[Working Title: Sackett v. EPA II: ascertaining the scope of wetlands jurisdiction under the Clean Water Act]

Introduction

Sackett v. EPA proves that when ordinary American citizens team up with public interest litigators to protect property rights from the lawless commands of an abusive federal agency, extraordinary things can happen. Represented by attorneys from Pacific Legal Foundation, Mike and Chantell Sackett began their lawsuit against EPA in April, 2008. The fifteen years since then have witnessed two Supreme Court rulings that have resulted in fundamental changes, for the better, in how federal environmental law operates. The first high court ruling, in 2012, expanded the circumstances in which a person injured by administrative action may sue to challenge that action.[1] The second, from this past Term, resolved an enduring and vexing controversy over the geographic reach of the Clean Water Act.

I have already written in this review about the first decision.[2] Here, I focus on the second, beginning with the Sacketts' initial efforts—stymied by EPA—to build their dream family home near the shores of Priest Lake, Idaho; then moving to a background discussion of the nearly half-century-long legal dispute about the Clean Water Act's scope that culminated in the Court's ruling in *Sackett* this past Term; next explaining the substance of the *Sackett* majority and concurring opinions; and then concluding with a critical analysis of those opinions, as well as a few thoughts about *Sackett* as a microcosm of the past and future of the Court's environmental and administrative law jurisprudence.

The mise en scène

In 2004, the Sacketts purchased a vacant lot in a largely built-out residential subdivision near Priest Lake, Idaho. At its north end, the lot is bounded by Kalispell Bay Road, a thirty-foot wide paved county road. Immediately on the north side of that road runs a manmade ditch that drains a large complex of wetlands known as the Kalispell Fen (which is situated north of the road and the subdivision). The roadside ditch travels west about a half-mile where it terminates at Kalispell Creek, which then connects about a third of a mile south with Priest Lake itself. Immediately to the south of the Sacketts' lot is a graveled drive known as Old Schneider Road; and immediately to the south of that road is a row of developed houses that front Priest Lake itself. There is no standing water on the Sacketts' lot, nor is there any surface-

[1] See Sackett v. EPA, 566 U.S. 120 (120).

[2] See Damien M. Schiff, Sackett v. EPA: Compliance Orders and the Right of Judicial Review, 2011–2012 Cato Sup. Ct. Rev. 114–15.

water connection between the Sacketts' lot and the ditch north of Kalispell Bay Road, or the lot and Priest Lake.

In the spring of 2007, the Sacketts began construction of their family home by removing the lot's topsoil and trucking in gravel and other material more suitable for a building pad. Just a few days after the work had begun, officials from EPA and the Army Corps of Engineers entered the property and informed the Sacketts' work crew that the lot likely contains wetlands subject to regulation under the Clean Water Act. These officials recommended that all work cease until the Sacketts' compliance with the Act could be established.

A statutory prelude

Enacted in 1972, the Clean Water Act[3] is the preeminent federal water-quality statute. Its passage marked a significant change in Congress's approach to federal regulation, embodying "a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation."[4] Whereas under the prior federal approach pollutant discharges were in practice only prohibited when they led to nuisances or water quality standard violations, the Clean Water Act established a system that, in addition to enhancing enforcement and penalties, also regulated (and sometimes prohibited) certain discharges at their source, regardless of any resulting nuisance or standard exceedance.[5]

Briefly stated, the Act forbids the unpermitted discharge of "pollutants" from "point sources" to "navigable waters."[6] It defines "navigable waters" as "the waters of the United States, including the territorial seas."[7] Although the statute defines "territorial seas," it does not define "the waters of the United States" (commonly abbreviated "WOTUS"). Nonexempt discharges to "navigable waters" require a permit from either EPA (called a National Pollutant Discharge Elimination Program, or NPDES, permit) or, if the discharge involves "dredged or fill material," from the Corps (commonly called a Section 404 permit).[8] In practice, the Clean Water Act's permitting regime is "arduous, expensive, and long."[9] "In deciding whether to grant or deny a permit, [the agencies] exercise[] the discretion of an enlightened despot,

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[3] 33 U.S.C. §§ 1251–1389.
[4] City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981) (quoting remarks from the legislative history).
[5] See EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 202-05 (176).
[6] 33 U.S.C. §§ 1311(a), 1362(12).
[7] *Id*. § 1362(7).
[8] See *id*. §§ 1342(a), 1344(a). The Act authorizes EPA to transfer NPDES and Section 404 permitting authority to the states. See *id*. §§ 1342(b), 1344(g)-(h).
[9] See U.S. Army Corps of Eng'rs v. Hawkes Co., Inc., 578 U.S. 590, 594-95 (2016) (a Section 404 permit typically takes more than two years and $250,000 in consulting costs to secure).

relying on such factors as 'economics,' 'aesthetics,' 'recreation,' and 'in general, the needs and welfare of the people."[10] Even when obtained, a permit can result in significant changes to the proposed project and dramatically limit the use of the property.[11] As for enforcement, the Act is a "potent weapon," imposing "'crushing' consequences 'even for inadvertent violations."[12] Indeed, discharging pollutants without a required permit, or violating permit conditions, risks cease-and-desist orders, compliance orders, administrative penalties, tens of thousands of dollars per day in civil penalties, injunctions, and even criminal prosecution for mere "negligent" violations of the statute.[13]

For purposes of this article, however, the most important point to bear in mind about the Act's framework is that everything hinges on the meaning of "navigable waters"—if whatever you're doing does *not* result in pollutants being added to "navigable waters," then your activity is not regulated by the Act.

A ponderous WOTUS opus

The significant costs and liabilities that the Clean Water Act can impose underscore the importance of clearly demarcating the Act's scope. Unfortunately, the "reach of the Clean Water Act is notoriously unclear,"[14] and attempts to define it have proved to be "a contentious and difficult task"[15] that "has sparked decades of agency action and litigation."[16] This is especially true with respect to non-navigable wetlands such as those that EPA alleged to exist on the Sacketts' lot.

Shortly after the Clean Water Act was passed, EPA and the Corps adopted regulations defining "navigable waters."[17] EPA's interpretation was quite broad,[18] whereas the Corps's was notably more limited. Guided by the Supreme Court's longstanding construction of the phrase "navigable waters of the United States," as

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[10] Rapanos v. United States, 547 U.S. 715, 721 (2006) (quoting 33 C.F.R. § 320.4(a) (2004)) (plurality op.).

[11] See Mandelker, Practicable Alternatives for Wetlands Development Under the Clean Water Act, 48 Envtl. L. Rep. News & Analysis 10894, 10913 (2018) ("The [Clean Water Act's] practicable alternatives requirement functions . . . as a conditioned permit that requires project modifications to reduce a development's effect on wetlands resources.").

[12] Sackett v. EPA, 143 S. Ct. 1322, 1330 (2023) (quoting Army Corps of Engineers v. Hawkes Co., 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)).

[13] See Sackett, 143 S. Ct. at 1330–31. See also 33 U.S.C. § 1319(a)–(g).

[14] Sackett v. EPA, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

[15] Nat'l Ass'n of Mfrs. v. Dep't of Defense, 138 S. Ct. 617, 624 (2018).

[16] Sackett, 143 S. Ct. at 1332.

[17] 38 Fed. Reg. 13,528, 13,529 (May 22, 1973); 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974).

