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Recommended Citation
Samantha Bingaman, Nothing at Stake but Life’s Essentials: How Sole Reliance on New Textualism Endangers Clean Water, Environmental Justice Communities, and Environmental Law (and a Judicial Framework to Fix It), 83 Md. L. Rev. ()
Available at: https://digitalcommons.law.umaryland.edu/mlr/vol83/iss4/6

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COMMENT

NOTHING AT STAKE BUT LIFE’S ESSENTIALS: HOW SOLE RELIANCE ON NEW TEXTUALISM ENDANGERS CLEAN WATER, ENVIRONMENTAL JUSTICE COMMUNITIES, AND ENVIRONMENTAL LAW (AND A JUDICIAL FRAMEWORK TO FIX IT)

SAMANTHA BINGAMAN*

“You throw a stone into a deep pond. Splash. The sound is big, and it reverberates throughout the surrounding area. What comes out of the pond after that? All we can do is stare at the pond, holding our breath.”

-Haruki Murakami1

Water is life, as the old saying goes. We drink, we wash, we play, we swim, we travel, and we grow with water, among other activities central to our personal, cultural, and even spiritual needs.2 Amid our many differences, humans’ shared reliance on water for health and happiness can bring a feeling of unity in an otherwise fragmented world. However, as we increasingly learn about persistent water pollution, shortages, and conflicts, this shared reliance on a finite and fragile resource may foster uncertainty and recalcitrance regarding future access to usable water.3 These are the unfortunate lessons that underscore how human intrusion can upset the balance of critical water

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* So many people helped me in so many ways during this research. I would like to thank: Jon Mueller for his insightful comments; Bob Percival for sharing his environmental law wisdom; Joe Dowdell for helping transform this idea into a publication; the Maryland Law Review Editorial Board (especially Rosemary Ardman, Renae Lee, and Jo Vonderhorst) for their keen eyes and diligent suggestions; Jeremy Firestone for inspiring an interest in this field many years ago; and Conrad, Giovanna, Pete, Summer, Todd, and Jeannette for their support and encouragement to take this one sentence at a time.

1. HARUKI MURAKAMI, 1Q84 (2009).
3. Id. at 292–94.
cycles that provide us with life’s essentials, and how one entity’s action can catalyze a ripple effect of unintended consequences.

Clean water law, as well as other forms of environmental law, is no stranger to these ripple effects. Decisions of the Supreme Court of the United States, for example, naturally produce direct and indirect impacts through the socioenvironmental sectors, but of late, the Court has kindled drastic changes in environmental law. In May 2023, for example, the Supreme Court decided *Sackett v. Environmental Protection Agency*, “an absolute bombshell” of a case. Using a new textualist approach to narrowly interpret a wetlands protection provision of the Clean Water Act (“CWA”), the Court handed down a decision contravening decades of agency practice, erasing protections for at least half of the nation’s wetlands, and galvanizing an additional set of socioenvironmental questions. For example, what does *Sackett* mean for those who live in environmental justice communities, already victimized by poor infrastructure and unclean water resources? And does *Sackett* indicate the imminent overturning of *Chevron* deference—a possibility that has been slowly emerging from the shadows of the Roberts court? Following the Court’s throwing of the proverbial stone into the proverbial pond, the environmental community waits with its breath held, attempting to understand—and prepare for—the full extent of *Sackett*’s ripple.

The case also tells us something greater about the future of environmental law—that often, the character of these ripple effects may hinge on the type of statutory interpretation that the Court employs to decipher the environmental statute in question. This Comment argues that judicial new textualism, as applied in *Sackett*, severely limits the purpose and reach of environmental statutes designed to protect life’s essentials of clean water, air, and other resources. Instead, courts should utilize a pragmatic, multifactor interpretive approach when analyzing environmental laws. Part I first briefly maps the legislative purpose and evolution of the CWA from the twentieth century to today, then explains the CWA’s basic structure and

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4. See generally id.
5. 143 S. Ct. 1322 (2023).
7. 33 U.S.C. §§ 1251 et seq.
8. See infra Sections II.A–B.
9. See infra note 216.
11. See supra text accompanying note 1.
12. See infra Part II.
13. See infra Section II.D.
permitting provisions. It then describes the importance of recent CWA cases, such as *Sackett* and *County of Maui v. Hawaii Wildlife Fund*, with special focus on their diverging interpretation styles.

Part II analyzes *Sackett’s* effect on efforts to keep water clean, specifically in environmental justice communities, in response to the widely debated issue among environmental scholars and commentators. It then proposes how *County of Maui* may provide a powerful gap-filling tool to achieve positive environmental outcomes. Finally, this Comment broadens the inquiry beyond clean water, using the dichotomy of *Sackett* and *County of Maui* to demonstrate how new textualism is poorly suited to interpret environmental statutes, as the approach ignores the environmentally restorative purposes and congressional goals behind many of these statutes.

Instead, this Comment argues that a pragmatic framework should be applied in matters of clean water and general environmental law—a unique amalgamation of many forms of law—to maximize environmental protections in a time of great environmental degradation.

I. BACKGROUND

In order to understand how judicial textualism impacts water pollution, this Part first discusses the historical development of the CWA, its purpose and provisions relevant to this Comment, and how recent Supreme Court decisions have modified the CWA in practice.

*A History of Severe Water Pollution Drives the CWA’s Passage*

For a large part of U.S. history, the nation’s waters ran sick and fouled. Population growth and poor sanitation practices, coupled with the laissez-faire model of industrial regulation, drove waters into abysmal states of impairment. However, for the first half of the twentieth century, the only substantive waterway control regulation was the limited-in-scope Rivers and

14. *See infra* Sections I.A–B.
15. 140 S. Ct. 1462 (2020).
16. *See infra* Section I.C.
17. *See infra* Sections II.A–B.
18. *See infra* Section II.C.
19. *See infra* Section I.D.
20. *See infra* Section I.D.
21. *See infra* Section I.A.
22. *See infra* Section I.B.
23. *See infra* Section I.C.
Harbors Act of 1899. This 1899 Act narrowly focused on promoting the navigational character of waterways and had limited impact on improving water quality, and by 1948, Congress sought to further water pollution control efforts with the passage of the Federal Water Pollution Control Act. While this 1948 Act allowed the federal government to file public nuisance actions for interstate pollution, it conditioned the government’s cause of action on approval from state officials in the state where the discharge originated. If the government received states’ approval to bring the case to federal court, relief was granted only if practicable and economically feasible.

After another lukewarm attempt to expand federal oversight on water quality issues with the Water Quality Control Act of 1965, the nation’s water quality issues literally erupted on the national stage. In 1969, the Cuyahoga River in Ohio caught on fire several times from built up waste products dumped from nearby industry. Described as the river that “oozes rather than flows,” the Cuyahoga and its fires mobilized public concern for the nation’s inefficiently managed waterways. The Cuyahoga River Fire of 1969 is also credited with spurring the environmental movements of the 1970s, particularly the “sweeping amendments” that transformed the Federal Water Pollution Control Act into the CWA we know today.

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26. 33 U.S.C. § 403. Section 10 of the Act generally prevented unauthorized construction of bridges inhibiting trade and commerce, though it also prohibited the unauthorized dumping of refuse into waterways. Id.
27. Id.
31. Pub. L. No. 89-234, 79 Stat. 903 (1965); see also Murchison, supra note 29, at 532 (“[The Act] directed states to establish water quality standards for interstate waters and to prepare implementation plans . . . but the new federal statute did not mandate enforceable regulations on individual sources of pollution. Moreover, when a state failed to act, the statute did not grant the administrator authority to impose and enforce a federal implementation plan.”).
B. The Purpose, the Structure, and Congress’s Intent Behind the CWA

Faced with a “cancer of water pollution . . . engendered by our abuse of our lakes, streams, rivers, and oceans,”36 Congress passed the CWA with near-unanimous support.37 In the statute’s first provision, Congress announced the clear, ambitious, and unwavering purpose of the CWA: “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”38 Even when the CWA’s original passage was jeopardized by President Richard Nixon’s cost-driven veto,39 Congress underscored its dedication to curbing water pollution and overrode the veto with ease.40 The Senate again overrode President Ronald Reagan’s cost-centric veto to the CWA’s reauthorization bill in 1987, and as late as 1995, refused to pass a bill that would have weakened the CWA’s provisions.41 As it seemed, curing the cancer—notwithstanding the costs—was the nation’s foremost priority for the first decades of the CWA’s existence.42

The CWA functions by setting national water quality criteria recommendations for surface waters43 and requires the EPA to establish technology-based standards to control pollution into “waters of the United States,” or “WOTUS.” Before 2023, WOTUS was an expansive term, including traditionally navigable waters—oceans, rivers, lakes, streams—their adjacent wetlands, and other waters with a significant ecological nexus

36. Sen. Edmund S. Muskie, chairman of the Senate’s Subcommittee on Air and Water Pollution, stated:

Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.

We have ignored this cancer for so long that the romance of environmental concern is already fading in the shadow of the grim realities of lakes, rivers, and bays where all forms of life have been smothered by untreated wastes, and oceans which no longer provide us with food.


38. 33 U.S.C. § 1251(a). Other goals included eliminating pollution in navigable waters by 1985 and for waters to be fishable by 1983, among other national policies. Id. § 1251(a)(1)–(7).

39. President Nixon vetoed the CWA originally in 1972, stating his concerns about the costs of water pollution programs on the public. Caputo, supra note 37, at 10574.

40. Id. at 10574–75.

41. The 1995 bill would have repealed “the portion of the Act that limits discharges of polluted stormwater.” Id. at 10575 n.15 (citing H.R. 961, 104th Cong. § 322(c) (1995)).

