

C O M M E N T S

# SACKETT AND THE UNRAVELING OF FEDERAL ENVIRONMENTAL LAW

by Cale Jaffe

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On May 25, the U.S. Supreme Court dropped an absolute bombshell with its ruling in *Sackett v. Environmental Protection Agency*.<sup>1</sup> It is a monumental Clean Water Act (CWA)<sup>2</sup> case, but also much more than that. To be sure, the bold headline on *Sackett* is that the Court eliminated a major swath of CWA protections. But the subheading should focus on the serious threat that the Court's decision poses for federal environmental law writ large.

The majority opinion by Justice Samuel Alito held that wetlands just 300 feet from Priest Lake, Idaho, would no longer be considered “adjacent” to the lake and thus no longer covered by the CWA. As a result, those wetlands, along with many other aquatic resources across the country, lost their protected status as part of the “waters of the United States” (WOTUS).<sup>3</sup>

Much was written about *Sackett* in the immediate aftermath of the Court's pronouncement. Earthjustice's Kirti Datla opined that this was “terrible news for those who care about clean water,” with nearly 60 million acres of wetlands across the country “no longer protected by the Clean Water Act.”<sup>4</sup> Steven Burns, who advises clients on the management of coal ash lagoons that are potentially “adjacent” to federally protected rivers, celebrated that

“this is the strictest limit on regulatory authority under the wetland program the court has ever established.”<sup>5</sup>

The sheer breadth of wetland protections that have been lost is matched only by the remarkable scope of judicial authority that has been expanded. Start with the black-letter text of the CWA: §404(g) of the Act confirms the statute protects “navigable waters” along with “wetlands adjacent thereto.”<sup>6</sup> That language has been on the books since 1977. Every president charged with interpreting and enforcing the “wetlands adjacent” language—from Presidents Jimmy Carter through Joseph Biden and even including former President Donald Trump—has agreed that at least some wetlands that do not physically abut a navigable water—those separated from a lake by a berm or road, for example—could still qualify as “adjacent” and be protected under federal law.<sup>7</sup>

Not anymore. In the Supreme Court's view, wetlands are now only “adjacent” if they maintain “a continuous surface connection” to a navigable waterway “so that they are ‘indistinguishable’ from those waters.”<sup>8</sup> This represents a dramatic and unprecedented retreat by the Court from the understanding of “wetlands adjacent thereto,” which had been adopted by the executive via regulation and accepted by the U.S. Congress for the past several decades.

As Justice Brett Kavanaugh explained in his opinion that concurred in the judgment only, “instead of adhering to the ordinary meaning of ‘adjacent’ wetlands, to the 45 years of consistent agency practice, and to this Court's precedents, the Court today adopts a test under which a wetland is covered only if the wetland has a ‘continuous surface connection’ to a covered water.”<sup>9</sup> So much for the Court's co-equal branches of government. Congress had been clear with its choice of the word “adjacent” to describe covered wetlands. The U.S. Army Corps of Engineers (the Corps) had been clear in affirming a hydrological need to

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*Author's Note: With students at the University of Virginia (UVA), I co-authored an amicus brief on behalf of the Idaho Conservation League in support of the Agency's position in Sackett v. Environmental Protection Agency; and owe a special thanks to Elizabeth Putfark (UVA Law '24) and Aspen Ono (UVA Law '23) for their incredible work on that brief. I also thank my UVA Law colleague, Alison Gocke, for comments on an earlier draft of this Comment.*

1. *Sackett v. Environmental Prot. Agency*, 143 S. Ct. 1322, 53 ELR 20083 (2023).
2. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
3. The phrase “WOTUS” comes from the CWA's definition of “navigable waters,” which covers “the waters of the United States, including the territorial seas.” See 33 U.S.C. §1362(7).
4. Kirti Datla, *What Does Sackett v. EPA Mean for Clean Water?*, EARTHJUSTICE (May 26, 2023), <https://earthjustice.org/article/what-does-sackett-v-epa-mean-for-clean-water>.

5. Steven Burns, *Sackett Court's New Wetlands Test Leaves Open Questions*, BLOOMBERG L. (May 26, 2023), <https://news.bloomberglaw.com/us-law-week/sackett-courts-new-wetlands-test-leaves-open-questions>.
6. CWA §404(g), 33 U.S.C. §1344(g).
7. *Sackett v. Environmental Prot. Agency*, No. 21-454, slip op. at 6 (U.S. May 25, 2023) (Kavanaugh, J., concurring in the judgment).
8. *Id.*, slip op. at 27 (opinion of the Court).
9. *Id.*, slip op. at 8 (Kavanaugh, J., concurring).

protect at least some non-abutting wetlands. Yet, the Court deferred to none of that.

Is the federal government now out of the wetlands protection game? Perhaps not entirely. Although a divided Congress is unlikely to pass legislation to restore protections for wetlands, the U.S. Environmental Protection Agency (EPA) still maintains authority over discharges from discrete “point sources” under §301 of the Act.<sup>10</sup> Another CWA case, *County of Maui v. Hawaii Wildlife Fund*, upheld the obligation for polluters to seek a CWA permit under §301 for any releases that operate as the “functional equivalent of a direct discharge from [a] point source into navigable waters.”<sup>11</sup>

In the Hawaii case, point source discharges from a well were covered even though it took “roughly 87 to 110 days” for pollution to migrate from that well to the Pacific Ocean shoreline.<sup>12</sup> Prof. Robin Craig has highlighted a tension between *County of Maui* and *Sackett*, noting that “the 2020 *County of Maui* decision will likely become increasingly important”<sup>13</sup> as EPA’s authority under §404 shrinks post-*Sackett*. Conservationists may need to focus more on the paths pollutants travel as they leave the kind of discrete point sources covered by *County of Maui*.