[18] *See* 40 C.F.R. § 125.1(p)(2), (4), (6) (1974) (claiming authority over all "[t]ributaries" of navigable waters, as well as all "lakes, rivers, and streams" used by "interstate travelers" or used in interstate "industrial" commerce).

it was employed in predecessor statutes, the Corps construed the Act principally to reach interstate waters that are navigable in fact or readily susceptible of being rendered so.[19] In 1975, a federal district court rejected this interpretation as too narrow.[20] The Corps did not appeal the ruling.[21] Instead, following EPA's example, the Corps promulgated much broader regulations.[22]

The Corps's revised regulations were meant to extend the scope of "navigable waters" to the outer limits of Congress's power to regulate interstate commerce.[23] Thus, federal permitting authority was asserted not just over interstate waters, but also intrastate waters with various relationships to interstate or foreign commerce, as well as all tributaries of such waters, and all "wetlands"[24] that are "adjacent" to—*i.e.*, bordering, contiguous, or neighboring—any regulated water.[25] In the ensuing years, EPA and the Corps also claimed authority over isolated waters used by migratory birds, pursuant to the so-called "Migratory Bird Rule,"[26] as well as "ephemeral streams" and "drainage ditches" with an ordinary high water mark.[27] These were the regulations still on the books when the Sacketts were told to stop building their home.

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During this initial period of agency rulemaking and revision, the Supreme Court began to weigh in on the WOTUS question. Its first such decision was *United States v. Riverside Bayview Homes*. There, the Court considered whether EPA and the Corps had reasonably interpreted the Act to regulate wetlands that were immediately

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[19] See Rapanos, 547 U.S. at 723 (citing The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870), and 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974)).

[20] Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

[21] The Corps wanted to appeal but the Justice Department declined to do so. Summary & Comments, Comprehensive Wetlands Protection: One Step Closer to Full Implementation of §404 of the FWPCA, 5 Envtl. L. Rep. 10099, 10101 (1975). During the district court litigation, the Corps was particularly disappointed with the Justice Department's failure to raise various arguments, such as "the difference between dredged and fill material and other pollutants." *Id*. at 10102.

[22] See Rapanos, 547 U.S. at 724.

[23] Rapanos, 547 U.S. at 724 (citing 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977)).

[24] These were defined as "those areas that are inundated or saturated [so as to support] a prevalence of vegetation typically adapted for life in saturated soil conditions," 33 C.F.R. § 323.2(c) (1978).

[25] 33 C.F.R. § 323.2(a)(2)-(5), (d) (1978).

[26] Rapanos, 547 U.S. at 725 (citing 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986)).

[27] Id. (citing 65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000)).

adjacent to a navigable-in-fact water.[28] The Court began its statutory analysis by citing its then recent decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[29] for the proposition that the Court must defer to an agency's reasonable interpretation of ambiguous text within a statute that the agency is charged with administering.[30] Looking to the text of the Clean Water Act, the Court conceded that, on "a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'"[31] But weighing in favor of EPA and the Corps' view was Congress's aim, as the Court understood it, to regulate at least some waters besides those that are navigable-in-fact,[32] as well as the agencies' scientific judgment that wetlands play an important role in protecting water quality.[33] In light of this legislative intent and administrative expertise, the Court concluded that the agencies had reasonably resolved the line-drawing ambiguity raised by the Act's regulation of "waters" by including within such aquatic features those wetlands that are "inseparably bound up with the 'waters' of the United States."[34]

Second, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*,[35] the Court considered whether EPA and the Corps may regulate "nonnavigable, isolated, intrastate waters," based on how the use of such waters could affect interstate commerce, pursuant to the Migratory Bird Rule.[36] The Court began its analysis by analyzing *Riverside Bayview*, determining that it was the "significant nexus" of geographic closeness between wetlands and the adjacent waters with which they were "inseparably bound up" that led *Riverside Bayview* to affirm the agencies' authority over such wetlands.[37] This kind of shoreline connection is, in contrast, necessarily absent with respect to features like the abandoned and ponded gravel pits at issue in *SWANCC*, which were "*not* adjacent to open water."[38] In light of that important distinction, the Court in *SWANCC* concluded that the Act cannot be stretched to reach such isolated waters. As the Court underscored, the agencies "put forward no persuasive evidence that the Corps mistook Congress' intent in 1974"—namely, that the Act was merely an exercise of Congress's commerce power over navigation, and that the statute's use of the "term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [Clean

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[28] See Riverside Bayview, 474 U.S. at 124.

[29] 467 U.S. 837 (1984).

[30] Riverside Bayview, 474 U.S. at 131.

[31] *Id*. at 132.

[32] See *id*. at 133, 138-39,

[33] *Id*. at 133-34

[34] *Id*. at 134.

[35] 531 U.S. 159 (2001).

[36] See SWANCC, 531 U.S. at 162.

[37] *Id*. (quoting Riverside Bayview, 474 U.S. at 134).

[38] *Id*. at 168.

Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[39] Buttressing that conclusion was the Court's observation that acceptance of the agencies' reading of the Act to reach isolated waters would, by trenching upon "the States' traditional and primary power over land and water use," raise "significant constitutional and federalism questions."[40] Yet, far from wanting to implicate such issues, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.'"[41]

A few years later, the Court in *Rapanos v. United States*[42] addressed the middle question left after *Riverside Bayview* and *SWANCC*—whether the Act allows for the regulation of wetlands adjacent to non-navigable ditches and other waters that ultimately flow into traditional navigable waters.[43] Five members of the Court held the agencies' regulations asserting control over such waters to be invalid insofar as they purport to regulate all tributaries of traditionally navigable waters and all wetlands adjacent to such tributaries.[44] But no opinion explaining why the Act cannot be so construed garnered a majority of the Court.

Writing for himself and three other members of the Court, Justice Scalia began his analysis by noting that, however the qualifiers "navigable" and "of the United States" may limit the Act's scope, that scope surely can extend no farther than "waters."[45] Justice Scalia then proceeded to explain, based on (i) an ordinary meaning analysis of the statutory text, (ii) the Court's rulings in *Riverside Bayview* and *SWANCC*, and (iii) Congress's desire to preserve traditional state authority over land and water, that "waters" include "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"[46] "Wetlands" would not normally fall under such a definition.[47] But as Justice Scalia pointed out, there is a difference between considering a wetland on its own to be a "water," and concluding that inevitably some wetlands may be regulated as "waters," given the "inherent ambiguity in drawing the boundaries of any 'waters.'" *Rapanos*, 547 U.S. at 740. Indeed, it was that line-drawing ambiguity which convinced the Court in

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[39] *Id*. at 172.
[40] *Id*. at 174.
[41] *Id*. (quoting 33 U.S.C. § 1251(b)).
[42] 547 U.S. 715 (2006).
[43] See Rapanos, 547 U.S. at 729–30.
[44] *Id*. at 728 (plurality opinion); *id*. at 759 (Kennedy, J., concurring in the judgment).
[45] *Id*. at 731.
[46] *Id*. at 739 (quoting Webster's Second at 2882).
[47] See Riverside Bayview, 474 U.S. at 132.