42. Id. at 10574–75.

or connection to traditionally navigable waters. The CWA seeks to protect these WOTUS by prohibiting any unauthorized discharge of pollutants to WOTUS, unless covered by a requisite permit. While the CWA has a multitude of regulatory requirements, this Comment will focus on the main permitting provisions: the Section 402 National Pollutant Discharge Elimination System (“NPDES”) and the Section 404 prohibition on unauthorized dredging and filling of WOTUS, including wetlands.

The NPDES program prohibits the unauthorized discharge of pollutants into WOTUS from any point source, defined as:

“[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”

Operators of point sources must obtain and comply with a NPDES permit, which consists of “limits on . . . discharge, monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or people’s health.” The EPA may grant NPDES permits, but more commonly, states are delegated authority to enforce their own NPDES program so long as the state’s regulations are just as stringent as the CWA.

44. President Obama formulated this expansive WOTUS definition in his Clean Water Rule of 2015. According to the rule, the EPA would afford federal CWA protections for:

Traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of “waters of the United States”; tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and “other waters” that meet either the relatively permanent standard or the significant nexus standard.


46. Id. § 1342.
47. Id. § 1344.
48. Id. § 1342.
49. Id. § 502(14), 33 U.S.C. 1362(14).
51. After submitting an EPA-approved point source management plan and agreeing to continued EPA oversight, the lead environmental agency of a given state is generally vested with NPDES permitting authority. Ky. Waterways All. v. Ky. Utils. Co., 905 F.3d 925, 928–29 (6th Cir.)
Whatever the permitting entity, NPDES permits are distributed as individualized or general permits, with the former tailored more stringently to the type of point source or the degree of impairment of the receiving waterway.\(^{52}\)

In addition to the NPDES program, the Section 404 program operates “to regulate the discharge of dredged or fill material into [WOTUS], including wetlands,”\(^ {53}\) which provide a host of invaluable ecosystem services.\(^ {54}\) Regulated activities include fill for private and commercial development and mining projects that take place in wetlands.\(^ {55}\) As with the NPDES program, the EPA often delegates Section 404 permitting and enforcement authority to the states, while also sharing programmatic and enforcement authority with the U.S. Army Corps of Engineers.\(^ {56}\) While federal agencies have regularly interpreted the CWA to include adjacent wetlands within the definition of WOTUS,\(^ {57}\) the question of which wetlands are protected under Section 404—and other questions regarding the reach of the CWA—has aroused fervent debate in the judiciary.\(^ {58}\)

### C. The Judiciary Shapes the CWA

The CWA is the most litigated environmental statute in the Supreme Court,\(^ {59}\) resulting in a varied history of judicial interpretations and case law. Out of the many noteworthy CWA cases, the following Section chronologically maps those most relevant to this Comment: *United States v. 2018). As of 2023, forty-seven U.S. states were fully or partially authorized to take the lead on their respective states’ NPDES permitting. *NPDES Program Authorizations*, EPA (Mar. 21, 2023), https://www.epa.gov/npdes/npdes-program-authorizations.

52. For a deeper summary of individualized and general NPDES permits as applied to agricultural operations, see Md. Dep’t of the Env’t v. Assateague Coastal Tr., 484 Md. 399, 409–36, 299 A.3d 619, 625–41 (2023).


54. William J. Mitsch, Blanca Bernal & Maria E. Hernandez, *Ecosystem Services of Wetlands*, 11 Int’l J. Biodiversity Sci., Ecosystem Servs. & Mgmt. 1, 1 (2014). Mitsch, Bernal, and Hernandez deem wetlands “among the most valuable ecosystems on the planet,” underscoring how they provide habitat for fish and wildlife, absorb excess water to mitigate floods and drought, act as carbon sinks and climate stabilizers, support biodiversity, “cleanse polluted waters, protect shorelines, and recharge groundwater aquifers.” Id. (internal citation omitted).

55. *Permit Program under CWA Section 404*, supra note 53.

56. Id.

57. The U.S. Army Corps of Engineers, for example, recognized that waters adjacent to traditionally navigable waters, including wetlands, ponds, lakes, tributaries, impoundments, and similar waters, were WOTUS. 33 C.F.R. § 328.3(6).

58. See infra Sections I.C.1–3.

59. “Since the CWA’s enactment, the Court has issued thirty-four CWA decisions, which constitutes thirty-four percent of the one hundred environmental opinions issued from 1972–2012.” Sandra Zellmer, *The American Congress: Legal Implications of Gridlock: Treading Water While Congress Ignores the Nation’s Environment*, 88 Notre Dame L. Rev. 2323, 2324 (2013).
Riverside Bayview Homes, Rapanos v. United States, County of Maui v. Hawaii Wildlife Fund, and Sackett v. EPA. This kaleidoscope of cases demonstrates the often shifting, nuanced, and even contradictory views towards the CWA’s scope.

1. Riverside Bayview Homes and Rapanos

Riverside Bayview was an early CWA case that demarcated federal jurisdiction over wetlands. In the years between the passage of the CWA and the opinion in 1985, the EPA and Army Corps of Engineers determined that a wide variety of waters, including wetlands and non-navigable waters, qualified for federal protections; in other words, wetlands not directly abutting larger water sources, like rivers, oceans, or lakes, could not be dredged or filled without permission. The Court upheld the agencies’ interpretations, holding that Section 404 protects wetlands that “border . . . or are in reasonable proximity to other [WOTUS].”

Following another developer’s challenge decades later, the WOTUS rule was again adjudicated by the Supreme Court in Rapanos v. United States. This time, the Court fractured into two standards for how to determine which type of waters constitute WOTUS, though neither commanded a majority opinion: (1) Justice Scalia’s plurality, which posited that CWA protections apply to wetlands adjacent only to waters in the “ordinary sense,” like streams, oceans, rivers, and lakes, and (2) Justice Kennedy’s concurrence, suggesting that wetlands should be protected if they have a “significant nexus” to a traditionally navigable water. In the years following, many courts applied Kennedy’s “significant nexus” test either exclusively or in conjunction with the plurality’s test, but no court applied solely the plurality’s test. The EPA also modeled the Clean Water Rule of 2015 on the significant nexus test, which served as the prevailing definition of WOTUS until 2023.

60. 474 U.S. 121 (1985).
63. 143 S. Ct. 1322 (2023).
64. Riverside Bayview, 474 U.S. at 135.
65. 40 C.F.R. § 230.3(s)(3).
66. Riverside Bayview, 474 U.S. at 134.
68. Rapanos, 547 U.S. at 757.
69. Id. at 779 (Kennedy, J., concurring in the judgment).
70. HANDBOOK, supra note 30, at 23.
71. See supra note 44. President Trump attempted to replace the Clean Water Rule with the more restrictive Navigable Waters Protection Rule, though this regulation was vacated by an
2. County of Maui

Between Rapanos and Sackett, the Court decided another CWA case in 2020: County of Maui v. Hawaii Wildlife Fund. Although the case centered on point source doctrine, the interplay between County of Maui and Sackett, described below, is significant. In County of Maui, the Court analyzed whether the word “from” in Section 402’s prohibition on discharges into navigable waters “from any point source” included pollution conveyed indirectly, rather than directly from a discrete pipe or channel, to navigable waters.

In Maui, Hawaii, a municipal wastewater reclamation facility collected sewage from the surrounding town, treated it, and pumped a daily four million gallons of partially treated effluent into four underground injection wells. The facility did not have a NPDES permit because the County claimed its operations did not directly discharge effluent into WOTUS, only groundwater. Environmental organizations attributed the partially treated effluent from the wastewater facility, which travelled less than one half-mile through groundwater to the Pacific Ocean, to the deteriorating conditions of the nearby marine ecosystem. Claiming that the wastewater treatment facility was an unauthorized point source contributing to pollution of a navigable water, albeit through a non-point source conveyance of groundwater, the environmental organizations won summary in district court. The Ninth Circuit affirmed the district court’s ruling, holding that a CWA permit is required when “pollutants are fairly traceable from the point source to a navigable water.” The Supreme Court subsequently rejected the Ninth Circuit’s “fairly traceable” language, instead holding that the CWA “requires a permit . . . when there is the functional equivalent of a direct discharge” into

73. As noted in Section I.B, supra, the point source regulatory program of Section 402 is distinct from the wetland development provisions of Section 404, though the two provisions still share WOTUS as a key jurisdictional term.
74. See infra Section IID.
75. County of Maui, 140 S. Ct. at 1469 (emphasis added) (quoting 33 U.S.C § 1362(12)).
76. Id.
77. Id. “Congress intended to leave substantial responsibility and autonomy to the States” to regulate groundwater. Id. at 1471 (quoting 33 U.S.C. § 1251(b)).
78. Id.
79. Id.
81. Id.
WOTUS. The Court determined that the word “from” evidenced that Congress intended permits to apply to the origin of pollution, not the conveyance. Also examining legislative history during the 1972 debates over the CWA, the Court saw merit in interpreting the CWA’s language beyond just “discrete conveyance[s],” such as the channels, pipes, and ditches listed as examples in the statute, to align with the purpose of the CWA to improve the quality of the nation’s waterways. This interpretation resulted in the Court’s “functional equivalent” holding, which served as a narrowing of the Ninth Circuit’s interpretation and a broadening of the dissent’s conservative limitation of the permit requirement only from direct discharges.

Recognizing that courts would apply the new functional equivalent standard on a case-by-case basis, the Court introduced a list of seven factors for courts to balance in their analysis, with the first and second being the most important:

1. transit time,
2. distance traveled,
3. the nature of the material through which the pollutant travels,
4. the extent to which the pollutant is diluted or chemically changed as it travels,
5. the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source,
6. the manner by or area in which the pollutant enters the navigable waters,
7. the degree to which the pollution (at that point) has maintained its specific identity.