Still, a massive retrenchment of federal regulatory authority over wetlands seems unavoidable. With that retreat, some experts have begun looking to state water control laws. Prof. Deborah Sivas has observed that California’s water protection program “arguably provides sufficient authority for regulating even intermittent and isolated wetlands” going forward.<sup>14</sup> But other states might not be so lucky. The Environmental Law Institute’s James McElfish surveyed state-law regimes and found that 24 states—representing the lion’s share of the country by acreage—“rely entirely on the federal Clean Water Act for protection of these waters and do not independently protect them.”<sup>15</sup>

Collectively, these early assessments of *Sackett* underscore two vital points: much has been lost for wetlands protection, and much has changed with respect to the Court’s broader environmental law jurisprudence. To delve into both of these issues, this Comment first provides a little background on the unique and long-running controversy that was at the heart of *Sackett*. Next, I parse the four opinions from the case. Justice Alito penned the majority opinion, joined by Chief Justice John Roberts and Justices Clarence Thomas, Neil Gorsuch, and Amy Coney Barrett.

Justice Thomas authored a concurrence, joined by Justice Gorsuch, which sought to cast doubt on the constitutionality of regulating intrastate waters regardless of their effect on interstate commerce.

Justice Kavanaugh, joined by Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson, authored his concurrence that agreed with the majority in rejecting the “significant nexus” test for wetlands regulation, but also would “stick to the text” of the CWA, which he points out uses the words “adjacent” and “adjoining” to mean different things.<sup>16</sup> The Kavanaugh opinion reads as if it were drafted to be a potential (but failed) majority opinion, perhaps with Justice Barrett as the sought-after fifth vote. Finally, Justice Kagan, joined by Justices Sotomayor and Jackson, drafted a final concurring opinion that reads more like a forceful dissent.

Following that analysis, I look at one of the Supreme Court’s landmark decisions on agency expertise and wetlands, *United States v. Riverside Bayview Homes*.<sup>17</sup> It seems to me that *Riverside Bayview Homes*, a unanimous decision that environmentalists, courts, and the regulated community have relied on since 1985, is now a dead letter. Finally, I take a look at the road ahead, considering how the decision in *Sackett* will filter down (pun intended) to affect other environmental values.

## I. The Long-Running *Sackett* Controversy

With students in the Environmental Law and Community Engagement Clinic at the University of Virginia (UVA), I co-authored an amicus brief in *Sackett* on behalf of the Idaho Conservation League.<sup>18</sup> This nonprofit group was founded in 1973, one year after the CWA was signed into law. Today, the organization includes conservation biologists, field researchers, and other environmental staff, many of whom generously shared their expertise about Priest Lake with UVA clinic students and me.

Priest Lake has been called the “crown jewel” of Idaho. It stretches over 19 linear miles, reaches depths of more than 300 feet,<sup>19</sup> and serves as “an instrument in transport” (i.e., as “traditional navigable waters”).<sup>20</sup> Since the late 1800s, it has played an important role in the economic life of the Pacific Northwest. In the early days, the lake was used to move logs downstream to lumber mills on the Priest River. Not long after that, it became an iconic tourist destina-

10. 33 U.S.C. §1311.

11. 140 S. Ct. 1462, 1468, 50 ELR 20102 (2020).

12. Robin Kundis Craig, *Does Sackett Bring Clarity to “Waters of the United States”?*, A.B.A. TRENDS, July/Aug. 2023, at 1, available at <https://www.americanbar.org/content/dam/aba/publications/trends/2023/trends-julyaugust-2023-full-issue.pdf>.

13. *Id.*

14. Deborah A. Sivas, *Stanford’s Deborah Sivas on SCOTUS Decision That Limits EPA Powers*, STAN. L. SCH. (May 26, 2023), <https://law.stanford.edu/2023/05/26/stanfords-deborah-sivas-on-scotus-decision-that-limits-of-epa-powers/> (Q&A with Sharon Driscoll).

15. James M. McElfish Jr., *What Comes Next for Clean Water? Six Consequences of Sackett v. EPA*, ENV’T L. INST.: VIBRANT ENV’T BLOG (May 26, 2023), <https://www.eli.org/vibrant-environment-blog/what-comes-next-clean-water-six-consequences-sackett-v-epa>.

16. *Sackett v. Environmental Prot. Agency*, No. 21-454, slip op. at 14 (U.S. May 25, 2023) (Kavanaugh, J., concurring).

17. 474 U.S. 121, 16 ELR 20086 (1985).

18. Brief of Amicus Curiae the Idaho Conservation League in Support of Respondents, *Sackett v. Environmental Prot. Agency*, 143 S. Ct. 1322 (2023) (No. 21-454), [https://www.supremecourt.gov/DocketPDF/21/21-454/228334/20220617143504924\\_21-454%20Amicus%20Idaho%20Conservation%20League.pdf](https://www.supremecourt.gov/DocketPDF/21/21-454/228334/20220617143504924_21-454%20Amicus%20Idaho%20Conservation%20League.pdf) [hereinafter Brief of Amicus Curiae the Idaho Conservation League].

19. Idaho Department of Parks and Recreation, *Priest Lake State Park*, <https://parksandrecreation.idaho.gov/parks/priest-lake/> (last updated June 2, 2023).

20. Transcript of Oral Argument at 13, *Sackett v. Environmental Prot. Agency*, 143 S. Ct. 1322 (2023) (No. 21-454), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2022/21-454\\_8m59.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-454_8m59.pdf) [hereinafter Transcript of Oral Argument] (question from Justice Sotomayor).

tion. The Great Northern Railroad put in a line from Spokane, Washington, to the lake around the turn of the 20th century, and began printing advertisements in newspapers encouraging vacationers to take a ride out to experience the lake's "man's-size thrills."<sup>21</sup> Today, Priest Lake anchors the International Selkirk Loop, a scenic drive connecting Canada and the United States.<sup>22</sup> Boating, fishing, and tourism on Priest Lake continue to play a critical role in Idaho's tourist economy.