Riverside Bayview to allow for the regulation of "all abutting wetlands as waters."[48] Thus, "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[49] Put another way, the surface water connection must be so substantial that the wetland and abutting water are rendered "*indistinguishable*."[50]

Although Justice Kennedy provided the fifth vote to support the Court's judgment rejecting the agencies' expansive regulation, he disagreed with the plurality's rationale for that rejection.[51] Instead of a boundary-drawing-problem test for determining when a wetland may be deemed a "water," Justice Kennedy proposed a "significant nexus" standard, which he purported to derive from *SWANCC*. According to this rule, a wetland may be regulated if it, either alone or in combination with other "similarly situated" wetlands in the "region," significantly affects the physical, chemical, and biological integrity of "waters more readily understood as 'navigable.'"[52]

Scene shift: EPA commences enforcement, and the Sacketts go to court

Less than a year after *Rapanos*, the Sacketts began construction of their family home, only to be stopped days later by EPA and Corps officials who, as noted above, informed the Sacketts' crew that construction should cease because a federal permit was likely required. Following the agencies' initial site visit, EPA sent the Sacketts a "Request for Information" concerning their building project.[53] In their written response, the Sacketts explained that they had all local building permits in hand, that their site was bordered by developed properties and roads, and that nothing in their deed of title or other paperwork suggested that their lot contains wetlands. A couple of months later, EPA followed up with a voicemail, informing the Sacketts that the agency needed to do "additional research" and inquiring as to whether the Sacketts would comply with its "request" that they remove the fill from their property.[54] Answering by letter, the Sacketts requested "a response from the EPA in writing as to a rational reason why the property . . . needs to be reclaimed," while

[48] Rapanos, 547 U.S. at 740.
[49] *Id*.
[50] *Id*. at 755 (emphasis in original).
[51] *Id*. at 759 (Kennedy, J., concurring in the judgment).
[52] *Id*. at 780.
[53] *Cf*. 33 U.S.C. § 1318 (authorizing EPA to demand from any owner or operator of a "point source" "such . . . information as [EPA] may reasonably require").
[54] In a prior telephone conversations, EPA personnel had informed Chantell Sackett that the Sacketts "would not have gotten a permit to build there" and thus that the agencies would "ask [them] to restore [the] site [and] build elsewhere."

noting that the agency had still not provided "any official notification in writing of any violation."

That notification was delivered in November, 2007, in the form of an administrative compliance order.[55] This EPA directive asserted that the Sacketts' lot contains "navigable waters" subject to the Clean Water Act. Specifically, EPA found that the property contains "wetlands" as defined by regulation, and that these alleged wetlands are among "the waters of the United States" because of their alleged relationship to Priest Lake. Thus, EPA's order determined that the Sacketts had violated the Act by trying to build their home without first having obtained a Clean Water Act permit. The Sacketts were therefore ordered to refrain from further construction and to immediately begin to "restore" their property. Failure to comply would subject them to tens of thousands of dollars per day in administrative and civil penalties.[56]

Believing that their lot does not contain "navigable waters" subject to federal authority, the Sacketts requested from EPA an administrative hearing on the agency's order, to no avail. The Sacketts therefore proceeded, in April, 2008, to file an action under the judicial review provisions of the Administrative Procedure Act.[57] They contended that EPA's compliance order was arbitrary and capricious because the Clean Water Act does not grant EPA authority to regulate their property. EPA moved to dismiss the suit, arguing that the compliance order was not judicially reviewable. The district court granted EPA's motion and the Ninth Circuit affirmed, but the Supreme Court granted certiorari and reversed, holding that the order constituted "final agency action" subject to judicial review under the APA.[58]

On remand to the district court, the parties cross-moved for summary judgment, with the district court ultimately ruling in EPA's favor on the basis of the agency's invocation of the "significant nexus" test. The Sacketts appealed again, and again were rebuffed by the Ninth Circuit, which affirmed the district court's judgment that EPA has authority over the wetlands alleged to exist on the Sacketts' property.[59] The court began its merits analysis with a review of circuit case law applying the *Marks*

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[55] *Cf.* 33 U.S.C. § 1319(a)(3) (authorizing EPA to issue such orders, "on the basis of any information available," for a variety of alleged violations).

[56] See Schiff, supra n. 2, at 114–15.

[57] 5 U.S.C. §§ 701–06.

[58] Sackett, 566 U.S. at 131.

[59] Before reaching the merits, the Ninth Circuit confirmed that the Sacketts' appeal remains live despite EPA's voluntary, non-binding withdrawal of the compliance order during the appeal, because the Sacketts' "central legal challenge" to EPA's jurisdiction remained "unresolved." Sackett v. EPA, 8 F.4th 1075, 1084–86 (9th Cir. 2021).

framework for interpreting fractured decisions like *Rapanos*, and concluded that, under *Marks*, the significant nexus test set forth in Justice Kennedy's concurrence should govern.[60] The court then affirmed EPA's determination that the agency has jurisdiction over the Sacketts' lot because (i) the property contains, within the meaning of the agencies' regulations, "wetlands" that are "adjacent" to a "tributary" of Priest Lake (namely, the roadside ditch), and (ii) the site's purported two-thirds-of-an-acre wetland, in combination with the few dozen acres of wetlands on the other side of Kalispell Bay Road, bears a significant nexus to Priest Lake.[61]

Sackett v. EPA II: a "watershed"[62] decision

In the forecourts: seeking cert a second time

The Sacketts sought cert, phrasing their question presented in terms of a competition between *Rapanos* opinions: should the *Rapanos* plurality's standard govern wetlands jurisdiction, or should the Kennedy significant nexus test, adopted by EPA and the Corps and most lower courts,[63] prevail? The Court granted cert in January, 2022, but in doing so rephrased the question presented to delete any reference to or dependence on *Rapanos*, and instead simply asked whether the Ninth Circuit had articulated the correct test for wetlands jurisdiction. As we shall see, that change in the question presented may have been due in part to concerns among some justices that no opinion from *Rapanos* had the right answer.

The Decision—First Reading

Although the case was argued on the first day of the October 2022 Term, the Court did not issue its decision until late May 2023. Justice Alito wrote a majority opinion for the Court, fully joined by the Chief Justice, Justice Thomas, Justice Gorsuch, and Justice Barrett. Justice Thomas, Justice Kagan, and Justice Kavanaugh each wrote a concurrence, although the latter two opinions (to which Justice Sotomayor and Justice Kagan joined) concurred in the judgment only.

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[60] *Id*. at 1087–91.
[61] *Id*. at 1092–93.
[62] I have precedent for what might otherwise be a cringe-worthy pun! *See SWANCC*, 547 U.S. at 175 (2006) (Stevens, J., dissenting) ("It is fair to characterize the Clean Water Act as 'watershed' legislation.").
[63] Whether one of the *Rapanos* opinions was controlling was a most vexing issue for the lower courts. *See generally* M. Reed Hopper, Running Down the Controlling Opinion in Rapanos v. United States, 21 U. Denv. Water L. Rev. 47 (2017), But in the Supreme Court, neither the Sacketts nor EPA argued that any *Rapanos* opinion was controlling under *Marks*, and the Supreme Court concluded, in a brief analysis, that none was. *See Sackett*, 143 S. Ct. at 1329 n.3.

Before proceeding to the various opinions in *Sackett*, I think it important to note, given the many press accounts of the decision describing the ruling as divided along ideological lines,[64] that there were no dissenting opinions and that the Court was unanimous in two critical respects: none of the justices agreed with EPA's position that the significant nexus test should control wetlands jurisdiction, and none of the justices believed that the Sacketts' property should be regulated under the Clean Water Act.[65] This unanimity should be highlighted given the politicization of WOTUS and given that EPA and its amici considered adoption of the significant nexus test to be essential to protecting the nation's waters.