Balancing these factors on remand, the district court determined that the wastewater treatment plant’s pollution, though conveyed indirectly to the Pacific through groundwater, was the functional equivalent of a direct discharge that required a NPDES permit.

While a seemingly optimistic victory for clean water, many legal scholars underscore the dissenters’ criticism that the new test confuses the scope of what can be regulated, and “will no doubt lead to more uncertainty and confusion among regulators and industry.” Indeed, in January 2021, the Trump administration promulgated draft guidance on how to apply the

82. County of Maui, 140 S. Ct. at 1476 (emphasis in original).
83. Id.
84. Id. at 1469.
85. Justice Thomas dissented, arguing that the holding could be potentially construed to cover all pollution sources—even nonpoint—which Congress did not intend to regulate under the CWA. Id. at 1480 (Thomas, J., dissenting).
86. County of Maui, 140 S. Ct. at 1476–77.
88. See supra note 85.
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County of Maui functional equivalent standard and its factors. The memorandum underscored a conservative reading of the CWA and reiterated that NPDES permits are required only for point sources that directly discharge pollutants into WOTUS. However, in 2021, Biden revoked the rule and restored the permitting guidance to its pre-Trump definition.

3. Sackett v. EPA

Two years after County of Maui, the Supreme Court heard argument in another CWA case concerning the breadth of WOTUS under Section 404, the same question the Court considered in Rapanos. This time, however, the Court seized the opportunity to clarify WOTUS ambiguities and determine which wetlands, if any, qualify for federal protections under the CWA.

While this Comment focuses on Sackett v. EPA, a 2023 Supreme Court decision, the Sackett saga spans nearly two decades of litigation and includes an additional Supreme Court case: Sackett v. EPA, often referred to as “Sackett I.” The litigation began in 2004, when Michael and Chantell Sackett began backfilling their Idahoan lot to build a “modest” home. Though the lot was separated from nearby Priest Lake—an uncontested, traditionally navigable water—the EPA still deemed the lot an adjacent, ecologically important wetland using Justice Kennedy’s significant nexus test from Rapanos. Because the Sacketts did not acquire a Section 404 permit before the backfilling, the EPA issued an administrative compliance order under the CWA, requiring the Sacketts to cease development and restore the wetland.


91. Id.


95. Id. While technically known as Sackett v. EPA II, this Comment will refer to this 2023 decision solely as Sackett or Sackett v. EPA.


97. Sackett, 143 S. Ct. at 1331.

98. The EPA found that the Sackett’s lot was ecologically connected to the Kalispell Bay Fen, a large nearby wetland complex, that “significantly affect[ed] the ecology of Priest Lake.” Id. at 1332.


100. Sackett, 143 S. Ct. at 1331.
Foundation ("PLF"),\textsuperscript{101} first challenged the order as a final agency action subject to judicial review under the Administrative Procedure Act in \textit{Sackett I}.\textsuperscript{102} The case rose to the Supreme Court, and in 2012, the Court held that the order was final agency action, giving the Sacketts the green light to challenge it in federal court.\textsuperscript{103}

The Sacketts directed their second challenge to the substance of the CWA, arguing "that the EPA lacked jurisdiction [to issue the compliance order] because any wetlands on their property were not [WOTUS]."\textsuperscript{104} After a lengthy delay,\textsuperscript{105} the case again rose to the Supreme Court. As described below,\textsuperscript{106} the Court unanimously rejected Justice Kennedy’s significant nexus test\textsuperscript{107}—with no mention of affording \textit{Chevron} deference to existing regulations surrounding WOTUS determinations—agreeing that the Sacketts’ wetlands did not qualify as WOTUS.\textsuperscript{108} However, the Court split 5–4 in deciding the new test for determining WOTUS,\textsuperscript{109} with the majority adopting the narrower \textit{Rapanos} plurality test.\textsuperscript{110} According to the \textit{Sackett} majority:

[\textit{The CWA extends to only those wetlands that are “as a practical matter indistinguishable from waters of the United States” This requires the party asserting jurisdiction over adjacent wetlands to establish “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”}]\textsuperscript{111}

\begin{footnotes}
\footnote{101}{The Pacific Legal Foundation is a legal group advocating for property rights and conservative values. PACIFIC LEGAL FOUND., https://pacificlegal.org/ (last visited Feb. 23, 2024).}
\footnote{102}{\textit{Sackett I}, 566 U.S. 120, 122 (2012).}
\footnote{103}{\textit{Id.} at 131.}
\footnote{104}{\textit{Sackett}, 143 S. Ct. at 1332.}
\footnote{105}{The case took nearly a decade to reach the Supreme Court again, in part because Michael Sackett spent more than a year in federal prison after attempting to solicit sex from a 12-year-old girl. Robin Bravender, \textit{Winner of Major SCOTUS Wetlands Case in Jail for Sex Crime}, E&E\textit{NEWS} (Mar. 31, 2016, 01:05PM), https://www.eenews.net/articles/winner-of-major-scotus-wetlands-case-in-jail-for-sex-crime/.}
\footnote{106}{See infra Section II.A.}
\footnote{107}{See \textit{Rapanos} v. United States, 547 U.S. at 715, 779 (2006) (Kennedy, J., concurring in the judgment).}
\footnote{108}{\textit{Sackett}, 143 S. Ct. at 1341.}
\footnote{109}{\textit{Id.}}
\footnote{110}{See supra text accompanying note 68.}
\footnote{111}{\textit{Sackett}, 143 S. Ct. at 1341 (internal citation omitted) (quoting \textit{Rapanos}, 547 U.S. at 742, 755 (2006)).}
\end{footnotes}
The majority’s test, hereinafter the “continuous surface connection test,” was severely rebuked by the other four concurring Justices. A detailed analysis of those concurrences, as well as of the majority opinion, follows.

II. ANALYSIS

While property rights activists rejoice over the “victory” of Sackett’s ruling and the EPA’s reduced “presence on private land,” environmentalists regard the decision as a catastrophic failure. Many fear its direct consequences: Because the new Sackett test significantly underplays the significance of hydrologic connections between water bodies, at least half of the nation’s ecologically-critical wetlands could lose their legal protections. But even more worry that Sackett prognosticates trouble for the CWA and other environmental statutes through a greater “unraveling of federal environmental law.”

This Part analyzes Sackett’s impacts—a question currently debated in earnest in the environmental law field—then proposes that the Supreme Court’s rigid new textualist approach symbolizes broader implications for environmental law. Section A explores how the Court used a new textualist approach in Sackett and underscores the issues with this approach, specifically in the context of clean water law. Section B then forecasts how

112. See id. at 1362 (Kavanaugh, J., concurring in the judgment); id. at 1359 (Kagan, J., concurring in the judgment).
113. See infra Section II.A.
116. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (“[W]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.” (quoting S. REP. NO. 92-414, at 77 (1972))).
119. See supra note 117.
120. See infra Section II.A.
Sackett could produce a ripple effect of unintended consequences, particularly in the regulatory sphere and for environmental justice.121 Section C considers County of Maui as a potential pragmatic solution to counteract the limiting effects of Sackett.122 The purpose of this Section is to demonstrate the dichotomy of the new textualist Sackett and the pragmatic County of Maui, allowing Section D to posit that new textualism is poorly suited for environmental law and rather, a pragmatic framework should be applied in matters of environmental law.123

A. The Fallacies of Sackett’s New Textualist Approach

Sackett sent shockwaves through the environmental community,124 with many concerns surrounding from the majority’s use of new textualism when interpreting the word “waters” in the greater “waters of the United States [WOTUS].”125 The following subsections describe the Court’s use of new textualism in Sackett, then critique the fallacies with this interpretive approach.126

1. New Textualism as Applied in Sackett

The new textualist approach to statutory interpretation examines the text in question as well as “the structure of the statute, interpretations given similar statutory provisions, and canons of statutory construction.”127 In other words, once a court ascertains the apparent meaning of the word in question, “consideration of legislative history becomes irrelevant.”128 New textualists often “oppose both intentionalist and purposivist theories of statutory construction as giving the judiciary too great a role in deciding the meaning

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121. See infra Section II.B.
122. See infra Section II.C.
123. See infra Section II.D.
126. See infra Sections II.A.1–3.
128. Id. at 623.
of a statute.” The late Justice Scalia championed new textualism, characterizing it as an approach to statutory interpretation that centers on the ordinary meaning of statutory terms:

[F]irst, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.

Professor Bradford Mank explains that “textualist judges selectively prefer clear-statement rules that favor states’ rights and private economic interests, and usually narrow a statute’s meaning. Clear-statement rules generally weaken legislative authority by ignoring a statute’s probable purpose unless Congress makes a very clear statement in the text of its intent.” Thus, Sackett’s focus on the ordinary meaning of “waters” and favor for a clear-cut statement for the definition of WOTUS—rather than the more flexible, agency-deferential significant nexus test—can be classified as new textualist interpretation.