The *Sackett* case takes its name from an Idaho couple, Michael and Chantel Sackett, who challenged federal efforts to protect wetlands on their property that EPA had determined were jurisdictional because they were "adjacent to Priest Lake." This was not the Sacketts' first Supreme Court rodeo. They prevailed before the Court in 2012, when Justice Antonin Scalia authored a unanimous opinion confirming that they could go straight to federal court to challenge EPA's compliance order under the Administrative Procedure Act (APA).<sup>23</sup> It was a curious challenge, given that other property owners around the lake had received similar "jurisdictional determinations" regarding wetlands and had worked with the Corps to complete the necessary environmental assessments. Indeed, staff with the Idaho Conservation League identified several permits that had been issued by the Corps around the same time that the Sackett dispute began.<sup>24</sup> Most of these were issued in a matter of a few weeks or months.

In other words, the Sacketts were merely being asked to follow the same rules as their neighbors. These permitting decisions were designed to help control pollution flowing into Priest Lake's clear mountain waters. Collectively, the community was working together to preserve the ecological well-being of the lake while also investing in the economic vitality of the area. And to anyone who had visited the area, EPA's determination that wetlands on the Sackett property merited federal protection should have been no surprise.

First, the aquatic resources on the Sackett property were visibly part of the Kalispell Bay Fen, a type of wetlands complex that takes thousands of years to develop and plays a critical role in capturing and retaining pollutants before they reach downstream waters.<sup>25</sup> A graduate student at the University of Idaho studied the Kalispell Bay Fen's impact on Priest Lake back in 1995. His master's thesis documented a continuous flow of groundwater from the area around the Sackett wetlands to Priest Lake, with sustained flow rates of nine to 13 feet per day.<sup>26</sup>

Second, the Sackett wetlands had historically drained into Kalispell Creek, which flowed directly to Priest Lake. Following an earlier round of residential development, much of that flow was channelized into a man-made ditch along Kalispell Bay Road. But the hydrological connection between the Sackett wetlands and Priest Lake remained. Native westslope cutthroat trout could be seen swimming up from the lake through Kalispell Creek to spawning grounds in the Kalispell Bay Fen. EPA had even documented the presence of large trout in the fen directly above the Sackett wetlands.

Third, the Sackett wetlands were only 300 feet from the western edge of Priest Lake. From there, the Sacketts had a clear view of the water. If you were to walk directly from the property to the lake, you would pass only one group of houses that sat closer to the shore. Looking at a map of the acreage, I can even imagine the Sacketts telling friends that their place is "along Kalispell Bay Road, adjacent to the lake." That would be an entirely apt description of the location. And so it would have been common sense to talk about wetlands on the same site as "adjacent" as well.

All of these factors should have made this an easy case: (1) the documented groundwater flow to the lake; (2) the presence of trout and other aquatic life in the Kalispell Bay Fen above the Sackett wetlands; and (3) the obvious physical proximity of those wetlands to Priest Lake.

Still, Justice Alito dismissed CWA regulation of the Sackett property, referring at times to "'jurisdictional' soil" or "mundane materials like 'rock, sand,' and 'cellar dirt.'"<sup>27</sup> The implication was that the federal government has been impermissibly regulating land use, not water quality. Justice Scalia had argued in a four-justice plurality opinion in the 2006 case of *Rapanos v. United States*—joined at that time by Justices Alito, Thomas, and Chief Justice Roberts—that agencies were perceived as overstepping and regulating "with the scope of discretion that would befit a local zoning board."<sup>28</sup> The *Sackett* majority explicitly adopted the Scalia plurality view as the new jurisdictional test going forward.<sup>29</sup>

Yet, this perspective obscures a key detail that can be easy to overlook: the Sacketts wanted to dump sand and gravel into wetlands on their property because otherwise there would be too much water to support a foundation for new construction. They filled those wetlands because they wanted "a house—not a houseboat."<sup>30</sup> If these wetlands, which seem obviously connected to Priest Lake, are no longer jurisdictional following the Supreme Court's ruling this spring, then it is hard to conceive of what remains protected.

21. Brief of Amicus Curiae the Idaho Conservation League, *supra* note 18, at 7.

22. International Selkirk Loop, *Home Page*, <https://selkirkloop.org/> (last visited Aug. 15, 2023).

23. *Sackett v. Environmental Prot. Agency (Sackett I)*, 566 U.S. 120, 42 ELR 20064 (2012).

24. Brief of Amicus Curiae the Idaho Conservation League, *supra* note 18, at 27-28.

25. *Id.* at 12.

26. Kevin M. Freeman, An Evaluation of Ground Water Nutrient Loading to Priest Lake, Bonner County, Idaho 43 (May 1995) (M.S. Thesis, University of Idaho) (available as an embedded link, "Research conducted on the hydrology of Priest Lake and its surroundings," in Marie Kellner, *U.S. Supreme Court Navigates Tricky Waters in Priest Lake Wetlands Case*, IDAHO CONSER-

VATION LEAGUE (June 15, 2022), <https://www.idahoconservation.org/blog/supreme-court-navigates-priest-lake/>).

27. *Sackett v. Environmental Prot. Agency*, No. 21-454, slip op. at 3 (U.S. May 25, 2023) (opinion of the Court).

28. 547 U.S. 715, 738, 36 ELR 20116 (2006).

29. *Sackett*, slip op. at 14 (opinion of the Court).