Split decision no more:

Justice Alito's majority opinion adopts the Rapanos *plurality*

The short answer to the question, What is the holding of *Sackett*?, is—the *Rapanos* plurality.[66] The analysis that Justice Alito provides to reach that result is divided into two main parts. First, like the *Rapanos* plurality, he explains what qualifies as a regulable "water." Then, again tracking the *Rapanos* plurality, he explains when a wetland may be considered a regulable "water."[67]

As to the first step, Justice Alito quotes the *Rapanos* plurality's test that "the CWA's use of 'waters' encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes."[68] In adopting the *Rapanos* plurality standard for "waters," Justice Alito's opinion offers a number of reasons in support: the statute's use of the plural term "waters," which commonly denotes discrete bodies of water; the fact that the operative definitional term is "navigable waters," which typically are features like rivers, lakes, and oceans; how the term "waters" is used in other sections of the statute, and in other federal statutes, in a way that clearly indicates bodies of open water; and how the Court itself in prior opinions has used the term.[69]

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[64] *See, e.g.*, Ian Millhiser, "A new Supreme Court opinion is terrible news if you care about clean water," Vox, May 25, 2023, *at* https://www.vox.com/2023/5/25/23737426/supreme-court-clean-water-act-epa-pollution-wetlands-sackett-alito; Oliver Milman, US supreme court shrinks clean water protections in ruling siding with Idaho couple, The Guardian, May 25, 2023, *at* https://www.theguardian.com/environment/2023/may/25/supreme-court-decision-idaho-wetlands-clean-water-act.

[65] See Sackett, 143 S. Ct. at 1344; *id*. at 1369 (Kavanaugh, J., concurring).

[66] Sackett, 143 S. Ct. at 1341 (majority opinion).

[67] Thus, by limiting the analysis to what qualifies as a "water," the majority opinion (like the *Rapanos* plurality) does not address when a water is "of the United States." *See* Sackett, 143 S. Ct. at 1344 (Thomas, J., concurring).

[68] Sackett, 143 S. Ct. at 1336 (majority opinion).

[69] *Id*. at 1336–38.

In rejecting EPA's argument that the term "waters" includes any feature marked by the mere presence of water, Justice Alito explains that such a standard would, absurdly enough, include even puddles, which few would describe as "waters." Moreover, it would be inconsistent with *SWANCC*, which held that "isolated waters" are not regulable; and would make otiose *Riverside Bayview*'s effort to justify regulation of presumptively non-water wetlands through its extensive discussion of the challenge in delineating the outer reaches of waters. Finally, such a broad standard would conflict with Congress's aim to preserve the states' "primary" authority over land and water resources.[70]

Having established the standard for a regulable "water," Justice Alito proceeds to explain when a wetland can be considered part of a regulable water. He starts off his analysis with the same premise as *Riverside Bayview*, namely, in ordinary parlance one would not consider a wetland to be a water.[71] But, just as in *Riverside Bayview*, so too Justice Alito acknowledges that the Clean Water Act must regulate at least some wetlands, because of Congress's 1977 addition of the statute's Section 404(g). That provision authorizes EPA to transfer Section 404(a) permitting authority (which otherwise rests with the Corps) to the states, but that transfer authority is limited by a carve-out in a parenthetical. Specifically, Section 404(g)(1) provides that EPA may transfer permitting authority for:

> the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, *including wetlands adjacent thereto*).[72]

The "other than" parenthetical indicates, per Justice Alito, that at least some wetlands are considered regulable "navigable waters." But which ones? The answer to that question cannot be resolved wholly by Section 404(g)(1), because "it is not the operative provision that defines the Act's reach."[73] Rather, one must harmonize Section 404(g)(1) with Section 502(7), which defines the term at issue, *viz.*, "navigable waters," as "the waters of the United States." Such harmonization is achieved by focusing upon Section 404(g)(1)'s use of "including." That, per Justice Alito, signals that "adjacent" wetlands are regulable only if they are "includ[ed]" among "the waters of the United States," *i.e.*, if they "qualify as 'waters of the United States' in their own

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[70] *Id*. at 1338.
[71] *Id*. at 1338.
[72] 33 U.S.C. § 1344(g)(1) (emphasis added).
[73] Sackett, 143 S. Ct. at 1339.

right." In other words, "they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA," which is to say, as the *Rapanos* plurality observed, that they maintain a continuous surface connection to a bona fide "water" such that it is difficult to determine whether the water ends and the wetland begins.[74]

Justice Alito then proceeds to expand upon his earlier point that, as *Riverside Bayview* itself observed, Section 404(g)(1) cannot be determinative of the scope of the Act. To be sure, "adjacent" can in many contexts mean something less than "immediately abutting," but "construing statutory language is not merely an exercise in ascertaining the outer limits of a word's definitional possibilities, and here, only one meaning produces a substantive effect that is compatible with the rest of the law."[75] Moreover, in a nod to the major questions doctrine,[76] Justice Alito observes that, because Congress does not typically hide "elephants in mouseholes," "it would be odd indeed if Congress had tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs."[77] To read Section 404(g)(1) as doing so would effectively amend Section 502(7) such that "navigable waters" would comprise "the waters of the United States *and their adjacent wetlands*." Yet, as Justice Alito underscores, that would be inconsistent with Section 404(g)(1) itself, which merely states that navigable waters "includ[e] wetlands adjacent thereto," as opposed to "adjacent" wetlands constituting a separate, regulable category of hydrogeographic features. Thus, the better reading of Section 404(g)(1) is that certain types of adjacent wetlands are regulable but only because they are *already* part of the "waters of the United States," for the reason that they are indistinguishably associated with "waters" as typically understood.[78]

Following this close textual analysis, Justice Alito proceeds to a discussion of various clear statement canons[79] to demonstrate how EPA's interpretation of the

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[74] *Id*. at 1341.
[75] *Id*. at 1339–40.
[76] See generally West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) ("Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices. Nor does Congress typically use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme. . . . [¶] Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.") (cleaned up).
[77] *Id*. at 1340.
[78] *Id*.
[79] See generally Biden v. Nebraska, 2023 WL 4277210, at *16 (U.S. 2023) (Barrett, J., concurring) ("There are many such canons on the books, including constitutional avoidance, the clear-statement federalism rules, and the presumption against retroactivity. Such rules

statute cannot be sustained. Recall that EPA's primary counter-argument to the *Rapanos* plurality standard was that the significant nexus test, as originally articulated in Justice Kennedy's concurring opinion in *Rapanos*, is the best interpretation of the Act's wetlands coverage.[80] Justice Alito concludes that, besides conflicting with the Act's text and structure, the significant nexus tests fails to satisfy the "federalism" and "fair notice" canons.

As to the former, Justice Alito recites the Court's tradition of requiring a clear statement from Congress whenever the latter "wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[81] Such a clear statement requirement is particularly apt with respect to the Clean Water Act, as the statute expressly declares Congress's aim to preserve the states' traditional authority over land and water resources.[82] EPA's reading of the statute would directly undercut that aim: the amount of acreage the agency would claim authority to regulate would be "truly staggering." Yet far from containing any clear statement supporting EPA, the Clean Water Act "never mentions the 'significant nexus' test, so the EPA has no statutory basis to impose it."[83]

As to the "fair notice" canon, Justice Alito explains that due process requires Congress to define penal statutes—such as the Clean Water Act[84]— "with sufficient definiteness that ordinary people can understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement." But the significant nexus test offers no such guidance; to the contrary, the "freewheeling inquiry" that it invites "provides little notice to landowners of their obligations under the CWA." That lack of notice, combined with the statute's imposition of significant penalties for "otherwise . . . ordinary activities," means that Congress must be quite clear that it intends such a rule. The significant nexus test "falls far short of that standard."[85]

Justice Alito then concludes his opinion by quickly dispatching with EPA's main rearguard argument, namely, through Section 404(g)(1) Congress ratified the broad understanding of the scope of the Clean Water Act as expressed in the Corps' 1975 and 1977 regulations construing "the waters of the United States." In rejecting EPA's ratification argument, Justice Alito emphasizes the textual analysis that underpins the majority's adoption of the *Rapanos* plurality standard—Congress has

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effectively impose a 'clarity tax' on Congress by demanding that it speak unequivocally if it wants to accomplish certain ends.").

