; the statute was designed from start to finish to build a new partnership between the federal government and the states, all for the specific purpose of limiting some property owners from polluting (and protecting other property owners from pollution).[249] The canon therefore is unfaithful to the statute, and the statute as a whole is an emphatically clear statement that Congress did want to revise balances of federal and state authority.[250] Additionally, and at the risk of piling on, the Court also applied a canon ostensibly designed to *preserve* the traditional mix of state and federal authority to *alter* a mix of state and federal authority that had existed for five decades, and that had lasted through multiple rounds of Clean Water Act amendments. As applied in Sackett, the canon was just an assertion of judicial supremacy.

The Court's second canon is also problematic. The Court stated that because the Clean Water Act is a criminal statute and "waters of the United States" is vague, the phrase should be interpreted narrowly, thus limiting due process concerns.[251] As a broad principle, it is both reasonable and traditional to seek clarity in criminal law.[252] But one would hope the court would investigate whether the term in fact is being applied vaguely—in other words, that a due

247. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States.").

248. *See Sackett*, 598 U.S. at 679–80 (not considering whether the Clean Water Act was designed to limit government authority over property).

249. As numerous legislators made clear, the Clean Water Act was heavily motivated by Congressional frustration with state progress. *See, e.g.*, *Water Pollution Control Legislation—1971 (Proposed Amendments to Existing Legislation): Hearings Before the Comm. on Public Works*, 92d Cong., 1st Sess. 273 (1971) (statement of Rep. Robert E. Jones Jr.) ("We left it to the States, year after year, and we didn't get a single thing but a bunch of nursery rhymes as to the Constitution, and we didn't get any clean water until the Federal Government insisted upon it and made some dollars available to the states for that use."); A Legislative History of the Water Pollution Control Amendments of 1972 349 (1972) (Statement of Rep. H. R. Gross) ("Through the years the states and the local subdivisions of government, including the municipalities, failed to enforce laws and ordinances in the matter of pollution and especially the polluting of streams. This is where the breakdown really came about."). *See generally* William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts*, 1789-1972: *Part 1*, 22 Stan. Env't L.J. 145 (2003). To presume that the statute sought to leave traditional state authority alone and avoid regulating private property is remarkably ahistorical as well as atextual.

250. *See supra* IV.C. Selective Reading of Purposes.

251. *Sackett*, 598 U.S. at 680–81.

252. *See* McBoyle v. United States, 283 U.S. 25, 27 (1931) ("[S]o far as possible the line should be clear.").

process analysis would consider the processes at issue. That would mean considering the regulatory provisions EPA and the Army Corps have used to lend specificity and predictability to Clean Water Act jurisdictional standards, along with the procedures the agencies have used to give landowners chances to obtain clarity.[253] To do otherwise is effectively to allow plaintiffs to bring a facial challenge without supporting evidence, and to condemn administrative processes without investigating how they actually function. The Court pursued no such inquiry. If it had, it might have realized that criminal prosecutions under the Clean Water Act are quite rare and generally are reserved for situations involving deliberate dumping or falsification of treatment records.[254] Additionally, the Court might have acknowledged the obvious and inescapable reality that laws, including criminal laws, cannot always draw bright lines.[255]

The Court's canons thus had little to do with making sense of the Clean Water Act. They are, at bottom, attempts to turn policy priorities favored by a majority of the justices—most importantly, opposition to government regulation—into default principles of statutory interpretation. That critique is not new; it has been the primary point of many authors raising concerns about the recent rise of substantive canons.[256] *Sackett* provides additional validation of their concerns.

E. The Presumption of Clarity

Thus far, this Essay has shown that the Court's interpretation of the phrase "the waters of the United States" was a mess of misinterpretation. That raises questions about why the Court would go so far astray. One obvious answer, already covered in these pages, is that the Court has policy goals that are at odds with the Clean Water Act, and this case offered a way to achieve those goals. But an additional—and interrelated—reason is the Court's problematic relationship with textual ambiguity.