30. Brief of Amicus Curiae the Idaho Conservation League, *supra* note 18, at 11.

## II. Parsing the Sackett Majority Opinion and Concurrences

In February 2019, former President Trump’s Administration proposed a rule to redefine the “waters of the United States” in a way that would have ended protections for half of previously covered wetlands.<sup>31</sup> National environmental groups expressed outrage that the rule would “set water safety back 50 years.”<sup>32</sup> Yet, the Supreme Court’s new ruling is even less protective than what the Trump EPA had proposed.

The Court started from a place of apparent agreement, rejecting President Biden’s proposal to assert jurisdiction over all wetlands having a “significant nexus” to navigable-in-fact waters. That test can be traced back to 2001 and the Court’s ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. Writing for the majority, Chief Justice William Rehnquist then explained, “It was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.”<sup>33</sup> In 2006, Justice Anthony Kennedy reaffirmed reliance on the “significant nexus” test in the solo concurrence he authored in *Rapanos v. United States*.<sup>34</sup>

All nine justices involved in *Sackett* concluded that the significant nexus test had proven unworkable in practice over the past 17 years. That conclusion might be traced to a handful of cases that raised eyebrows. In one Virginia case, wetlands eight miles from a navigable-in-fact river were subject to regulation after the Corps outlined a serpentine path, from wetlands to a roadside ditch, then to a “culvert” on the other side of the road,” and eventually to a creek that served as a tributary to a navigable river.<sup>35</sup> In another jurisdictional determination, “water flowed intermittently from wetlands . . . through a series of natural and manmade waterways, crossing under I-64, draining into the west arm of Stony Run, and eventually finding its way 2.4 miles later to traditional navigable waters.”<sup>36</sup>

Cases like these led Justice Gorsuch to ask at oral argument, “Is there a mileage limit” when determining adjacency? “Could it be three miles? . . . Could it be two miles? . . . One mile? . . . if the federal government doesn’t know, how is a person subject to criminal time in federal prison supposed to know?”<sup>37</sup> Perhaps hoping to resolve this concern, Justice Sotomayor followed up:

So is there another test? Not the *Rapanos* test, not the adjacency test, not the significant nexus test. But is there another test that could be more precise and less open-ended than the adjacency test or the significant nexus test that you use? Is there some sort of connection that could be articulated?<sup>38</sup>

Confusion might have existed at the outer bands of the Corps’ authority, as Justice Gorsuch’s questions demonstrated. And Justice Sotomayor’s question might have helped focus the Court on those difficult gray areas. Instead, the Court splintered into four separate opinions.

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). They ruled that wetlands are protected as part of the “waters of the United States” only if they maintain “a continuous surface connection” to navigable-in-fact waterways, such that the line between wetlands and other waters is “indistinguishable.”<sup>39</sup> The Court defended this astoundingly restrictive test by positing that “wetlands must qualify as ‘waters of the United States’ in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes ‘waters’ under” the Act.<sup>40</sup>

As I explain in greater detail below, the new *Sackett* test effectively overrules the Court’s 1985 decision in *Riverside Bayview Homes*, which had relied on a significant, hydrological connection between wetlands and navigable waters to uphold the Corps’ adjacency determination.<sup>41</sup> It is hard to imagine that the wetlands in *Riverside Bayview Homes* would have been jurisdictional if the Court had applied the *Sackett* test. This is because “Riverside’s property was not connected in any visible way to the streams feeding into Lake St. Clair.”<sup>42</sup> As was confirmed at oral argument in that case, “the nearest water body” to the wetlands was “more than 200 feet away, and that was a [man-made] canal that ultimately flowed into Black Creek.”<sup>43</sup> It was Black Creek (itself navigable) that ultimately drained into Detroit’s Lake St. Clair.

And from a textualist standpoint, the *Sackett* Court’s approach reads the word “adjacent” entirely out of the law. As Justice Kagan explained in her concurring opinion: “Because the Act covers ‘the waters of the United States,’ and those waters ‘includ[e]’ all wetlands ‘adjacent’ to other covered waters, the Act extends to those ‘adjacent’ wetlands.”<sup>44</sup> Congress’ use of the word “adjacent” should have meant that the CWA covers more than indistinguish-

31. Ryan Richards, *Debunking the Trump Administration’s New Water Rule*, CTR. FOR AM. PROGRESS (Mar. 27, 2019), <https://www.americanprogress.org/article/debunking-trump-administrations-new-water-rule/>.

32. Jeff Turrentine, *The Trump Administration Wants to Set Water Safety Back 50 Years*, NAT. RES. DEF. COUNCIL (Jan. 31, 2020), <https://www.nrdc.org/stories/trump-administration-wants-set-water-safety-back-50-years>.

33. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 167, 31 ELR 20382 (2001).

34. 547 U.S. 715, 787, 36 ELR 20116 (2006) (Kennedy, J., concurring in the judgment).

35. *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407, 416 (4th Cir. 2003) (discussing *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003)).

36. *Treacy*, 344 F.3d at 417.

37. Transcript of Oral Argument, *supra* note 20, at 83-86 (questions from Justice Gorsuch).

38. *Id.* at 92 (question from Justice Sotomayor).

39. *Sackett v. Environmental Prot. Agency*, No. 21-454, slip op. at 27 (U.S. May 25, 2023) (opinion of the Court).

40. *Id.*, slip op. at 19 (opinion of the Court).

41. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134-35, 16 ELR 20086 (1985).

42. Guy V. Manning, *Comment: The Extent of Groundwater Jurisdiction Under the Clean Water Act After Riverside Bayview Homes*, 47 LA. L. REV. 859, 872-73 (1987) (footnote omitted).