[80] See Sackett, 143 S. Ct. at 1341.

[81] *Id*. at 1341.

[82] See 33 U.S.C. § 1251(b).

[83] Sackett, 143 S. Ct. at 1342.

[84] See 33 U.S.C. § 1319(c).

[85] Sackett, 143 S. Ct. at 1342–43.

never amended the "operative" definitional text of "the waters of the United States," which is effectively what EPA would be asking the Court to do by accepting the agency's ratification argument. Further, EPA's ratification argument had already been rejected in substance by *SWANCC* and *Riverside Bayview*, the former in holding that isolated waters are not regulable despite the fact that the Corps's 1970s regulations would have covered them, and the latter in holding that Section 404(g)(1) does not place a "definitive" interpretation on the Act's scope, instead simply indicating that wetlands are not per se excluded from regulation. Finally, Justice Alito explained that EPA had failed to produce the "overwhelming evidence" needed to make a ratification argument; at best, the evidence was mixed.[86]

A step further:

Justice Thomas's concurrence

Justice Thomas, joined by Justice Gorsuch, issued a lengthy concurrence in which he fully agreed with the majority's adoption of the *Rapanos* plurality standard for relatively permanent waters as well as for when wetlands can be regulated as waters.[87] His concurrence instead addresses when a water can be considered "of the United States." Justice Thomas proceeds through an exhaustive review of the history of federal water quality regulation under the Commerce Clause, for which he sadly recounts there "would be little need . . . if the agencies had not effectively flouted our decision in *SWANCC*, which restored navigability as the touchstone of federal jurisdiction under the CWA."[88] Based on that discussion, he concludes that, when Congress enacted the Clean Water Act, it intended to regulate consistent with a traditional understanding of its power over the interstate channels of commerce, as a corollary of its power "[t]o regulate [c]ommerce . . . among the several States."[89] That traditional understanding is reflected in Congress's choice of the phrase "waters of the United States," which, according to Justice Thomas, means waters that are capable of serving as units of an interstate channel of commerce.[90]

In practice, Justice Thomas's understanding of "waters of the United States" would mean that only those waters that are navigable in fact could be regulated under the Clean Water Act. But even under a less demanding standard, the Sacketts' dispute should be an easy one to resolve: "Here, no elaborate analysis is required to

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[86] Sackett, 143 S. Ct. at 1343. Justice Alito also made short work of EPA's policy argument that the significant nexus test is necessary to ensure that water quality remains good throughout the nation. *See id.* ("But the CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority.").

[87] Sackett, 143 S. Ct. at 1344 (Thomas, J., concurring).

[88] *Id.* at 1355.

[89] U.S. Const. art. I, § 8, cl. 3.

[90] See Sackett, 143 S. Ct. at 1352–56.

know that the Sacketts' *land* is not a water, much less a water of the United States."[91] Justice Thomas concludes his concurrence by lamenting how the Court's Commerce Clause jurisprudence "has significantly departed from the original meaning of the Constitution," and "[p]erhaps nowhere is this deviation more evident than in federal environmental law, much of which is uniquely dependent upon an expansive interpretation of the Commerce Clause." But he also emphasizes that, "while not all environmental statutes are so textually limited, Congress chose to tether federal jurisdiction under the CWA to its traditional authority over navigable waters," a decision that "EPA and the Corps must respect."[92]

A sardonic déjà vu:

Justice Kagan's concurrence

Justice Kagan wrote a short and somewhat acerbic concurrence, joined by Justices Sotomayor and Jackson.[93] She concurred in the judgment but she did not agree with majority's test, which in her view is insufficiently protective of the environment.[94] For Justice Kagan the correct test for wetlands jurisdiction under the Clean Water Act is established by Section 404(g)(1): a wetland is regulated whenever it is "adjacent" to a covered water, adjacency being understood according to its ordinary meaning. Thus, a wetland can be regulated "not only when it is touching, but also when it is nearby" a covered water.[95] In settling upon a narrower standard, the majority opinion improperly puts "a thumb on the scale for property owners—no matter that the Act (i.e., the one Congress enacted) is all about stopping property owners from polluting."[96]

Justice Kagan is particularly critical of the majority's use of clear statement canons "not to resolve ambiguity or clarify vagueness, but instead to 'correct' breadth."[97] In this perceived misuse of such canons, Justice Kagan sees a parallel

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[91] Id. at 1357–58.
[92] *Id*. at 1358–59.
[93] That it was somewhat contentious may be reflected in the fact that Justice Kavanaugh did not join it. One also wonders whether it was among those opinions in the mind of the Chief Justice in writing his majority opinion in the student loan cases. *See* Biden v. Nebraska, 2023 WL 4277210, at *15 (U.S. 2023) ("It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary.").
[94] Sackett, 143 S. Ct. at 1359. She makes the de rigueur reference to the burning Cuyahoga, and encourages readers, if they've "lately swum in a lake, happily drunk a glass of water straight from the tap, or sat down to a good fish dinner," to thank the Act for it. Interestingly, in the four decisions of the Supreme Court construing "waters of the United States," the Cuyahoga is cited only in dissenting opinions, perhaps demonstrating rhetorical backfiring.
[95] *Id*. at 1359.
[96] *Id*. at 1361.
[97] *Id*.

between the supposed analytical inadequacies of the majority opinion in *Sackett* and those of the majority opinion the previous Term in *West Virginia v. EPA*.[98] In her view *Sackett* is of a piece with *West Virginia*, in that both employ "special canons 'magically appearing as get-out-of-text-free cards' to stop the EPA from taking the measures Congress told it to."[99] And the error in both cases leads to the same result: "the Court's appointment of itself as the national decision-maker on environmental policy."[100]

A "bank shot" textualism?

Justice Kavanaugh's concurrence

Justice Kavanaugh also concurred, joined by Justices Kagan, Sotomayor, and Jackson. But unlike Justice Kagan's, Justice Kavanaugh's concurrence expressly states his agreement with the majority's rejection of the significant nexus test and with the majority's conclusion that the Sacketts' property should not be regulated.[101] There, however, the agreement with the majority ended. In Justice Kavanaugh's view, the correct test comes from Section 404(g)(1)[102]—this despite his expression of misgiving at oral argument that expanding Section 502(7) to reach adjacent wetlands by means of Section 404(g)(1) is "kind of a bank shot way to do it."[103]

According to Section 404(g)(1), a wetland can be "adjacent" not just if it adjoins a water but also if it "is separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like."[104] Congress is not unfamiliar with the distinction: Justice Kavanaugh points out several instances in the statute where certain features are described as "adjoining."[105] Buttressing this textual analysis is the fact that every administration since President Carter's has interpreted the Act to reach at least some non-abutting wetlands.[106] Another supporting consideration is Congress's decision in 1977 to add Section 404(g)(1) in response to the controversies of the early 1970s over the scope of the original Act. Congress's adoption of the parenthetical containing the phrase "wetlands adjacent thereto" signaled Congress's approval of the agencies' view that some wetlands can be regulated, and that this represents an implied expansion of Section 502(7)'s definition of "the waters of the United States."[107] Justice Kavanaugh concludes his opinion by adverting to how the majority's rule may harm the environment by inhibiting flood

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[98] 142 S. Ct. 2587 (2022).
[99] Sackett, 143 S. Ct. at 1361.
[100] *Id*. at 1361–62.
[101] *Id*. at 1362.
[102] *Id*.
[103] Tr. 79.
[104] Sackett, 143 S. Ct. at 1363–64.
[105] *Id*. at 1364.
[106] *Id*. at 1365.
[107] *Id*. at 1367–68.

protection or allowing, for example, the Chesapeake Bay to be polluted through destruction of its non-adjoining wetlands, and may make things worse for the regulated public through the "regulatory uncertainty" created by perceived ambiguities in the surface-connection test.[108]

"We weren't all textualists then"[109] but we sure are now

In this final section of the article, I assess the majority opinion in light of the Kagan/Kavanaugh critiques,[110] framing the analysis with respect to four considerations: textualism, deference to executive interpretation, theories of congressional ratification of agency interpretation, and clear statement canons.