As explained above, water bodies with the WOTUS designation are protected from unpermitted human intrusion, such as pollution and development, like backfilling wetlands. However, these protections elicit opposition from anti-regulatory ideologies, which has stirred considerable, decades-long controversy over what qualifies as WOTUS. As Sackett

129. Bradford Mank, Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies, 86 Ky. L.J. 527, 534 (1997). Professor Mank explains that the intentionalist approach to statutory interpretation “examine[s] both a statute’s text and legislative history,” and the purposivist approach additionally entails “estimate[ing] the statute’s spirit or purpose.” Id. at 529.
130. Id. at 533.
132. Mank, supra note 129, at 527.
134. See Sackett v. EPA, 143 S. Ct. 1322, 1361 (2023) (Kagan, J., dissenting) (recognizing the majority’s creation of a clear-statement rule). Granted, the majority considered “[s]tatutory history”—in three sentences—but did so in a way that supplemented the new, narrowed, clear-statement rule and ignored legislative history and Supreme Court precedent favoring an expansive WOTUS interpretation. Id. at 1337; see also infra Section II.A.2.
135. See supra text accompanying notes 53–56.
139. See supra Section I.C.
demonstrates, the controversy is particularly fiery when private property owners are barred from development on WOTUS-designated land. Justice Alito, author of the majority opinion and known for his anti-environmental track record, sought to resolve this controversy surrounding Congress’s “frustrating drafting choice,” referring to the definition of WOTUS test. Modeling his new textualist analysis on that of Justice Scalia in the Rapanos plurality, Justice Alito ousted the flexible significant nexus test and limited “waters” only to those described in ordinary parlance as “streams, oceans, rivers, and lakes,” effectively omitting half of the nation’s wetlands and other hydrologically significant—but not traditionally navigable—waters. Following Justice Scalia’s lead, Justice Alito cited to the definition of “waters” in the 1954 edition of Webster’s New International Dictionary for support. But unlike Justice Scalia, who cautioned that the narrowed definition of waters should not be read to encourage loopholes, Justice Alito’s new textualist approach does not address these loopholes.

However, when the Court interpreted “adjacent”—an important task, given that the EPA previously interpreted that a wide swath of wetlands adjoining, adjacent, or nearby traditionally navigable waters qualified for CWA protections—the Court concerningly departed from its new textualism in favor of something more selective and outcome-driven.

140. Justice Alito describes the CWA as a “potent weapon” that can subject property owners to criminal penalties for violations. Sackett v. EPA, 143 S. Ct 1322, 1330 (2023).


142. Sackett, 143 S. Ct. at 1336 (“As noted, the Act applies to ‘navigable waters,’ which had a well-established meaning at the time of the CWA’s enactment. But the CWA complicates matters by proceeding to define ‘navigable waters’ as ‘the waters of the United States,’ §1362(7), which was decidedly not a well-known term of art. This frustrating drafting choice has led to decades of litigation, but we must try to make sense of the terms Congress chose to adopt.”).

143. See supra note 71 and accompanying text.

144. Sackett, 143 S. Ct. at 1336.

145. See supra note 117.

146. Sackett, 143 S. Ct. at 1336.

147. Compare Rapanos v. United States, 547 U.S. 715, 742–43 (2006) (stating that polluters cannot simply move their pipes further upstream to avoid permitting), with Sackett, 143 S. Ct. at 1340 (failing to caution against those looking to exploit loopholes).

148. See supra note 44 and accompanying text.

149. Sara Dewey, Sackett v. EPA: Departure from Textualism Significantly Limiting Clean Water Protection, HARV. L. SCH.: ENV’T & ENERGY L. PROGRAM 2, 3 (June 16, 2023),
Though the dictionary defines “adjacent” as both “contiguous” and “near,” the majority selected the former for its statute-narrowing effect, despite having hewed closely to the dictionary definition of “waters.” Justice Kavanaugh critiqued this selective textualism as “rewriting” the statute, while others argue this approach was not new textualism at all—only judicial activism. While the majority’s interpretation of “adjacent” demonstrates that selective textualism comes with its own suite of problems, it also highlights that words are inherently ambiguous, and ambiguity is resolved by differences in background and ideology. Essentially, a simple word may produce nine vastly different interpretations.

Justices Kavanaugh and Kagan, who authored concurrences only in the judgment and disagreed fervently with the narrowed continuous surface connection test, provided significant critique of the majority’s approaches. Justice Kavanaugh stated that he would “stick to the text,” indicating his preference to preserve the word “adjacent,” as written in the statute to mean nearby, rather than the majority’s interpretation of the term as “adjoining,” or directly abutting. While Justice Kavanaugh’s opinion began by analyzing the statutory text, he then explored extratextual consequences of the new rule, including its inconsistency with “[l]ongstanding agency practice”: a reference to the EPA and U.S. Army Corps’ definitions of waters for forty-five years. Justice Kavanaugh even considered the new rule’s contradiction to the science that overwhelmingly confirms the importance of invisible hydrologic connections between navigable waters and wetlands.


151. See supra text accompanying note 146.
152. Sackett, 143 S. Ct. at 1368 (Kavanaugh, J., concurring in the judgment). Justice Kagan also criticized the majority’s use of selective textualism in an earlier case, West Virginia v. EPA, discussed infra Section II.D.2. See West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (“The current Court is textualist only when being so suits it.”).
153. See Dewey, supra note 149, at 2, 3.
154. See Albert C. Lin, Erosive Interpretation of Environmental Law in the Supreme Court’s 2003-04 Term, 42 HOU S. L. REV. 565, 577 (2005) (“When the text yields no clear answer, judicial choice in interpretation is inevitable, and the selection of a particular dictionary definition may determine the outcome.”).
155. See id.
156. See Sackett, 143 S. Ct. at 1359 (Kagan, J., concurring in the judgement); id. at 1362 (Kavanaugh, J., concurring in the judgment).
157. Id. at 1369 (Kavanagh, J., concurring in the judgement).
158. Id. at 1363–64.
even if the boundary between both is distinguishable. Though Justice Kavanaugh is ideologically conservative, his criticism indicates that new “textualism is not inherently conservative,” but is instead “tied by contingent connections such as political movements and campaigns to conservatism.”

Though some scholars encourage pro-environmental petitioners to use new textualism to create winning arguments, it seems more likely that leaning strictly into new textualism arguments will not overcome the conservative ideology that venerates less regulation.

Highlighting many of the same points as Justice Kavanaugh, Justice Kagan disapproved of the continuous surface connection test, borne from an analysis devoid of consideration for congressional intent, modern science, and environmental consequences. The following subsections explore these issues in greater detail.

2. Sackett Jettisons the CWA’s Statutory Purpose

As discussed, the CWA served as a congressional solution to years of failed, hands-off attempts to regulate water pollution. The statute was passed with ambitious purpose “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and lofty goals to eliminate all pollution from navigable waters by 1985. The CWA’s legislative history evidences that Congress intended the definition of WOTUS to be broad, as “Congress rejected measures designed to curb the Corps’ jurisdiction [over wetlands] . . . because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of ‘navigable waters.’” Courts have also interpreted the CWA to give

160. “The scientific evidence overwhelmingly demonstrates that wetlands separated from covered waters by those kinds of berms or barriers, for example, still play an important role in protecting neighboring and downstream waters, including by filtering pollutants, storing water, and providing flood control.” Sackett, 143 S. Ct. at 1368 (Kavanaugh, J., concurring in the judgement).
163. Id. at 830; see also Sackett, 143 S. Ct. 1343 (rebuking the EPA’s ability to “muster[] only a weak textual argument.”).
165. See infra Sections II.A.1–2.
166. See supra Section I.A.
Corps broad jurisdiction over a wide class of WOTUS, because “due to the nature of the water system, the very evil that Congress sought to interdict—the befouling of the [WOTUS]—would likely occur were the [Corps’] jurisdiction to stop short of wetlands.”

Sackett’s new textualist interpretation threatens the ability to end this “befouling” with a stern rejection of the CWA’s aforementioned purpose and legislative history, which is a hallmark of the new textualist approach. With focus on the dictionary definitions of the terms “waters” and “adjacent,” the majority created a “pop-up clear-statement rule” in order “to cabin the anti-pollution actions Congress thought appropriate.” The effect, in turn, will muddle “Congress’s intention in crafting these statutes to address actual, real-world problems,” such as widespread water pollution. With Congress’s intention only background noise, Justice Kagan seems correct in her observation that the Court has “appoint[ed] . . . itself as the national decision-maker on environmental policy.”

3. Sackett Ignores the Science the Court has Previously Acknowledged and Accepted

Textualism also can produce inconsistent results with previous Supreme Court case law by ignoring the evolution of certain statutory terms and scientific discoveries. For example, by focusing on only the visible surface connections between traditionally navigable water bodies, Sackett’s textualist interpretation effectively overrules Riverside Bayview, which has guided wetland law since 1985 under the premise that “the limit of ‘waters’ is far from obvious.” Interestingly, Justice White in Riverside Bayview cautioned against purely textualist interpretations of the CWA. And at the core of Justice Kennedy’s significant nexus test in Rapanos, the case from which the Sackett Court lifted the new WOTUS rule, was recognition that

170. Id.
171. See supra text accompanying notes 127–132.
172. Sackett, 143 S. Ct. at 1361 (Kagan, J., concurring in the judgment).
175. Riverside Bayview, 474 U.S. at 132; see also Jaffe, supra note 6, 10804.
176. Riverside Bayview, 474 U.S. at 132 (“On a purely linguistic level, it may appear unreasonable to classify ‘lands,’ wet or otherwise, as ‘waters.’ Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under [CWA] § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat.”).
“wetlands are not simply moist patches of earth,” but rather something more complex and worthy of federal protection.\(^{177}\)

*Sackett* also provides puzzling contrast to *County of Maui*, a case decided by virtually the same bench three years earlier.\(^{178}\) In *Maui*, the Court specifically recognized that even invisible sources of pollution, such as groundwater, impact traditional navigable waters eventually.\(^{179}\) By relying on surface connections, in addition to disregarding the word “adjacent,”\(^{180}\) *Sackett* discounts the understanding of hydrology demonstrated in *Maui*, causing drastic dissonance between two cases that, as of now, are still good law. This disregard of precedent also rivals other controversial, recent cases where the Court seems to take the doctrine as a mere suggestion,\(^{181}\) indicating a troubling pattern from the “[C]ourt without precedent.”\(^{182}\)

### B. Sackett Suggests a “[G]reat [U]nraveling” of Environmental Law

Aside from issues surrounding the Court’s growing disregard of congressional intent behind the CWA and accepted hydrologic science, *Sackett* suggests that weakened environmental regulations at the hands of new textualist interpreters can launch a spiral of negative implications, both direct and indirect—in other words, a “great unraveling of federal environmental law.”\(^{183}\) As such, *Sackett* has sparked one of the most pressing questions in environmental law yet: How far do *Sackett*’s tendrils stretch?\(^{184}\)

This Section explores the ripple effects of the case, emphasizing specifically...
that the populations most endangered by Sackett live in environmental justice communities.  