43. Transcript of Oral Argument at 34, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (No. 84-701).

44. *Sackett*, slip op. at 1 (Kagan, J., concurring).

ably adjoining wetlands. Justice Kavanaugh’s concurrence emphasized that Congress could well have limited the law’s reach only to “adjoining” wetlands if it so chose. Legislators used the word “adjoining” in several other places in the same law—but not in §404 when talking about wetlands protection.<sup>45</sup> “Adjacent” wetlands should be something other than navigable-in-fact waters.

At the oral argument on October 3, 2022, this distinction had been especially important to Justice Kavanaugh and others. Perhaps most telling were questions from Justice Barrett. She cautioned the Sacketts’ lawyer that statutory language on “wetlands adjacent thereto” presented “the biggest problem for you, clearly.”<sup>46</sup> She elaborated, “[O]ne argument that the government makes and that would have some force is that the regulation defined ‘adjacent’ in the way Justice Kavanaugh’s pointing out.”<sup>47</sup>

Notwithstanding these concerns, Justice Barrett elected to join the Alito-led majority opinion, which spent a great deal of time discussing the unworkability of EPA’s significant nexus test. In so doing, the opinion of the Court reads more like a public-policy argument and less like a statutory interpretation. The majority referred to EPA’s jurisdiction as “unchecked,” and ominously asked, “What are landowners to do if they want to build on their property?”<sup>48</sup>

The majority then fretted that “a property owner may find it necessary to retain an expensive expert consultant who is capable of putting together a presentation that stands a chance of persuading the Corps” not to regulate. Seeking to paint a Kafkaesque picture of the process, Justice Alito continued:

The jurisdictional determination could be challenged in court, but only after the delay and expense required to exhaust the administrative appeals process. . . . Another alternative would be simply to acquiesce and seek a permit from the Corps. But that process can take years and cost an exorbitant amount of money. Many landowners faced with this unappetizing menu of options would simply choose to build nothing.<sup>49</sup>

As a coda to this analysis, the majority cited to one of the statutory purposes included in the CWA, “to recognize, preserve, and protect the primary responsibilities and rights of States,”<sup>50</sup> and posited that Congress did “not define the EPA’s jurisdiction based on ecological importance.”<sup>51</sup> Yet, this analysis fails to even discuss the primary statutory purpose identified by Congress in 1972: “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>52</sup> Nor does the Alito opinion consider

Congress’ national goal of “the protection and propagation of fish, shellfish, and wildlife.”<sup>53</sup>

And it is not just Congress’ views that have been set aside. As Justice Kavanaugh emphasized, the majority leaves unprotected a subset of non-adjoining but nonetheless “adjacent” wetlands that EPA and the Corps had always found to be covered by the statute:

Since 1977, when Congress explicitly included “adjacent” wetlands within the Act’s coverage, the Army Corps has adopted a variety of interpretations of its authority over those wetlands—some more expansive and others less expansive. But throughout those 45 years and across all eight Presidential administrations, the Army Corps has *always* included in the definition of “adjacent wetlands” not only wetlands adjoining covered waters but also those wetlands that are separated from covered waters by a man-made dike or barrier, natural river berm, beach dune, or the like.<sup>54</sup>

Here is the most remarkable aspect of the Court’s ruling: its refusal to acknowledge the coequal roles of Congress and the presidency—and the consensus those branches had reached, based on decades of expertise, that some non-adjoining wetlands needed to be conserved to protect water quality downstream. Rejecting this consensus, the Court leaned on its own concerns about burdens imposed on land developers in order to reinterpret the law. Or, as Justice Kagan retorted: “Surely something has to be done; and who else to do it but this Court? It must rescue property owners from Congress’s too-ambitious program of pollution control.”<sup>55</sup> The Court thus selected its own reading of the statute over one that had been endorsed by both the legislative and executive branches.

The majority’s analysis echoes last year’s decision in *West Virginia v. Environmental Protection Agency*, which heralded the arrival of the “major questions doctrine” in the context of a Clean Air Act (CAA)<sup>56</sup> regulation aimed at climate-warming pollutants.<sup>57</sup> With *Sackett*, the Court announces the application of another clear-statement rule: Congress must use “exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”<sup>58</sup>

But Congress was clear. “Wetlands adjacent thereto” are protected under the CWA. The phrase is right there in the text of the statute. Per Justice Kagan’s concurrence: “That congressional judgment is as clear as clear can be—which

45. *Id.*, slip op. at 9 (Kavanaugh, J., concurring). Compare 33 U.S.C. §1344(g) and 33 U.S.C. §1321(b).

46. Transcript of Oral Argument, *supra* note 20, at 29 (question from Justice Barrett).

47. *Id.* at 17-18 (question from Justice Barrett).

48. *Sackett*, slip op. at 13 (opinion of the Court).

49. *Id.*, slip op. at 13-14 (opinion of the Court).

50. 33 U.S.C. §1251(b).

51. *Sackett*, slip op. at 27 (opinion of the Court).

52. 33 U.S.C. §1251(a).

53. *Id.*

54. *Sackett*, slip op. at 6 (Kavanaugh, J., concurring).

55. *Id.*, slip op. at 3 (Kagan, J., concurring).

56. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

57. 142 S. Ct. 2587, 52 ELR 20077 (2022). See also David D. Doniger, *West Virginia, the Inflation Reduction Act, and the Future of Climate Policy*, 53 ELR 10553 (July 2023), <https://www.elr.info/articles/elr-articles/west-virginia-inflation-reduction-act-and-future-climate-policy>.