In normal speech and prose, ambiguity is a constant issue. We routinely misunderstand each other or ask for additional clarification, even when the speaker or writer is trying hard to be clear. We also routinely encounter situations in which an instruction or rule just doesn't specify how to handle the circumstances at hand. But in recent years, the Court's predominant approach

253. *See supra* notes 177–185 and accompanying text (describing those standards and procedures).

254. EPA's website provides data on all criminal prosecutions. *See Summary of Criminal Prosecutions,* EPA, https://perma.cc/K589-7XR6. In 2022, none involved confusion about the scope of "waters of the United States."

255. *See, e.g., supra* note 132 (discussing the ambiguities inherent in the Court's own jurisdictional standards).

256. *E.g.* Heinzerling, *supra* note 151, at 1938; Freeman & Stephenson, *supra* note 147, at 22; *see* Krishnakumar, *supra* note 146, at 1279 (describing "backdoor purposivism," "where judges simply guess at, or assert, Congress's actual purpose or intent based on personal intuition.").

to statutory ambiguity and textual gaps has been to deny that they exist.[257] In individual cases, the Justices seem loathe to concede that language might be anything less than clear, even when they have diametrically opposed interpretations of that clear meaning.[258] Under this view, difficult statutory language is like a riddle. It may be hard to solve, but there is one right answer waiting to be found.[259]

That assumption leaves a court ill-equipped to deal with language like "the waters of the United States." To a reasonable person, the application of those words to something like a vernal pool or an ephemeral stream is not clear.[260] Nor does reading the entire legislative history of the 1972 statute or its later amendments resolve the ambiguity (I've tried). What becomes clear, instead, is that members of Congress were not focused on determining exactly where the lines between land and "the waters" would be drawn. That should not be surprising. The Clean Water Act is large and complicated, and members of Congress are not experts in the distinctions between ephemeral and intermittent streams or the water-quality implications of floodplain wetlands.[261] It makes sense, then, that the definitional language they chose would leave those questions unresolved. Yet the Court seems to have approached its deliberations by assuming an answer will be found if only the Justices stare at the text long enough. And when text begins to "swim before one's eyes," as Justice Rehnquist once quipped about environmental statutes,[262] it is easy for the swimming words to become a set of tea leaves onto which one projects what one wants to see. That, it seems, is

257. This approach has its roots in the words of Justice Scalia, who famously asserted that his textualist methods would rarely lead him to find a statute ambiguous. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 521 (1989). As critics have pointed out, this makes little sense; one can be committed to textual tools yet acknowledge that they will not always lead to clarity. *See* Molot, *supra* note 13, at 40–43 (explaining this point).

258. *E.g.,* FERC. v. Elec. Power Supply Ass'n, 577 U.S. 260, 297 (2016) (Scalia, J., dissenting) ("Like the majority, I think that deference under *Chevron* . . . is unwarranted because the statute is clear."); *see* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 Colum. L. Rev. 749, 752 (1995) (critiquing a judicial tendency to "find[] linguistic precision where it does not exist").

259. *See* Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 Wash. U. L. Q. 351, 372 (1994) ("The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer.").

260. Although Justice Alito wrote one opinion concluding those words were unambiguous and signed onto another saying the same, he also described them—when not signing on to or writing a majority opinion—as "notoriously unclear" and "hopelessly indeterminate." Sackett v. EPA, 566 U.S. 120, 132–33 (2012) (Alito, J., concurring). These things cannot both be true.

261. *See* West Virginia v. EPA, 597 U.S. 697, 781–82 (2022) (Kagan, J., concurring) (explaining, in a Clean Air Act case, that Congress understands the limits of its knowledge and legislates accordingly).