1. Sackett’s Impact on Regulation and Environmental Justice

Scholars and commentators have spent a great deal of time forecasting the implications of Sackett, including the implications for the regulatory system, states, and environmental justice communities. First, Sackett also ignites more regulatory confusion with its ousting of the significant nexus test, despite the Justices’ supposed attempt to bring clarity to the fractured Rapanos rules. However, all Circuits applied some variation of the significant nexus test, leading most state and federal agencies to use the significant nexus test in their jurisdictional determinations. While Sackett certainly removes protections for intermittent waters, the case raises confusion about the status of small streams and tributaries, while also requiring agencies to define “indistinguishable” and “continuous surface connection.” This uncertainty produces a wave of questions and requires resources to resolve the confusion with planning and staff training, which is problematic for state environmental agencies already lacking on resources.

185. See supra Sections II.B.1–II.B.2.
186. See McElfish, supra note 118.
187. Commentators suggest that Sackett’s 9-0 vote—though accompanied by two concurrences that looked more like dissents—was due to the Justices’ desire to distill the test into one for clarity. See, e.g., Rafe Petersen & Alexandra E. Ward, Sackett Decision Provides Clarity, Substantially Restricts Clean Water Act Jurisdiction Scope, HOLLAND & KNIGHT (May 26, 2023), https://www.hklaw.com/en/insights/publications/2023/05/sackett-decision-provides-clarity-substantially.
188. HANDBOOK, supra note 30, at 23.
190. See SULLIVAN, supra note 117, at 6.
Further, states and Tribes are left responsible to fill the regulatory holes *Sackett* leaves in wetland and water law.\(^{193}\) While several states and Tribes do already “fill the federal gap,”\(^{194}\) other “[s]tates must determine whether, and how, to keep up with shifting federal coverage by adopting and implementing state legal protections for waters that were formerly, but are no longer, protected by federal law.”\(^{195}\) Twenty-three states, the District of Columbia, and several U.S. territories, which “represent[] the lion’s share of the country by acreage,” are subject to the new *Sackett* rule in lieu of independent state laws.\(^{196}\) And even more states—for a total of thirty-six—limit state or local regulators from protecting aquatic resources that have lost CWA coverage with “‘no more stringent than’ [federal] law[]” rules or property rights restrictions.\(^{197}\) If those jurisdictions wish to provide greater protection of their water resources, they will need to amend their respective laws.\(^{198}\)

Several Native American Tribes also filed an amicus brief in support of the EPA in *Sackett*, describing the difficulties of invoking their authority to protect waters not deemed WOTUS.\(^{199}\) The Tribes explained that “EPA will approve water quality standards only for waters of the United States, so even if a tribe’s laws extend to a broader scope of waters, it cannot invoke its . . . authority to protect waters not deemed [WOTUS].”\(^{200}\) Thus, whether by states’ and Tribes’ lack of resources or will to fill regulatory gaps, *Sackett* encourages retreat from more stringent resource protections.\(^{201}\) The result: a patchwork of state and Tribal laws that result in unequal protection of resources and communities.\(^{202}\) Because resources flow and ecosystems

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194. Id.


198. See Ehrman & Craig, supra note 193.


200. Id. at 20.

201. Id.

202. Certain states have an “uneven record of preserving vital water resources.” Colby Galliher, *Sackett v. EPA’s Aftermath and the Risk of Inflamed Western Water Conflict*, JUST SEC. (Oct. 2,
connect regardless of manmade state borders, lack of protection in one area can upset a neighboring system, despite the neighboring states’ stringent protections.  

Additionally, several Tribes express concern over the quality and quantity of consultation opportunities for cultural resources as a result of Sackett’s narrowing effect. Section 7 of the Endangered Species Act (“ESA”) and Section 106 of the National Historic Preservation Act (“NHPA”), for instance, require that Tribes have consultation opportunities to advise of any negative impacts of major development projects on “cultural touchstones.” Whether the focus of the consultation is a culturally important species or sacred land area, the process is critical for fairness and equity in the regulatory framework. However, “[r]eviews under those federal statutes are often prompted by a jurisdictional determination on ‘adjacent’ wetlands under the CWA.” In their amicus brief supporting the EPA in Sackett, several Tribal representatives warned that “[e]liminating federal jurisdiction and permitting requirements would strip away other federal protections like those under the [NHPA], a law that is integral to the protection of important tribal historic sites.” Professor Cale Jaffe underscores “the intentionality behind the daisy chain connecting” the CWA and the consultation requirements under the ESA and NHPA, fearing that as Sackett removes the Section 404 hook that would trigger the need to apply for Section 404 permits to develop wetlands, consultation processes under other environmental statutes may not be triggered. This risk, then, is “a wide array of harms [that] might never be evaluated.”
2. Sackett’s Impact on the NPDES Program and Environmental Justice

Sackett’s restricted WOTUS definition will likely impact other provisions of the CWA that depend on WOTUS as a key jurisdictional term. For example, the narrowing of wetlands eligible for protections under the CWA raises additional concerns about Sackett’s indirect impacts on water quality, particularly its effects on the Section 402 program. As described above, the NPDES program prohibits unpermitted pollution discharges from any point source into WOTUS. Post-Sackett, many point sources may no longer need NPDES permits to operate as long as they do not discharge into the now-narrowed class of federal jurisdictional waters. Problematically, this phenomenon compounds unabated and unmonitored water pollution commonplace in environmental justice communities. Communities throughout “Cancer Alley,” for example, have historically been subject to pollution from pervasive oil processing and chemical manufacturing operations. While grassroots coalitions, such as Rise St. James, have succeeded in challenging the siting of many large pollution operations, Sackett hinders these efforts, enabling an overabundance of toxic polluters to “have the legal precedence to proceed with . . . largely unregulated pollution.”

Those residing in environmental justice communities of the western states and tribal reservations may also experience heightened effects of this interplay between eviscerated WOTUS protections and the NPDES

211. The NPDES program requires permits for discharge of pollutants from point sources into WOTUS. 33 U.S.C. §§ 1311, 1342.
212. Ehrman & Craig, supra note 193.
213. See supra Section I.B.
217. “Cancer Alley” . . . is an area along the Mississippi River spanning from Baton Rouge to New Orleans, Louisiana, [home to] over 150 petrochemical plants and refineries . . . . The media and local inhabitants dubbed the region “Cancer Alley” after noticing that many residents were dying after developing different types of cancer.” Idna G. Castellon, Cancer Alley and the Fight Against Environmental Racism, 32 VILL. ENV’T. L.J. 15, 15 (2021).
219. See Louis, supra note 124.
For example, ephemeral streams provide potable water for 117 million people in the American West. However, in the absence of federal protections for these streams and other intermittent waters, pollution discharges may flow freely through some Americans’ only water sources. Additionally, Tribal amici in Sackett cautioned that “[e]xcluding entire categories of waters from Clean Water Act protections—as petitioners propose[d]—would undercut Tribes’ ability to protect against cross-border pollution, including destruction of upstream wetlands that protect tribal waters, and harm treaty protections.” The Tribes cited several mining operations that, without NPDES permits, would discharge harmful mining slurries into ephemeral streams. Without federal protection for some of these streams, Tribes lose “the tools and regulatory structure of the [CWA] to protect its diminishing rivers and streams from these discharges,” compromising food and water sources. In addition to water quality impacts, some commentators have forecasted that a decline in water quantity—as newly unprotected waters disappear with development—could ignite the “recrudescence of bitter fights over the rights to an ever-shrinking resource.” Compounded by the Supreme Court’s decision in Arizona v. Navajo Nation, which held the federal government has an obligation to secure water rights for tribal reservations, consequences could be dire.

While the Sackett majority’s analysis was rich with concern about the rights of property owners, it lacked even a whisper of concern for the impacts of the narrowed rule on environmental justice communities. But as Sackett’s new textualist rule sparks worry about the future of clean water in environmental justice communities, litigators look hopefully to the pragmatism of County of Maui as a potential solution.

220. See Galliher, supra note 202.
221. Id.
222. Id.
223. Amicus Brief, supra note 199, at 3.
224. Amici point to an open-pit sulfide mine in the headwater bogs and wetlands of the St. Louis River, phosphate mine dumping upstream of the Fort Hall Reservation in Idaho, and mines surrounding the Pueblo Reservation. Id. at 9–14.
225. Id. at 10.
226. See Galliher, supra note 202.
228. Id. at 1814. In Navajo Nation, decided only two months before Sackett, the Court held that the United States Government does not have an affirmative treaty or trust obligation to secure water rights for the Navajo Nation, and by implication, other Tribal Nations. Id. The Navajo Nation thus faces further difficulty in asserting sufficient water rights as the Colorado River dries up. Id. at 1833 (Gorsuch, J., dissenting).
229. See supra note 140 and accompanying text.
230. See infra Section II.C.
C. County of Maui: Two Steps Forward to Sackett’s One Step Back

When the Supreme Court published *County of Maui*, many environmentalists were optimistic about the new functional equivalent standard’s potential to extend federal protections to more pollution sources and receiving waters. The *County of Maui* Court interpreted the CWA’s point source definition pragmatically by combining purposivism and textualism, and “[w]hile the majority [did] look to the textual meaning of the CWA, they also rel[ied] on the intent of Congress and look[ed] to other non-textual sources other than dictionaries.” The opinion began with discerning the linguistic meaning of “from” alongside metaphors of meat drippings, gravy, buckets, and bathwater. The majority then considered the “power of modern science” to emphasize that groundwater, though not specified in the Act, is a powerful conduit of pollutants, and completely omitting it from regulation could undermine the Act’s purpose. It looked to statutory structure, legislative history, statutory intent, and “longstanding regulatory authority over land and groundwater.” Importantly, it considered the practical consequences of the Ninth Circuit’s expansive “fairly traceable” test juxtaposed against the petitioner County of Maui’s proposed narrower proximate cause test, aiming to find a middle ground between respecting private or State interests without forfeiting the Act’s purpose of restoring the integrity of the nation’s waters. The varied considerations lead to a flexible, multifactor test, appropriate for the complexity of the CWA and the factual differences between the various cases.