Whose textualism?

Let's begin with the most important contrast, for this is truly a case of dueling textualisms. Notably, both Justice Alito and Justice Kavanaugh profess to adopt tests for wetlands jurisdiction that are compelled by the statutory text. But for Justice Alito the defect in Justice Kavanaugh's test is that it pays no attention to Section 502(7): "Textualist arguments that ignore the operative text cannot be taken seriously."[111] This is the decisive point in favor of Justice Alito's opinion. Although other parts of the statute may inform the meaning of "the waters of the United States" as used in Section 502(7),[112] nevertheless, how that term is defined in the statute should be privileged over possibly contrary or broader inferences drawn from other parts of the statute.[113] That is precisely what Justice Kavanaugh's opinion fails to do. It instead makes determinative the tangential and parenthetical use of the phrase "wetlands adjacent thereto" in a provision of a statute that does not define the term but rather uses it to delimit EPA's permit transfer authority. Put another way,

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[108] *Id*. at 1368–69.

[109] Tr. 52.

[110] Notably, Justice Alito's majority opinion contains only one brief paragraph responding, very broadly, to the Kagan and Kavanaugh concurrences. *See* Sackett, 143 S. Ct. at 1344. Perhaps that light touch is a result of Justice Kagan's protestations earlier in the Term about excessive attention being given in majority opinions to dissents. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1293 (2023) (Kagan, J., dissenting) ("One preliminary note before beginning in earnest. As readers are by now aware, the majority opinion is trained on this dissent in a way majority opinions seldom are. Maybe that makes the majority opinion self-refuting? After all, a dissent with 'no theory' and '[n]o reason' is not one usually thought to merit pages of commentary and fistfuls of comeback footnotes.").

[111] Sackett, 143 S. Ct. at 1344.

[112] *See* Mont v. United States, 139 S. Ct. 1826, 1833–34 (2019) (observing that "the whole-text canon requires consideration of the entire text, in view of its structure and logical relation of its many parts") (cleaned up).

[113] *See* Van Buren v. United States, 141 S. Ct. 1648, 1657 (2021) ("When a statute includes an explicit definition of a term, we must follow that definition, even if it varies from a term's ordinary meaning.") (cleaned up).

Justice Alito's opinion is superior because it respects the age-old canon of construction that a court must read the statute as a whole, that it must read terms in context, and that it must try to harmonize all parts of a statute.[114] The only response Justice Kavanaugh has on this point is to declare that Section 404(g)(1) *is* the operative text: "In 1977, when Congress allocated permitting authority, Congress expressly included 'adjacent' wetlands within the 'waters of the United States.'"[115] This, however, is not really an acknowledgment of Section 502(7)'s privileged status as operative text but is instead an argument for Section 502(7)'s implied amendment by Section 404(g)(1). Once properly characterized as such, Justice Kavanaugh's defense falls apart, given the absence of the "clear and manifest" evidence that the Court typically requires to credit a statutory amendment by implication.[116]

Admittedly, there exists a tension in the statute. Going all the way back to *Riverside Bayview*, the Court has acknowledged that, in ordinary parlance, a wetland is not a water. At the same time, Section 404(g)(1) is very strong evidence that Congress believes that at least some types of wetlands that are "adjacent" to covered waters are themselves regulated.[117] But it is Justice Alito's opinion, not Justice Kavanaugh's, that appropriately balances and resolves this tension by affirming that, yes, some wetlands can be regulated, but only those wetlands that plausibly can be considered "waters" in their own right, *i.e.*, falling on the "adjoining" end of the "adjacent" spectrum. In contrast, Justice Kavanaugh's textualist argument ignores Section 502(7) to artificially ease the statutory tension, and ends up violating the first principle of textualism—that one must take the text as one finds it and not add text to support one's interpretation.[118]

Deference-lite?

Perhaps the strongest point Justice Kavanaugh musters in favor of his "adjacent" wetlands test is longstanding agency interpretation. Since the 1970s, across eight presidential administrations (as Justice Kavanaugh emphasizes

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[114] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.") (cleaned up).

[115] Sackett, 143 S. Ct. at 1367.

[116] See Sackett, 143 S. Ct. at 1340 (quoting Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662–664 & n. 8 (2007)).

[117] Here is another defect in Justice Kavanaugh's analysis: the "plain" meaning of Section 404(g)(1) is *not* that *all* adjacent wetlands are regulated, but rather only those wetlands adjacent to certain types of traditional navigable waters.

[118] See generally Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1738 (2020) ("After all, only the words on the page constitute the law adopted by Congress and approved by the President. 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.").

repeatedly), the EPA and the Corps have consistently interpreted the statute to regulate not just wetlands that immediately abut or adjoin a regulated water, but also wetlands that are to varying degrees further away from a regulated water.[119] But the force of Justice Kavanaugh's "longstanding agency interpretation" point is very much undercut by his inability to cast it in cognizable legal form. That is to say, Justice Kavanaugh never cites *Chevron*[120] or *Skidmore*.[121] So one is left to ask, what is the relevance of the fact that the agencies have interpreted the statute consistently over the course of several decades? Justice Alito does not respond directly to Justice Kavanaugh's longstanding agency interpretation point, but it is fair to assume that the majority's adoption of the *Rapanos* plurality standard includes that opinion's rejection of the same deference argument: "a curious appeal to entrenched executive error," amounting to "a novel principle of administrative law—a sort of [then] 30-year adverse possession that insulates disregard of statutory text from judicial review."[122]

Justice Kavanaugh's failure to employ any legally cognizable theory of deference is likely because, for him (as for Justice Alito and Justice Scalia), the interpretive question is one of plain meaning, for which theories of deference generally are irrelevant anyway.[123] But even if Justice Kavanaugh had made an express argument based upon a recognized theory of deference, it would still have foundered because the reasons for *why* the agencies have consistently interpreted the statute to reach more than just adjoining wetlands over the years are remarkably inconsistent. In the 1970s, the EPA and the Corps thought that they could regulate essentially all wetlands.[124] By the 1990s and 2000s, the agencies had adopted a somewhat less broad version of what could be regulated but nevertheless believed that they could regulate the majority of the wetlands in the country.[125] By the time of the Trump administration, the EPA and the Corps had retreated to a narrower understanding of their wetlands jurisdiction.[126] But with the advent of the Biden administration, the agencies reverted to a much more capacious view of wetlands jurisdiction.[127] This history of regulatory ping-pong, marked by vastly different rationales for why the statute should be construed to go as far or not as far as it

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[119] See Sackett, 143 S. Ct. at 1365.
[120] See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842–44 (1984)
[121] See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
[122] Rapanos v. United States, 547 U.S. 715, 752 (2006).
[123] Justice Kavanaugh attempts to finesse this conceptual mismatch by conceding that longstanding agency practice merely "reinforces the ordinary meaning of adjacency." Sackett, 143 S. Ct. 1364.
[124] See 33 C.F.R. § 323.2(a)(2)–(5), (d) (1978).
[125] See Rapanos, 547 U.S. at 724.
[126] See 33 C.F.R. § 328.3(c)(1) (2021).
[127] 33 C.F.R. § 328.3(a)(4), (c)(2) (2023).

might—variously, a broad understanding of the Commerce Clause,[128] a "hydrological connection" theory of statutory jurisdiction,[129] the significant nexus test,[130] and a modified version of the *Rapanos* plurality's continuous surface connection test[131]—is not an ideal context in which to conclude that the agencies have some considered advantage over the judicial branch in interpreting the statute. That they all would have included some non-adjoining wetlands within "the waters of the United States" seems more a function of regulatory happenstance than any special insight into Congressional intent.