262. U.S. Steel Corp. v. EPA, 444 U.S. 1035, 1038 (1980) (Rehnquist, J., dissenting from denial of certiorari).

what the Court has been doing with "waters of the United States." Rather than acknowledging the inherent ambiguity of the words and asking how a faithful agent then would interpret those words, the Court has treated ambiguity as opportunity and has inserted its own preferred meaning.

How might the Court have done better? It might have started by considering what the text *does* make clear. Both text and structure clearly indicate that the phrase "the waters of the United States" extends beyond traditionally navigable waters to at least some degree.[263] Clearly, also, Congress crafted the entire statute to achieve massive improvements in water quality and to involve both the federal government and the states in achieving those improvements.[264] Additionally, Congress chose the words "the waters of the United States" rather than a more precise phrase, suggesting an intent to leave some interpretive flexibility to someone else.[265] The statute also clearly says who has implementation authority; it explicitly delegates that authority to EPA and the Army Corps, not to the United States Supreme Court.[266] Finally, for many decades, and across multiple presidential administrations, Congress had left intact the jurisdictional standards that EPA and the Army Corps had developed, even when it chose to amend other parts of the statute.[267]

Taking all these clues together, it should have been easy for the Court to write a decision saying something like:

> The Clean Water Act does not specify exactly where the boundaries of jurisdictional waters lie. But EPA and the Army Corps have worked carefully to fix those boundaries in ways that are consistent with the words "the waters of the United States," that honor the enacted objectives of the Clean Water Act, that are grounded in extensive scientific research, and that provide as much predictability to regulated entities as this difficult line-drawing problem allows. Their judgment is

263. *See* Rapanos v. United States, 547 U.S. 715, 730–31 (2006) (acknowledging that the phrase cannot be limited solely to navigable-in-fact waters).

264. *See* 33 U.S.C. § 1251(a) (stating the act's objectives); *supra* IV.C. Selective Reading of Purposes 185 (discussing provisions giving major implementation roles to states).

265. *See* Manning, *supra* note 12, at 116 ("[A]n interpreter must take seriously the signals that Congress sends through the level of generality reflected in its choice of words.").

266. 33 U.S.C. § 1361 ("The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.").

267. *See* Kalen, *supra* note 42, at 897–905 (describing the history of the 1977 Clean Water Act amendments). Congress also enacted major amendments in 1987, after the enactment of the Migratory Bird Rule, and again left jurisdictional standards intact. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.). Drawing clues from post-legislative actions can be dangerous, but the Court does it. *See* West Virginia v. EPA, 597 U.S. 697, 731 (2022) (stating that the Court "cannot ignore" the fact that Congress had not enacted a scheme analogous to the one EPA adopted). If the Court is willing to view legislative inaction as evidence against agency power, it also ought to view legislative inaction as evidence for agency power, particularly where multiple rounds of legislative amendments have left those powers intact.

> reasonable, and for five decades, Congress has not seen fit to revisit it. As a reviewing court, it is not our place to set those standards aside.

In other words, the Court could have done something boringly familiar, yet currently far from fashion. It could have grounded its decision in traditional notions of deference to administrative agencies.[268]

The debate about deference to agencies' legal interpretations is perhaps the most well-worn in all of administrative law, and I will not try to do it justice here. For present purposes, the most important point is that in *Sackett*, and in the years of litigation leading up to it, everything *Chevron*'s defenders have warned about has happened. Those defenders have argued that *Chevron* appropriately gives decision-making authority to agencies, which have relevant expertise, rather than judges, who will often struggle to understand the technical basis for policymaking.[269] With *Sackett* and its predecessors, both the Supreme Court and lower courts have illustrated the prescience of that warning, sometimes making basic errors about water-quality science and sometimes ignoring that science entirely.[270] *Chevron* also promises greater uniformity, because one agency decision displaces the positions of multiple lower courts or courts of appeal.[271] Until *Sackett*, the waters-of-the-United-States litigation had produced multiple rounds of contradictory opinions, and for the past eight years, different legal standards have applied in different parts of the country.[272] *Sackett* claims to resolve that ambiguity, but it is a false claim; the decision does not even begin to specify how its vague standard will apply to most of the many types of aquatic features that dot and cross the American landscape.[273] That will necessitate additional agency rulemakings and orders, which advocates will respond to with legal challenges in carefully forum-shopped district courts, and the cycle will renew again. Finally, and most importantly, *Chevron* itself argued that deference is democratic because it respects choices made by Congress to leave some policy