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233. Id. at 572–73. It is interesting to note, however, that like Sackett v. EPA, 143 S. Ct. 1322, 1336 (2023), the County of Maui majority also consulted a dictionary-like publication to counsel their decision; but unlike Sackett, the publication was the Van Nostrand’s Scientific Encyclopedia from 2008, not the Webster’s Dictionary from 1954. County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1470 (2020).

234. County of Maui, 140 S. Ct. at 1475–76.

235. Id. at 1470.

236. Id.

237. Id. at 1476.

238. Id. at 1470–71.

239. See supra text accompanying note 86.

240. Bale recognizes that this test is especially appropriate from a purposivist perspective. Bale, supra note 232, at 571.
Sackett does not overrule County of Maui; rather, County of Maui functions as a flexible case-by-case strategy to help fill the holes that Sackett sledgehammers through CWA protections. Additionally, by virtue of its pragmatic interpretation, County of Maui is capable of continued progress in bringing more pollution sources under uniform federal regulation, even in the wake of Sackett. Unlike Sackett, which limits clean water permitting based on the status of the receiving water, County of Maui’s standard focuses on the method of conveyance. Thus, to continue fighting for clean water, “[c]onservationists may need to focus more on the paths pollutants travel as they leave the kind of discrete point sources covered by County of Maui.”

Professor Robin Kundis Craig observes:

County of Maui thus indicates that the legal status of intermediate waters is largely irrelevant when pollutants that a point source releases reach relatively close traditional navigable waters in recognizable form relatively quickly. Thus, filling wetlands that are not immediately adjacent to [WOTUS] under Sackett could still be a “discharge of fill material” requiring a Section 404 permit— that is, an addition of fill material to a jurisdictional water from a point source (the equipment that did the filling)—if some of the fill material travels downstream to a larger navigable water.

County of Maui’s functional equivalent standard is applied on a case-by-case basis and likely will not counteract all of Sackett’s limitations, but the standard resembles the significant nexus test by relying on underground or indirect connections between a point source’s pollution and a receiving navigable water. This strategy could prove useful for the Tribes concerned that in a post-Sackett world, mining operations could discharge toxins unabatedly into ephemeral streams, which are no longer protected federally. If petitioners were to trace discharge from a mining operation’s pipe, channel, or other discrete conveyance to pollution of a navigable water, then the facility may require a NPDES permit as a functional

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242. See supra text accompanying note 84.
243. Jaffe, supra note 6, at 10802.
244. See Kundis Craig, supra note 241
245. This is the essence of the functional equivalent test. County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1476 (2020).
246. See supra note 224 and accompanying text.
247. These are examples of point sources regulated under the NPDES program. 33 U.S.C. §§ 1342, 1362(14).
equivalent of a direct discharge.\textsuperscript{248} Here, the benefit of \textit{County of Maui} is bringing polluting facilities back under the monitoring, reporting, and effluent control programs of the CWA.\textsuperscript{249}

In the same manner, the functional equivalent test can address pollution that does not reach post-\textit{Sackett} jurisdictional waters or infiltrates groundwater in other environmental justice communities. For example, some scholars have explored \textit{County of Maui} as a tool to address pollution from concentrated animal feeding operations ("CAFOs"),\textsuperscript{250} industrial-sized farming operations explicitly recognized as point sources under the CWA.\textsuperscript{251} But while they produce health-endangering quantities of toxins,\textsuperscript{252} many CAFOs evade traditional NPDES permitting because runoff may flow into waters without federal protections, or in some instances, totally infiltrates before reaching any surface water.\textsuperscript{253} Further, other farming operations that do not meet certain size and characteristic requirements are not deemed CAFOs regulable under the CWA, even though they still pollute various environmental media.\textsuperscript{254} More often than not, CAFOs “are disproportionately situated in regions populated by minority, indigent, and uneducated groups who consequently are the primary bearers of the ill-effects of these inhumane operations.”\textsuperscript{255}

To reduce these pollution issues, litigators may seek to use \textit{County of Maui} to connect pollution conveyed through groundwater, which, like “[\textit{v}irtually all water, polluted or not, eventually makes its way to navigable

\textsuperscript{248} A court would additionally need to apply the seven \textit{County of Maui} factors described in the text accompanying note 86, \textit{supra}, to find a functional equivalent. Many scholars have proposed frameworks for how to apply the factors, as well as additional indicia for finding a functional equivalent. See generally, e.g., Rafael Alberto Avila, \textit{Defining, Supporting, and Scoping an Impact-Based Approach to Maui’s “Functional Equivalent Standard for Clean Water Act Permitting}, 48 ECOLOGY L.Q. 349 (2021); Susan Parker Bodine, \textit{Maui: A Discernible, Confined, and Discrete Path Forward}, 52 TEX. ENV’T. L.J. 1 (2023).

\textsuperscript{249} Many permits under the NPDES program have effluent limits and require regular reporting and monitoring of discharge. The EPA or state enforcement entity then takes action for exceedances. See generally NPDES, EPA (Feb. 21, 2024), https://www.epa.gov/npdes.

\textsuperscript{250} See generally Shawn D. Ren, \textit{Protecting Our At-Risk Communities from the Ground(water) Up: CAFOs, the Clean Water Act, and a Framework for Offering Clarity to an Imprecise Maui Test}, 71 EMORY L.J. 563 (2022).

\textsuperscript{251} 33 U.S.C. § 1362(14).

\textsuperscript{252} CAFOs produce wastewater with nitrogen, phosphorus, organic matter, sediments, pathogens, hormones, and antibiotics. \textit{Animal Feeding Operations (AFOs), EPA (Jan. 24, 2024)}, https://www.epa.gov/npdes/animal-feeding-operations-afos.

\textsuperscript{253} Ren, \textit{supra} note 250, at 567.

\textsuperscript{254} Id.

\textsuperscript{255} Id. at 566. Ren also indicates that “inhabitants in regions laden with CAFOs face a myriad of serious health complications, including irreversible brain damage, burning eyes, and ‘blue baby syndrome’ (also known as infant methemoglobinemia, a condition in which a baby’s skin turns blue from insufficient oxygen in the blood).” Id. at 565–66.
water.\textsuperscript{256} CAFOs produce bacteria, which can be detected through forms of pathogen tracking,\textsuperscript{257} in addition to dye tracers used to detect pollutants discharged from a point source.\textsuperscript{258} Further applying the seven \textit{County of Maui} factors persuasively\textsuperscript{259} may establish a CAFO as a functional equivalent of a direct discharge, thus requiring a NPDES permit. Although there are limitations on challenging the agricultural industry,\textsuperscript{260} \textit{County of Maui}’s functional equivalent standard is an uplifting tool that makes it possible for environmental petitioners, particularly in environmental justice communities, to address pollution.

One may even ponder whether \textit{County of Maui} could be applied in some manner to the Sackett’s property, as the wetlands around the property conduct groundwater into Priest Lake at a rate of nine to thirteen feet per day.\textsuperscript{261} Notwithstanding the hutzpah an agency would need to attempt this maneuver after nearly twenty years of \textit{Sackett} litigation,\textsuperscript{262} the question is worth a passing thought. In time, the Supreme Court may recognize \textit{County of Maui} as a powerful \textit{Sackett} workaround and cabin the former’s application to select situations.\textsuperscript{263} Before this happens, though, litigators should use \textit{County of Maui} as a vehicle to expand CWA protections:\textsuperscript{264} a capability borne of its blended interpretation styles.\textsuperscript{265}

\textsuperscript{256} County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1470 (2020).
\textsuperscript{257} Microbial source tracking “can provide an accurate attribution of the bacteria to specified sources.” Ren, supra note 250, at 585–86.
\textsuperscript{258} The Hawai’i Wildlife Fund used dye tracing to detect pollutants from the wastewater treatment plant’s injection wells in the Pacific Ocean. Haw. Wildlife Fund v. County of Maui, 886 F.3d 737, 742–43 (9th Cir. 2018), vacated, 140 S. Ct. 1462 (2020).
\textsuperscript{259} See supra note 248.
\textsuperscript{261} Jaffe, supra note 6, at 10808.
\textsuperscript{264} Id.
\textsuperscript{265} See supra text accompanying note 232.
D. Sackett Demonstrates Environmental Textualism’s Implications—
and the Need for a Unique Type of Interpretation—for
Environmental Law as a Whole

Having established the dichotomy between new textualism in Sackett
and pragmatism in County of Maui, this Part broadens the analysis to
examine new textualism in other types of environmental law. Additionally,
it explores how new textualism, combined with the major questions doctrine,
forecasts constraints on the administrative state in promulgating
environmental regulations. Finally, it offers a solution to these issues by
looking to pragmatism, demonstrated by County of Maui, before concluding
with a few thoughts about what courts should consider in their pragmatic
approaches to interpretation in environmental law.