Section 404(g)(1):

Is it a ratification, an implied amendment, or merely an interpretive signal?

Justice Kavanaugh's main defense to Justice Alito's charge of unserious textualist analysis is Section 404(g)(1). For him, that provision encapsulates Congress's resolution of the controversy that immediately followed enactment of the Clean Water Act. Aware that the Corps had interpreted the original version of the Act to reach "adjacent" wetlands, Congress effectively ratified (although Justice Kavanaugh does not use this term) the Corps's interpretation through Section 404(g)(1)'s reference to "wetlands adjacent thereto."[132] In contrast, for Justice Alito and the majority, that reference merely confirms that some wetlands are regulated; it does not operate to impliedly amend the Act's definitional provisions.

Before addressing the merits of this argument, it is important to note that Justice Kavanaugh's ratification theory for Section 404(g)(1) is somewhat less ambitious than that advanced by EPA, in that Justice Kavanaugh does not contend that Section 404(g)(1) ratified every "jot and tittle" of the Corps' 1977 regulations.[133] Rather, Justice Kavanaugh's view is simply that Congress recognized in Section 404(g)(1) that wetlands "adjacent" to other covered waters are regulated.

But although Justice Kavanaugh's ratification argument is somewhat more modest than EPA's, it nevertheless fails to convince for many of the same reasons. The most significant defect in Justice Kavanaugh's ratification argument is that, like EPA's version, it is being employed in a posture that ill fits the theory of Congressional intent which underlies ratification. Recall that the Corps's interpretation of wetlands jurisdiction was (and is) advanced as an interpretation of what Justice Alito calls the "operative" provision of the statute, namely, Section 502(7)'s definition of "navigable waters" as "the waters of the United States." That

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[128] See 33 C.F.R. § 323.2(a)(5) & n.2 (1978).
[129] See Rapanos, 547 at 729–30.
[130] See Sackett, 143 S. Ct. at 1341.
[131] 33 C.F.R. § 328.3(c)(1) (2021).
[132] Sackett, 143 S. Ct. at 1366–67.
[133] Cf. Rapanos, 547 U.S. at 751.

fact forces Justice Kavanaugh to accept that Congress in 1977 chose to adopt the Corps's interpretation of the 1972 Act's Section 502(7) *not* by amending Section 502(7)'s operative text—again, the object of the Corps's purportedly ratified regulation—but rather by adding a parenthetical reference to wetlands in a new statutory section dealing with permitting authority. I am aware of no other case where the Court has affirmed such tangential ratification. The oddity of the asymmetry in the ratification argument founded on Section 404(g)(1) is well captured by Justice Thomas's concurrence: "To infer Congress' intent to upend over a century of settled understanding and effect an unprecedented transfer of authority over land and water to the Federal Government, based on nothing more than a negative inference from a parenthetical in a subsection that preserves state authority, is counterintuitive to say the least."[134]

Clear statement canons:

Vindicating Congressional intent or judicially overriding it?

As I have already noted in describing the majority ruling, Justice Alito's opinion relies on three different clear statement canons: the federalism canon, a "fair notice" canon, and a version of the major questions doctrine. His employment of these canons receives sharp criticism from Justice Kagan.[135] But before addressing who has the better argument on canons, I think it important to emphasize that a good deal of the critique from the Kagan/Kavanaugh concurrences about how the majority uses the canons is unfair. It is unfair because the principal target of the majority opinion's use of the canons is *not* the "adjacent" wetlands standard advocated by Justice Kagan

[134] Sackett, 143 S. Ct. at 1355. Although not cited in any of the Sackett opinions, a piece of legislative history from the 1977 amendments casts doubt on both Justice Kavanaugh's and EPA's ratification arguments. During the House floor debate on the 1977 conference report, Representative Bauman noted that "there has been some controversy as to exactly how this new legislation will be applied," adding that it was his understanding that "the Federal Government will retain through the Corps of Engineers jurisdiction over navigable waters." 123 Cong. Rec. 38924, 38972 (1977). He then went on to inquire of the conference report managers: "[B]ut what does "adjacent wetlands" mean? How far will that go? I represent counties where when the tide comes up, a third of those countries [sic] could suddenly be adjacent wetlands. I would hope that the States would be able to have delegated to them control over such areas." In response, Representative Clausen (who managed the conference report for the minority, see *id*. at 38952) stated: "I would interpret the word 'adjacent' to mean immediately contiguous to the waterway." *Id*. at 38972.

[135] Sackett, 143 S. Ct. at 1360 ("So the majority proceeds to its back-up plan. It relies as well on a judicially manufactured clear-statement rule."). Justice Kavanaugh does not appear to question the propriety of the majority's clear statement canons, just their relevance to the dispute at hand. See *id*. at 1367 ("In any event, the decisive point here is that the term 'adjacent' in this statute is unambiguously broader than the term 'adjoining.' On that critical interpretive question, there is no ambiguity.").

and Justice Kavanaugh, but rather EPA's significant nexus test.[136] And that is the very test that all of the justices, including Kagan and Kavanaugh, rejected.

And as against EPA's interpretation, Justice Alito's employment of the canons of construction is beyond reproach. Let's begin with the federalism canon. That canon of construction is not only well established,[137] it is actually written into the statute's prefatory "declaration of goals and policy."[138] And contrary to Justice Kavanaugh's contention that the federal government "has long regulated the waters of the United States, including adjacent wetlands," the Clean Water Act's codification of the federalism canon is a direct refutation of Justice Kavanaugh's expansive reading of the regulatory and statutory history. But one need look no further than Justice Thomas's concurrence to see that, traditionally, Congress had chosen to regulate only those waters that serve as channels of interstate commerce. In short, there is no longstanding tradition of Congress seeking to regulate as far afield as the significant nexus test would regulate, or for that matter as Justice Kavanaugh's "adjacent" wetlands test would reach.[139]

With respect to the majority's use of what I have termed the "fair notice" canon, it is again nothing unusual for the Court to expect Congress to speak clearly when it seeks to impose significant penalties for ordinary conduct.[140] That is simply a particular application of the well-established canon of constitutional avoidance: the Court will be reluctant to adopt an administrative construction of a statute that raises significant constitutional questions.[141] For her part, Justice Kagan contends that the majority improperly puts a "thumb on the scale" for property owners "to cabin the anti-pollution actions Congress thought appropriate."[142] Although it is true that the Sacketts are property owners, and that Justice Alito's majority opinion is principally concerned with the impact that EPA's significant nexus test has on landowners, nevertheless these points do not mean that the majority has now adopted a biased interpretation of the statute meant to favor, contrary to congressional intent, private property owners over the environment. Rather, what the majority is doing is simply focusing on one prominent segment of the *regulated* public. It just so happens that, with respect to the Clean Water Act, the regulated public typically are landowners.[143] But that does not mean that the majority opinion has now decided to put a thumb on the scale for private property owners. Rather, the majority opinion

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[136] Sackett, 143 S. Ct. at 1341–43.
[137] *See* Solid Waste Ag. of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–74 (2001).
[138] 33 U.S.C. § 1251(b).
[139] See Sackett, 143 S. Ct. at 1345–54.
[140] *Id*. at 1342.
[141] See, e.g., SWANCC, 531 U.S. at 174.
[142] Sackett, 143 S. Ct. at 1361.
[143] *Id*. at 1335–36.

simply requires Congress to treat the regulated public in environmental matters with the same concern for fair notice and due process that we would expect Congress to evince with respect to any other issue.