---

268. Here, I'm describing something like traditional *Chevron* deference. *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). But the label matters less than the underlying spirit. *Skidmore* deference coupled with respect for and understanding of the work of administrative agencies could work just as well. *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

269. *See* Manning & Stephenson, *supra* note 239, at 1114 (summarizing arguments for this rationale).

270. *See, e.g.,* Rapanos v. United States, 547 U.S. 715, 806–807 (2006) (Kennedy, J., concurring) (criticizing Justice Scalia's misunderstandings of the mobility and environmental impacts of filling streams and wetlands).

271. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1121 (1987).

272. *See supra* notes 80–86 and accompanying text.

273. In regulations, EPA and the Army Corps have specified the jurisdictional status of a variety of aquatic features. *See* 33 C.F.R. § 328.3 (2024). The *Sackett* decision, however, focuses only on wetlands.

decisions to agencies.[274] Whatever the general merits of that theory, it works for Clean Water Act jurisdiction; Congress chose open-ended language and left it intact for five decades.

The Court's move away from deference also is symptomatic of a broader problem, which is the Supreme Court's growing lack of interest in, and understanding of, the work of government agencies.[275] In its Clean Water Act decisions, the Court increasingly seems to perceive agencies through the caricatured lenses offered by anti-governmental litigants. They are "enlightened despot[s];" their assertions of jurisdiction are marked by haphazard overreach; and where jurisdiction exists, the agencies impose "crushing" burdens.[276] That narrative goes well beyond Clean Water Act litigation, with justices characterizing the administrative state as a "behemoth" that needs to be tamed and warning that its functions pose a fundamental threat to democracy.[277] The whole account boils down to a worn cliché: federal regulators are incompetent, overreaching, and dangerous.

Yet if the Court were to shed its ideological blinders and engage with the work water-quality regulators are doing, a very different picture would emerge. I have spent years researching that work, including interviewing dozens of federal and state regulators, along with reviewing the written product they produce.[278] That research supports an understanding of water-quality governance that cannot be reconciled with the cliches offered by the Court. Agency staff have told me about the wide variety of ways in which they seek to make their programs more understandable and more efficient, while still respecting water-quality science and the environmental goals of the Clean Water Act.[279] Likewise, they have repeatedly emphasized their concern for the people they regulate *and* for the environmental systems they are charged with protecting.[280] No one claims

274. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

275. *See generally* Jed Handelsman Shugerman & Jodi L. Short, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, 65 B.C. L. Rev. __ (forthcoming 2024) (noting that the Court's major questions doctrine decisions routinely ignore the realities of administrative decision-making).

276. *See* Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 602 (2016); Rapanos v. United States, 547 U.S. 715, 721 (2006); Sackett v. EPA, 598 U.S. 651, 660 (2023)

277. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) (warning of administrative governance as a threat to democracy); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (describing administrative agencies' power as a "behemoth").

278. *See* Owen, *The Negotiable Implementation of Environmental Law*, *supra* note 185, at 168–74; Dave Owen, *The Conservative Turn Against Compensatory Mitigation*, 48 Env't L. 265, 275–82 (2018); Owen, *Little Streams*, *supra* note 33; Owen, *Regional Federal Administration*, *supra* note 76, at 79–107.

279. *See* Owen, *Little Streams*, *supra* note 33, at 46–52.