1. Environmental Textualism’s Problems are Not Siloed Only to
Sackett

Sackett is not a fringe example of environmental textualism’s
inconsistencies and issues for environmental law; rather, the Court has
shifted to a more new textualist approach to statutory interpretation in
environmental law over the recent decades. In the CWA sector, Professor
Stephen Johnson explains that in the years following the CWA’s passage, the
Court “focused heavily on legislative history and the purpose of the law in
§ 101(a) and interpreted the law to carry out that purpose. Over time, though, the
Court adopted a more textualist approach to interpreting the Clean Water Act, and
beginning with the Rehnquist Court, the Court’s approach to statutory interpretation became more textualist.

The Court has also applied new textualist ideals to interpretations of
other environmental statutes, including the Clean Air Act (“CAA”). Like
the CWA, Congress imbued the CAA with goals focused intently on
protecting human health and the environment from pollution, rather than

266. See supra Sections II.A–C.
267. See infra Section II.D.1.
268. See infra Section II.D.2.
269. See infra Section II.D.3.
270. See Johnson, supra note 25, at 362. Professor Johnson notes that in the years following the
CWA’s passage, the Court “focused heavily on legislative history and the purpose of the law in
§ 101(a) and interpreted the law to carry out that purpose. Over time, though, the Court adopted a
more textualist approach to interpreting the Clean Water Act, and beginning with the Rehnquist
Court, the Court began to focus on protecting states’ rights.” Id. (footnotes omitted).
271. Id.
272. Id.
273. David M. Driesen, Thomas M. Keck & Brandon T. Metroka, Half a Century of Supreme
Court Clean Air Act Interpretation: Purposivism, Textualism, Dynamism, and Activism, 75 WASH.
to achieve a balance between environmental protection and competing considerations.\textsuperscript{275} But in \textit{ Utility Air Regulatory Group v. EPA},\textsuperscript{276} the Court again ignored these congressional purposes as it evaluated whether the CAA’s delegation of authority to the EPA to regulate “any air pollutant” actually meant “any air pollutant,” including greenhouse gases from stationary sources.\textsuperscript{277} Writing for the majority, Justice Scalia seemingly “engineered an escape from the statute’s literal language with respect to coverage of pollutants in order to adapt the statute . . . in a manner the Supreme Court found more sensible than [the] EPA’s approach.”\textsuperscript{278} Therefore, the majority carved out an exception to the statute, in which certain sources were exempt from greenhouse gas permitting.\textsuperscript{279} In partial dissent, Justice Breyer demonstrated that if one were to interpret “any air pollutant” broadly and shift the restriction to the size of sources to be regulated, the CAA instead would exempt certain small sources, not entire classes of pollutants, from regulation,\textsuperscript{280} highlighting that solely interpreting statutory text can produce variable results.

Professor Albert Lin also highlights new textualism’s limitations in \textit{Engine Manufacturers Association v. South Coast Air Quality Management District}.\textsuperscript{281} Justice Scalia drafted the opinion as an ode to new textualism, this time using dictionaries to determine the meaning of the word “standard” with respect to vehicle fleet rules under Section 209 of the CAA.\textsuperscript{282} In the process of invalidating an EPA rule prohibiting the purchase of various vehicles that did not meet stringent emissions standards, the majority ignored the goals, policy rationales, and legislative history of the relevant section of the CAA.\textsuperscript{283} Professor Lin states that “[t]he majority’s refusal to look beyond the plain language of the statute—and the dictionary definition of ‘standard’—deprived states and local air districts of one tool for achieving the air quality standards mandated by the CAA.”\textsuperscript{284}

On the other hand, it bears mentioning that occasionally, primarily textualist interpretations do align with the environmental priorities of federal

\textsuperscript{275} Driesen et al., \textit{supra} note 273, at 1788. Some of these goals are also to be accomplished without consideration of costs, such as setting National Ambient Air Quality Standards under CAA § 109(b). \textit{See} Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 486 (2001).
\textsuperscript{276} 573 U.S. 302 (2014).
\textsuperscript{277} \textit{Id.} at 307.
\textsuperscript{278} Driesen et al., \textit{supra} note 273, at 1832.
\textsuperscript{279} \textit{Utility Air Regulatory Group,} 573 U.S. at 315–28.
\textsuperscript{279} \textit{Id.} at 334–40 (Breyer, J., concurring in part and dissenting in part).
\textsuperscript{281} \textit{Engine Mfrs. Ass’n,} 541 U.S. at 253.
\textsuperscript{282} Lin, \textit{supra} note 281, at 583.
\textsuperscript{283} \textit{Id.} at 585.
In Tennessee Valley Authority v. Hill, the Court determined that the closure of the gates of the Tennessee River’s Tellico Dam would likely eradicate the endangered snail darter. Despite pressures from the Tennessee Valley Authority, which had expended millions of dollars on the Dam, the Court issued the injunction. According to the Court, “[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in [Section 7] of the Endangered Species Act,” which declares that federal projects shall “not jeopardize the continued existence” of any endangered species.

But if the juxtaposition of the aforementioned cases tells us anything, it is that new textualism in environmental law produces outcomes that only occasionally align with the congressional intent behind many environmental statutes—passed during times of national outcry for stricter environmental standards—or account for new legal, scientific, or social issues in the environmental sector. Therefore, sole reliance on new textualism to interpret environmental statutes “is a deeply flawed strategy,” as its rigid focus on the plain meaning of words and favoring clear-cut rules is largely an inappropriate strategy for a dynamic socioenvironmental sphere.

2. Sackett’s New Textualist Approach Drives Another Nail into Chevron Deference’s Coffin

Sackett’s new textualist approach also represents the latest assault on the administrative state by further indicating the Court’s desire to dispose of—or massively maim—Chevron deference, portending massive

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287. The Dam’s structure was fully constructed, save for the final closure of the Dam’s gates. Id. at 170.
288. Id. at 173.
289. Id. at 172.
290. Id. at 173 (quoting 16 U.S.C. § 1536).
291. See supra text accompanying notes 276–290.
292. In addition to the CWA and CAA, many other statutes were also passed during the 1970s with ambitious goals to address nationwide environmental problems, including the National Environmental Policy Act (1969), Marine Mammal Protection Act (1972), Resource Conservation and Recovery Act (1976), and Comprehensive Environmental Response, Compensation, and Liability Act (1980). See generally William H. Rodgers, The Environmental Laws of the 1970s: They Looked Good on Paper, 12 Vt. J. Env’t L. 2 (2010).
293. Suitt, supra note 161, at 822.
294. See Jacobs, supra note 173, at 58:29 (describing challenges to the EPA in Sackett indicative of “a challenge not only to agencies’ authority, but to Congress’ authority to create agencies and to delegate tasks”).
disruption to normal operations of United States institutions. The story of Chevron deference began in 1984, when the Court issued its seminal ruling in *Chevron v. NRDC.* Under the Court’s holding, a court shall defer to an executive agency’s interpretation of a statute if (1) “the statute is silent or ambiguous with respect to the specific issue,” and (2) the agency’s interpretation was “based on a permissible construction of the statute.”

*Chevron* deference is critical, because though Congress often legislates on technical and complex matters, it lacks both the time and the expertise to do “the fine-grained analysis” requisite for a statute’s often numerous regulations. Thus, “regulators have an important role . . . of applying their expertise to Congress’s goals, aspirations, intent, [and] statutory language.” Using the tool of *Chevron* deference in the environmental context, the EPA and U.S. Army Corps of Engineers (among other federal agencies) employ experts of environmental science and policy to interpret, implement, and enforce regulations for rapidly-changing environmental conditions. While some anti-regulatory proponents advocate for the ousting of bureaucratic agencies, we simply “can’t administer a country without them”—nor can we administer a country without *Chevron* deference.

Notwithstanding these principles—and general principles of *stare decisis—Sackett* erased forty-five years of regulatory discretion and rules, including rules that lasted transitions through ideologically opposite administrations, only to be replaced by a clear-cut rule more restrictive than even clean water regulations of the Trump era. The Court’s decision to assign a dictionary definition to a highly complex term further belittled *Chevron* deference, which was not even mentioned in the EPA’s Opposition

297. Id. at 842–43.
299. Id.
300. Additionally, the National Oceanic and Atmospheric Administration, Fish and Wildlife Service, Forest Service, and Department of Agriculture oversee and administer environmental regulations.
302. See Jacobs, supra note 173, at 12:58.
303. Jaffe, supra note 6, at 10804 (“The five-justice majority focused on revisiting protections for clearly adjacent wetlands that had long been settled (i.e., critical wetlands that would even have been protected under the Trump Administration’s WOTUS regulation).”); see also supra note 71.
Brief in *Sackett*. Scholars have questioned the doctrine’s longevity for years, but the *Sackett* Court’s appreciation for new textualist canons seems to divert technical decision-making authority further from expert agencies, thus “aggrandiz[ing] the lawmaking power of federal courts.” The Supreme Court will decide whether to overrule or massively weaken *Chevron* deference in its upcoming term, as the Court has heard oral arguments in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*. Many anticipate that the Court will officially jettison the doctrine, leaving expert agencies restricted in their administration and interpretation of environmental statutes.