58. *Sackett*, slip op. at 23 (opinion of the Court) (citing U.S. Forest Serv. v. Cowpasture River Pres. Ass’n, 140 S. Ct. 1837, 50 ELR 20148 (2020)).

is to say, as clear as language gets. And so a clear-statement rule must leave it alone.”<sup>59</sup>

Again, as both the Kagan and Kavanaugh concurrences emphasize, the Alito majority was not interpreting inscrutably vague language from the CWA. It was not resolving any ambiguity left open by executive regulations. Rather, the Court was reversing clear determinations that had been made by Congress, the Corps, and EPA based on a half-century of experience in working to restore the waters of the United States. Effectively, the Court was assuming for itself the power to resolve a public-policy dispute on wetlands in contravention of the expert decisions that the politically accountable branches had already made.

Justice Thomas, joined by Justice Gorsuch, would have gone even farther than the Alito majority to suggest that “mere ‘effects’ on interstate commerce were not sufficient to trigger Congress’ navigation authority.”<sup>60</sup> Per Justice Thomas, Congress could lack a constitutional command to even protect water quality in the main stem of Priest Lake, Idaho—notwithstanding the economic impact of boating, swimming, fishing, timbering, and tourism along the 26,000-acre waterway.<sup>61</sup>

Justice Thomas laid the foundation for his theory with a citation to *The James Morrison*, an antebellum-era decision striking down federal licensure of steam-powered ferries operating in intrastate waters. The case was decided by District Judge Robert William Wells, a Virginia-born Democrat<sup>62</sup> who, after service in the state House of Representatives and as attorney general of Missouri, was appointed by President Andrew Jackson to the federal bench.<sup>63</sup> Wells reacted in horror to the possibility that “if congress has the power to regulate all these employments, and a thousand others equally connected with that commerce, then it can regulate nearly all the concerns of life, and nearly all the employments of the citizens of the several states; and the state governments might as well be abolished.”<sup>64</sup>

Wells’ ruling was issued in the waning days of the Missouri Compromise, which had sought to maintain a tenuous balance between slave states and free states.<sup>65</sup> And it was handed down only nine years after enactment of a Missouri state law that imposed criminal penalties for “the publication, circulation, and promulgation of the abolition doctrines.”<sup>66</sup> Bleeding Kansas—the violent conflict over slavery that pre-

saged the Civil War—was on the horizon. In this context, it is not hard to guess what Wells, who had been a slave-state politician from 1823 to 1836, might have had in mind when he fretted about regulation of “a thousand” other activities “equally connected with that commerce.”

Even more centrally, *The James Morrison* is plainly no longer good law following the Supreme Court’s ruling in *Wickard v. Filburn* more than 80 years ago, upholding federal regulation of wholly intrastate activities that, in the aggregate, have a substantial effect on interstate commerce.<sup>67</sup> That, of course, was Thomas’ and Gorsuch’s point. Their concurrence insisted that “the Court’s Commerce Clause jurisprudence has significantly departed from the original meaning of the Constitution,” and “nowhere is this deviation more evident than in federal environmental law.”<sup>68</sup>

The comparison between *Sackett* and *West Virginia* now comes into focus. Writing about *West Virginia*, Prof. Richard Lazarus has bluntly surmised that “a radically conservative majority within the Supreme Court is seriously threatening environmental law’s continued ability to safeguard public health and welfare.”<sup>69</sup> The Court has not yet found the federal regulation of wetlands or greenhouse gas pollution unconstitutional, but it has relied on new means of statutory construction (i.e., clear-statement rules) to invalidate efforts it finds objectionable.

Justice Kagan also noted a throughline from *West Virginia* to *Sackett*, remarking, “The vice in both instances is the same: the Court’s appointment of itself as national decision-maker on environmental policy.” She assessed the situation in stark terms: “‘The Court, rather than Congress, will decide how much regulation is too much.’ Because that is not how I think our Government should work—more, because it is not how the Constitution thinks our Government should work—I respectfully concur in the judgment only.”<sup>70</sup> To be sure, *Sackett* and *West Virginia* paint a picture of a Supreme Court that evinces a remarkable propensity for exerting its own policy preferences.

### III. Whither Riverside Bayview Homes?

Simply put, the Court seems to be behaving as a political actor—no different than the other political branches, except that members of the Court are not popularly elected.<sup>71</sup> Sen. Mitch McConnell (R-Ky.) has taken to the pages of the *Washington Post* to push back against this view, contending that “no party wins or loses before the Supreme Court every time,” and that the new conservative majority on the Court is just trying to hold “jurisprudence above

59. *Sackett*, slip op. at 4 (Kagan, J., concurring).

60. *Id.*, slip op. at 8 (Thomas, J., concurring).

61. U.S. Forest Service, *Priest Lake Ranger District—Idaho Panhandle N.F.*, [https://www.fs.usda.gov/detail/ipnf/learning/history-culture/?cid=fsm9\\_019005](https://www.fs.usda.gov/detail/ipnf/learning/history-culture/?cid=fsm9_019005) (last visited Aug. 15, 2023).

62. Missouri Secretary of State, *Missouri History: Attorney Generals*, <https://www.sos.mo.gov/archives/history/historicallistings/ag> (last visited Aug. 15, 2023).

63. Federal Judicial Center, *Wells, Robert William*, <https://www.fjc.gov/node/1389586> (last visited Aug. 15, 2023).

64. *Sackett*, slip op. at 9 (Thomas, J., concurring) (quoting *The James Morrison*, 26 F. Cas. 579, 581 (No. 15,465) (D.C. Mo. 1846)).

65. Ken Drexler, *Missouri Compromise: Primary Documents in American History*, LIBR. CONG. (Mar. 7, 2019), <https://guides.loc.gov/missouri-compromise/introduction>.

66. Missouri Secretary of State, *Missouri State Archives: Missouri’s Early Slave Laws*, [https://www.sos.mo.gov/archives/education/aahi/earlyslavelaws/slave\\_laws](https://www.sos.mo.gov/archives/education/aahi/earlyslavelaws/slave_laws) (last visited Aug. 15, 2023).