280. *See, e.g.*, Owen, *Regional Federal Administration*, *supra* note 76, at 88 (quoting a district chief who described working with "mom-and-pop operations"—"a lot of times we help them with drawings and things like that[,] and it's just a built in understanding and empathy . . .

that work is perfect; when agencies must address difficult policy issues with limited time and on limited budgets, problems are certain to arise. But agency staff have emphasized—and, through the thoughtfulness of their insights, have demonstrated—that they approach their work with care.

The written record supports these claims. To provide one key example, the 2015 Clean Water Rule, which engendered so much political backlash, was a monumental effort to balance water-quality protection and the need for predictability. [281] If one actually reads the document and its supporting reports, it is hard not to be deeply impressed with the meticulousness of its legal and scientific analyses and with the sheer volume of work that informed the agencies' standards. The same is true of the 2023 waters-of-the-United-States rule.[282] Indeed, the contrast between those rules and the terse, sloppy, and factually inaccurate court decisions that have set them aside is jarring.[283] Yet the growing culture of anti-administrative judging—a culture the Court is actively encouraging—obscures the reality that government regulatory agencies often bring creativity and integrity to their work. And therein lies perhaps the saddest element of the Court's Clean Water Act jurisprudence. There is no need for all the bitterness toward agencies. If the Court took the time to understand Clean Water Act implementation, it might be able to let that bitterness go.

Conclusion

Lamenting Supreme Court decisions can seem like crying over spilled milk. The Court has made its choice, and the vote wasn't close; it will likely be another generation, at best, before decisions like *Sackett* might be revisited. In the short term, Congress also is unlikely to act. Protecting water quality against the cumulative impacts of many stream and wetland fills, most of which on their own might seem of minor importance, is a difficult political sell. But critiquing the decision might have a few benefits.

For one, the case should be on the list of problems that require fixing when, or if, a more balanced Supreme Court emerges. Additionally, and in the shorter term, perhaps understanding the wrong done through the federal courts can

---

because you know the culture[,] you were raised here and know the challenges that people are having and you want to help them as much as you can.").

281. Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37054 (June 29, 2015). This is a subjective assessment, of course, as is my assessment of the 2023 rule. But it is an informed and strongly held one. I have spent years studying and writing about environmental regulation, and I am deeply impressed by the quality of both documents.

282. Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004, 3016 (Jan. 18, 2023).

283. *See, e.g.*, Dave Owen, *The WOTUS Rule Deserves Better Judging*, Env't L. Prof Blog (Apr. 14, 2023), https://perma.cc/V5BC-DL5E (critiquing West Virginia v. EPA 669 F. Supp. 3d 781 (D.N.D., 2023)); Dave Owen, *Ignored Facts, Distorted Law, and Today's WOTUS Injunction*, Env't L. Prof Blog (Aug. 27, 2015), https://perma.cc/3GVK-WS3Y (critiquing North Dakota v. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015)).

help motivate state actions that fill some of the gaps created by *Sackett* and its predecessors.[284] That will not be a complete fix—the partnerships Congress sought to create through the Clean Water Act would be replaced by unilateral state action—and it will not happen in many states, but even reform in a few places would be something.

More broadly, understanding *Sackett* should inform the broader debates about the direction of the Court. That debate is never likely to center on a Clean Water Act dispute typically referred to with a clunky acronym; WOTUS lacks the political salience of cases about reproductive rights or racial or sexual-orientation discrimination. Even within the environmental sphere, cases addressing climate change are more likely to claim the limelight.[285] But this case should be part of that broader debate, for it is a case study in strategic but flawed statutory interpretation and a powerful example of a court doing what courts should not do.

284. *See* James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 Env't L. Rep. 10679, 10685–87 (2022) (describing steps states have taken to fill federal coverage gaps).

285. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697 (2022). One indicator provides a crude measure of the difference: as of March 11, 2024, Westlaw identifies *West Virginia* as having been cited 2,237 times, while *Sackett* has been cited 374 times. *West Virginia* has been decided for longer, but not for six times as long.