While the abandonment of *Chevron* will likely put the administrative branch into a state of “convulsive shock,” the Court’s increased use of the major questions doctrine could have further paralyzing effects. Like new textualism’s favor for clear-statement rules, the major questions doctrine similarly requires “agencies . . . to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance.” But what constitutes clear congressional authorization is actually quite vague, and “the Court is still figuring out for itself what constitutes an extraordinary case of economic or political significance,

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306. Jaffe, supra note 6, at 10808 (“Gone is the deference owed to 45 years of agency expertise, which had documented a need to protect wetlands with a strong and sustained groundwater connection to navigable-in-fact waters.”).
307. See Guerra, supra note 305, at 306.
308. The exact issue is “[w]hether the court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.” *Loper Bright Brief*, supra note 295, at 1 (citation omitted).
310. 62 F.4th 621 (1st Cir. 2023), cert. granted, 144 S. Ct. 325 (2023).
311. See Guerra, supra note 305, at 303 (“The betting odds for *Chevron*’s survival do not look good.”)
312. See Freeman, supra note 10, at 10189 (“The fact that many important regulatory statutes are old and quite outdated creates the inevitable need for agency discretion to adapt these statutes to new problems, which opens the door to novel and potentially far-reaching interpretations.”).
314. See Mank, supra note 130, at 533.
315. West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., dissenting) (internal quotation marks omitted).
especially in the context of the EPA.”316 The result, therefore, is a chilling effect on “both congressional and agency action.”317

The Sackett majority indicated its secondary use of the major questions doctrine, following on the heels of one of the most noteworthy MQD cases in history: West Virginia v. EPA.318 The parallels between West Virginia and Sackett led to Justice Kagan to copy-and-paste several lines from her dissent from the former into the latter, emphasizing her continued criticism for the majority’s chosen ways to weaken environmental regulations.319 Justice Kagan links the two cases to suggest that both textualism and major questions “can be used to tilt the analysis . . . before a classic textual analysis of the provisions in the [CWA] or in the [CAA] even starts.”320 And the synergy between West Virginia’s MQD and Sackett’s new textualism—collectively diverting deference away from agency experts—“paint[s] a picture of a Supreme Court that evinces a remarkable propensity for exerting its own policy preferences.”321 Thus, Sackett’s perpetuation of administrative branch fallout underscores yet another reason the decision is problematic.322

3. A Framework for a Pragmatic Interpretation Approach for Environmental Statutes

The new textualist approach to statutory interpretation disregards statutory purposes and congressional intent behind laws, as well as the practical consequences of judicial decisions.323 Juxtaposing new textualist cases against those that use pragmatic approaches, as in County of Maui,324 especially highlights that new textualism is ill-suited to maximize the objectives of environmental statutes. Of course, if Congress were to amend noteworthy environmental statutes to “explicitly provide that the laws should be interpreted to carry out their enacted purposes to protect public health and the environment,” then new textualist judges would find difficulty in avoiding these clear statutory directives.325 But until that day comes—if it

317. Id. at 848.
318. Id. at 846–56.
320. See Jacobs, supra note 173, at 44:43.
321. Jaffe, supra note 6, at 10806.
322. Id.
323. See supra text accompanying note 130.
324. See supra Section II.C.
ever does—the judiciary should jettison new textualism and instead employ pragmatism when interpreting environmental statutes.

With judicial pragmatism, judges must consider a wide variety of principles, such as the statute’s text and purpose, legislative history, and precedent to “choose the construction [of the statutory provision] that will have the most beneficial practical consequences,”326 as opposed to textualism’s narrow focus solely on a dictionary definition, ordinary meaning, or word’s usage in other parts of the statute.327 Professors William Eskridge and Philip Frickey describe this “practical reasoning” approach as one “that eschews objectivist theories in favor of a mixture of inductive and deductive reasoning,”328 but not to a point of unfettered judicial activism or “ad hocism.”329 Instead, pragmatism seeks to holistically balance a fulsome record of factors and practical consequences as a check on subjectivity.330 Besides, no interpretation approach is clear of bias or subjectivity,331 new textualist judges, for example, interpret words against the backdrop of their own background knowledge or experiences.332 Further, Justice Kavanaugh’s pragmatic concurrence in Sackett—joined by liberal Justices Sotomayor, Kagan, and Jackson—also suggests that pragmatism is not restricted to any one political ideology, indicating that environmental statutes may survive even the staunchest conservative motives if interpreted pragmatically.333

Because environmental law is unique, it requires a form of pragmatism tailored to its issues.334 First, interpreters of environmental statutes must start with the “aims,” or the legislative purposes, of environmental laws to

326. Robert J. Pushaw, Jr., Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court’s Approach to Statutory Interpretation, 51 GA. L. REV. 121, 123–24 (2016); see also Daniel A. Farber & Philip P. Frickey, Legislative Intent and Public Choice, 74 VA. L. REV. 423, 469 (1988) (nothing that the approach applies “as many tools as possible to help [judges] in the difficult task of applying statutes”).

327. See supra notes 127–134 and accompanying text.


329. Id. at 322.

330. Id. at 364.

331. See Suit, supra note 161, at 823 (“[D]espite the rhetoric with which textualism is often celebrated, textualism does not bar judicial activism or ideological influence; to the contrary, it may easily function as a conduit of judicial activism and ideology.”).

332. Id.

333. Justice Kavanaugh considered not only the text of the CWA, but also past agency interpretations, the science surrounding hydrology, and the loopholes. Sackett v. EPA, 143 S. Ct 1322, 1362–69 (2023) (Kavanaugh, J., concurring in the judgment).

334. Many fields of law are distinct and complex, and environmental law is no different, despite the Roberts Court’s tendency “to treat environmental cases as administrative, statutory, or constitutional law cases that merely arise in the context of environmental disputes.” Stephen M. Johnson, The Roberts Court and the Environment, 37 B.C. ENV’T AFFS. L. REV. 317, 318 (2010).
properly commence the statutory analysis. The purpose of many environmental statutes “is to address environmental harm...caused by human activity.” But if one adopts a new textualist approach and “does not account for the aims of a given statute, the outcome will eviscerate the laws, leaving only a shadow of their intended impact.” A judge should only “work back” from the identified statutory purpose to use other forms of statutory interpretation, such as textualism, when assessing a legal issue, but must be careful not to lose sight of the statutory purpose. This is the judiciary’s commitment to best uphold congressional intent to improve the environment, but also to avoid destroying crucial protections for people and ecosystems, as in Sackett.

Second, “because environmental problems are regularly changing and scientific knowledge of environmental issues are consistently advancing, statutory interpretation of environmental law must account for these changes by considering new legal issues that arise in relation to the aims of the statute.” County of Maui’s pragmatic fusion of textualism and purposivism, for example, provides an instructive starting point for the new legal issues that a court may consider. The majority started with the text, then considered a variety of factors like regulatory tradition, ecological consequences, statutory purpose and design, and legislative history. As with the CWA, each environmental statute retains a unique set of these factors that cannot be adequately considered with solely clear-cut, new textualist rules.

Judges using environmental pragmatism may also consider the “worldly implications of [a] decision” when interpreting environmental statutes,

336. Id. at 41.
337. Id. at 35.
338. Id. at 41.
339. See supra Sections II.A–B for a discussion of the impacts of Sackett.
340. Ziebarth, supra note 335, at 36.
341. See Bale, supra note 232, at 565.
342. Judges often consider both the scientific consensus and uncertainty in judicial decisions. However, judges should also be cautious to recognize where there is scientific uncertainty. In that case, a pragmatic judge may recognize that scientific uncertainty is best resolved by expert agencies. See generally Stephanie Tai, Uncertainty About Uncertainty: The Impact of Judicial Decisions on Assessing Scientific Uncertainty, 11 J. CONST. L. 671 (2009). Thus, pragmatism may also hold agency interpretations in high regard, even if Chevron is overruled. See supra Section III.D.2.
343. See supra notes 232–240 and accompanying text.
such as the impacts on environmental justice communities. As opposed to new textualism, which considers only “the text, the whole text, and nothing but the text,” pragmatism’s flexible approach can incorporate environmental justice into the equation. Some underscore that “[a] restrained, text-focused judiciary is required by the Constitution[],” and consideration of policy factors implicates the separation of powers. To be sure, “[t]here is no federal law governing environmental justice,” and many environmental justice communities lack direct causes of action to rectify environmental wrongs. But pragmatic judges may recognize that Congress did not discriminate in who should receive the benefits of reduced pollution in the CWA or other environmental laws; rather, it drafted statutes with broad statements directed towards collectively improving the nation’s wellbeing, not one neighborhood’s wellbeing.

Additionally, pragmatic judges must also consider environmental justice because it falls under the greater umbrella of civil rights, which has crucial equality and constitutional underpinnings. Thus, if the Roberts Court can dedicate paragraphs showing concern over property owners’ rights, it can surely do the same for those facing degraded and contaminated water, air, and resources. In fact, some environmental scholars have highlighted the “surprise” pragmatism of recent cases that provided unanticipated victories for civil and tribal rights, suggesting that the Roberts Court, despite its new textualist streak, is capable of embracing pragmatism.

346. See, for example, the likely implications of the Sackett decision on environmental justice communities in supra Section II.B.


348. Id.


350. In the CWA, for example, Congress simply aspired to “restore . . . the chemical, physical, and biological integrity of the Nation’s waters,” with no distinction on who should receive those benefits. 33 U.S.C. § 1251(a).

351. The environmental justice movement grew out of the civil rights movement, and while the two movements are similar, each has its own defining characteristics. Alice Kaswan, Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice”, 47 AM. U. L. REV. 221, 228 (1997).

352. See supra note 140.

CONCLUSION

This Comment has utilized Sackett and the CWA to broadly represent that judicial new textualism often reads the restorative and conservation purposes out of environmental statutes designed to protect life’s essentials, including water, air, and other environmental resources.354 However, it seeks to contribute to the field of environmental law by demonstrating that pragmatic, multifactor approaches to statutory interpretation, as exhibited in County of Maui, emphasize the practical effects of judicial decisions, including impacts on environmental justice communities.355 As daily headlines underscore the nation’s need to reverse vicious cycles of pollution and degradation,356 the judiciary must stay mindful of the ripple effects that one decision may have on human wellbeing and modern, ever-worsening environmental crises.357 Throwing the stone into the pond, in other words, must be done with care.358

354. See supra Sections II.A–B.
355. See supra Sections II.C–D.
357. Id.
358. See supra text accompanying note 1.