67. 317 U.S. 111 (1942).

68. *Sackett*, slip op. at 25-26 (Thomas, J., concurring).

69. Richard Lazarus, *The Scalia Court: Environmental Law’s Wrecking Crew Within The Supreme Court*, 47 HARV. ENV’T L. REV. \_\_\_ (forthcoming 2023).

70. *Sackett*, slip op. at 6 (Kagan, J., concurring) (quoting her dissent in *West Virginia v. Environmental Protection Agency*).

71. See Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F 97, 97 (2022) (“[M]y argument is that the Court has begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity *except* the Supreme Court itself.”).

politics.”<sup>72</sup> But there can be no doubt that the Supreme Court’s recent decisions—*Sackett* and *West Virginia* among them—have led to the upheaval of long-settled precedents.

The bleak future for the Supreme Court’s canonical decision in *Riverside Bayview Homes* provides one such example.<sup>73</sup> In that seminal case on wetlands jurisprudence issued nearly 40 years ago, a unanimous Court deferred to the Corps to “choose some point at which water ends and land begins.” The Court explained:

Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of “waters” is far from obvious.<sup>74</sup>

The *Sackett* majority avers that it still adheres to this precedent, writing that *Riverside Bayview Homes* “acknowledged that wetlands are not included in traditional notions of waters.”<sup>75</sup>

To be sure, the *Riverside Bayview Homes* Court did ask if “Congress intended to abandon traditional notions of ‘waters’ and include in that term ‘wetlands’ as well.”<sup>76</sup> And the Court observed that the property at issue was “part of a wetland that actually abut[ted] on a navigable waterway,” which was a man-made canal.<sup>77</sup> But the analysis did not end there. Justice Byron White’s opinion highlighted “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems,” and found that it was “reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.”<sup>78</sup>

Deferring to the Corps’ reasonable regulation of “all wetlands adjacent to other bodies of water,” the Court in *Riverside Bayview Homes* remarked approvingly that the Corps had “concluded that wetlands may serve to filter and purify water,” provide “significant” protection for aquatic species, and “function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water.”<sup>79</sup>

The importance of establishing a hydrological connection between wetlands and waterways is buttressed by the underlying facts of *Riverside Bayview Homes*. The property in question was an area of wetlands in Detroit, Michigan, several hundred feet away from Lake St. Clair. Counsel for

the developer proffered at oral argument that the wetlands at issue were “isolated.”<sup>80</sup>

Trying to get a feel for the lay of the land, Justice White asked the developer’s lawyer, “[A]s far as adjacency is concerned, would you say this is neighboring?” Counsel demurred: “I would say it is not far away,” a response that elicited laughter in the courtroom. Counsel quickly clarified, “It is 200 feet away, Your Honor, from the nearest canal.”<sup>81</sup> As we summarized it in our amicus brief in *Sackett*:

The jurisdictional wetlands in [*Riverside Bayview Homes*]: (1) stood at least 200 feet away from a canal; (2) relied on the canal to drain into Black Creek; and (3) relied on Black Creek flowing into Lake St. Clair. There was absolutely no trouble distinguishing the wetlands from Black Creek or the lake.<sup>82</sup>

In other words, even when wetlands were distinguishable on the surface from navigable-in-fact waters, they nonetheless could be subject to regulation when applying the *Riverside Bayview Homes* standard. And yet post-*Sackett*, millions of acres of similarly situated wetlands are no longer protected by the CWA. Justice Alito attempted to align *Sackett* with *Riverside Bayview Homes* by quoting Justice White’s acknowledgment of “the inherent difficulties of defining precise bounds to regulable waters.”<sup>83</sup> Justice White, however, focused on these “difficulties” only in the context of the Court’s discussion of the fundamental role that wetlands play in water quality protection.

The conflict between these two Supreme Court decisions centers on one essential detail: the line-drawing problem that the *Riverside Bayview Homes* Court identified was not the geographical one that the *Sackett* majority now imposes. Rather, it was hydrological. Anyone visiting the *Riverside Bayview Homes* property in 1980s Detroit could have seen that the wetlands—separated as they were by a man-made canal—were obviously a discrete aquatic resource. They were wholly separated on the surface from the canal, Black Creek, and Lake St. Clair.

Those wetlands were nonetheless subject to regulation because they were, to use the *Riverside Bayview Homes* Court’s term, “inseparably bound up” with Black Creek and the lake hydrologically. Three amicus briefs in *Sackett*—filed on behalf of a coalition of wetland scientists, two former EPA administrators, and 167 current and former members of Congress—all documented congressional and administrative agency statements from the years shortly before and immediately after passage of the CWA on this point.<sup>84</sup> Collectively, these statements outlined congressio-

72. Mitch McConnell, *Neither Party Can Count on the Supreme Court to Be Its Ally*, WASH. POST (July 10, 2023), <https://www.washingtonpost.com/opinions/2023/07/10/mitch-mcconnell-supreme-court-ideology/>.

73. 474 U.S. 121, 16 ELR 20086 (1985).

74. *Id.* at 132.

75. *Sackett*, slip op. at 16 (opinion of the Court) (internal quotation marks omitted).

76. *Riverside Bayview Homes*, 474 U.S. at 133.

77. *Id.* at 135.

78. *Id.* at 133.

79. *Id.* at 134-35 (internal citations omitted).

80. Transcript of Oral Argument at 34, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (No. 84-701).

81. *Id.* at 42.

82. Brief of Amicus Curiae the Idaho Conservation League, *supra* note 18, at 23.

83. *Sackett v. Environmental Prot. Agency*, No. 21-454, slip op. at 21 (U.S. May 25, 2023) (opinion of the Court).