Finally, what one might call a proto-version of the major questions doctrine appears briefly in Justice Alito's majority opinion, specifically, when Justice Alito rejects EPA's ratification argument based upon Section 404(g)(1). One reason he gives for that rejection is that Congress does not "hide elephants in mouseholes," *i.e.*, "alter the fundamental details of regulatory scheme in vague terms or ancillary provisions."[144] That of course is precisely what EPA's ratification argument, coupled with its significant nexus test, would have accomplished. Justice Kagan and Justice Kavanaugh do not respond to this elephants-in-mouseholes point directly, but rather impliedly argue that it is inapposite because Section 502(7) is not a mousehole, Section 404(g)(1) effectively amended Section 502(7), and Congress clearly intended to enact an elephant. Or, as Justice Kagan puts it, "make no mistake: Congress wrote the statute it meant to. The Clean Water Act was a landmark piece of environmental legislation, designed to address a problem of "crisis proportions."[145] But here as with the other canons, the critique from the concurrences is largely misplaced. Justice Alito is not saying that the *concurrences'* standard would result in elephants in mouseholes, but rather *EPA's* standard of significant nexus. As for the concurrences, the only thing Justice Alito has to say is, as noted above, on a high level of textualist methodology, uninflected by any clear statement canon.

Parting thoughts

In many respects, the saga of the WOTUS wars, from *Riverside Bayview* in 1985 to *Sackett* in 2023, represents a microcosm of the significant changes in the Supreme Court's jurisprudence during that same period with respect to statutory interpretation generally.

Take deference. 1985's *Riverside Bayview* was one of the Court's first important post-*Chevron* decisions. *SWANCC* in 2001 represented something of a retreat from *Chevron*, but not much: the Court avoided its command by basing the decision in the statute's plain meaning and clear statement canons, although *Chevron* figured prominently in the dissent.[146] By *Rapanos* in 2006, *Chevron*'s influence had waned further, receiving only passing attention in the plurality and Kennedy concurrences, though still relied on in the dissent.[147] Yet by *Sackett* in 2023, *Chevron* fails to merit a citation in any of the opinions. And as for deference generally, there

[144] *Id*. at 1340.
[145] *Id*. at 1359.
[146] Compare SWANCC, 531 U.S. at 172–74 with *id*. at 191 (Stevens, J., dissenting).
[147] See Rapanos v. United States, 547 U.S. 715, 739 (2006) (majority opinion); *id*. at 766 (Kennedy, J., concurring in the judgment); *id*. at 789, 793 (Stevens, J., dissenting).

is only a glancing and unadorned reference in Justice Alito's majority opinion to EPA's request that the Court "defer to its understanding of the CWA's jurisdictional reach, as set out in its most recent rule defining 'the waters of the United States,'"[148] and Justice Kavanaugh's recitation of the supposed consistent agency interpretation supporting his "adjacent" wetlands standard.

The same with legislative history. *Riverside Bayview* is chockfull of citations to Committee reports, floor debates, and failed bills. Even *SWANCC* had some of that, especially with respect to Section 404(g)(1). But with *Rapanos*, legislative history was largely relegated to the dissent. And in Sackett 2023, it is nowhere to be found, which is particularly remarkable given the concurrences' heavy reliance on Section 404(g)(1)'s supposed ratification of the Corps' earlier regulations.

And the same with textualism. *Riverside Bayview* admits that the plain meaning of Section 502(7) doesn't include wetlands, but it relies on a congeries of statutory purpose, legislative history, and expert agency judgment to read the statute to regulate wetlands. By *SWANCC* text was triumphant, but *Rapanos* perhaps signaled a retreat, with the strongly anti-textual significant nexus test prevailing in the lower courts. And yet again, with *Sackett* in 2023, everybody is a textualist: Justice Alito's main argument is his close textual exegesis of "waters," and he rejects EPA's test principally because the agency "has no statutory basis to impose it." As for the concurrences, their main critique of the majority's continuous surface connection test is a textualist one.[149] Indeed, at points Justice Kagan sounds like Justice Scalia redivivus: "So the majority shelves the usual rules of interpretation—reading the text, determining what the words used there mean, and applying that ordinary understanding even if it conflicts with judges' policy preferences."

In summary, I believe that the *Sackett* decision will be an important one for environmental law for three reasons.

First, it signals the end of the days of reflexive agency deference, of what one might call the "green canon,"[150] of the judicial placing of the thumb on the scale for the environment. Not only is the majority opinion lacking any reference to or reliance on the water-quality purposes or goals of the Act, but those concerns are largely absent as well from Justice Kavanaugh's and Justice Kagan's concurrences. Their

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[148] Sackett, 143 S. Ct. at 1341.

[149] *Id*. at 1359.

[150] The locus classicus for such a green canon would undoubtedly be TVA v. Hill, 437 U.S. 153, 174 (1978) ("Concededly, this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds. But examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.").

analyses are based principally upon the text of the statute, and although they do note the importance of wetland protection for water quality, what drives their arguments is not the effort to vindicate that purpose as such but rather their conclusion that Congress has clearly spoken through Section 404(g)(1). Whether one agrees with that conclusion or not, nevertheless we have come quite a ways from the days of *Riverside Bayview*, where most of the Court's opinion was consumed with the discussion of how the expert administrative agencies had determined that regulation of wetlands was essential to vindicating Congress's water quality goals in the Clean Water Act, and we have certainly come a long way from Justice Stevens's full-throated *Chevron*-based defense, in dissent in *Rapanos*, of EPA and the Corps's view of the statute.

Second, the *Sackett* decision confirms that, indeed, we are all textualists now. Not a single vote was given for EPA's significant nexus test which, after all, was devised by Justice Kennedy not that long ago. *Sackett* highlights how, on this Court nowadays, one must have a text-based argument to have even a chance of winning.

And third, the Court's development of a "fair notice" clear statement canon promises to have significant effect in cases dealing with other environmental statutes. One can easily imagine instances where federal environmental law regulates "ordinary" conduct, and in many such statutes, Congress has chosen to significantly punish violations.[151] To maintain that toxic combination will require Congress to speak clearly. *Sackett* thus effectively precludes any federal agency from relying upon a vague textual interpretation if the statute is one which severely penalizes everyday activity.

[151] See, for example, the Endangered Species Act, 16 U.S.C. §§ 1531–44, which imposes significant civil and even criminal penalties on the "take" of protected species, see *id.* § 1540(a)–(b), an action that is defined very broadly, see *id.* § 1532(19).