84. Brief of Scientific Societies as Amici Curiae in Support of Respondents, *Sackett v. Environmental Prot. Agency*, 143 S. Ct. 1322 (2023)

nal and executive recognition of the importance of wetlands for improving water quality in navigable rivers and lakes.

A significant, hydrological connection between wetlands and other waters no longer seems to matter. As such, *Sackett* has overruled the unanimous opinion in *Riverside Bayview Homes* in practical effect. It is yet more fallout from the Court's bombshell opinion.

#### IV. An Ominous Ripple Effect

Looking ahead, it also seems likely that the Court's antiregulatory rollback will filter down to affect other environmental laws, like the National Environmental Policy Act (NEPA),<sup>85</sup> the Endangered Species Act (ESA),<sup>86</sup> and the National Historic Preservation Act (NHPA). Reviews under those federal statutes are often prompted by a jurisdictional determination on "adjacent" wetlands under the CWA.<sup>87</sup>

Federal permitting proceedings under §404, for example, are routinely deemed "major Federal actions" under §102 of NEPA. Those determinations can then initiate proceedings to develop holistic environmental impact statements, which lead to evaluations of a myriad of adverse effects: "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative."<sup>88</sup>

The ESA, a proverbial "pit bull" in the world of environmental management,<sup>89</sup> can similarly depend upon a CWA trigger. It directs all federal agencies to confirm that their actions will not "jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of critical habitat for a listed species.<sup>90</sup> A proposal for a limestone mine near Fort Myers, Florida, for example, needed a dredge and fill permit under CWA §404. That permitting process led to the drafting of a biological opinion under the ESA, which considered the impact of the mining project on habitat for endangered

Florida panthers.<sup>91</sup> The wetlands permit was the critical hook that initiated review.

An analogous process plays out when it comes to conserving historic resources. Section 106 of the NHPA requires that "prior to the issuance of any license," federal agencies must "take into account the effect of the undertaking on any historic property."<sup>92</sup> So when construction of a residential real estate project on Martha's Vineyard needed a CWA permit, that review obligated the Corps to consider preservation efforts for a 19th-century lighthouse immediately next door.<sup>93</sup>

What is important to see here is the *intentionality* behind the daisy chain connecting all of these federal environmental programs. Congress explicitly created these statutory triggers—"major Federal actions" under NEPA, "agency action" under the ESA, and "federally assisted undertaking" under the NHPA—to ensure that federally governed activities would receive a comprehensive review. That well-rounded process gives decisionmakers a clear picture of the real-world impacts of any proposed activity.

A book chapter I co-authored with Aspen Ono (a former law student in the Environmental Law and Community Engagement Clinic) documents how "the interconnectivity of the Clean Water Act and other federal statutes reflects the interconnectedness of the things they regulate."<sup>94</sup> Cumulative harms to federally protected resources can be prevented, or at least mitigated, under this approach. But a wide array of harms might never be evaluated if a developer fails to seek a CWA permit to begin with.<sup>95</sup>

And with that, my overarching assessment of *Sackett v. Environmental Protection Agency* is a somber one. Gone are protections for the *Sackett* wetlands sitting just a building's width away from Priest Lake. 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. Gone is *Riverside Bayview Homes*.

On the horizon, perhaps, is Justice Thomas' campaign for a radical reimagining of federal environmental law and an attack on what he pillories as "an expansive interpretation of the Commerce Clause."<sup>96</sup> If you are inclined to discount that campaign as representing a minority view on the Court, recall that today's *Sackett* test was the minority view 17 years ago in *Rapanos*. An entire regime of interrelated, environmental protections drafted by Congress over the past half-century now stands on shakier ground.

(No. 21-454), [https://www.supremecourt.gov/DocketPDF/21/21-454/228171/20220616144200253\\_21-454\\_Amici%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/21/21-454/228171/20220616144200253_21-454_Amici%20Brief.pdf); Brief of Former EPA Administrators William K. Reilly and Carol M. Browner as Amici Curiae in Support of Respondents, *Sackett v. Environmental Prot. Agency*, 143 S. Ct. 1322 (2023) (No. 21-454), [https://www.supremecourt.gov/DocketPDF/21/21-454/228263/20220617143524535\\_Brief%20of%20Former%20EPA%20Administrators%20as%20Amici%20Curiae%20in%20Support%20of%20Respondents.pdf](https://www.supremecourt.gov/DocketPDF/21/21-454/228263/20220617143524535_Brief%20of%20Former%20EPA%20Administrators%20as%20Amici%20Curiae%20in%20Support%20of%20Respondents.pdf); Brief of Amici Curiae 167 U.S. Members of Congress in Support of Respondents, *Sackett v. Environmental Prot. Agency*, 143 S. Ct. 1322 (2023) (No. 21-454), [https://www.supremecourt.gov/DocketPDF/21/21-454/228284/20220617124532268\\_ELJC\\_Sackett\\_MOCAmicus\\_FINAL%20June17%209AM%20-%20FOR%20FILING.pdf](https://www.supremecourt.gov/DocketPDF/21/21-454/228284/20220617124532268_ELJC_Sackett_MOCAmicus_FINAL%20June17%209AM%20-%20FOR%20FILING.pdf).

85. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.

86. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

87. For a more thorough analysis of the manner in which the CWA and other federal environmental statutes are daisy-chained together, see Cale Jaffe & Aspen Ono, *Ripple Effect: A Look at Sackett v. EPA and the Non-Water Quality Values That the Clean Water Act Protects*, in ENVIRONMENTAL LAW BEFORE THE COURTS: A US-EU NARRATIVE (Giovanni Antonelli et al. eds., Springer 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4549824](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4549824).

88. 40 C.F.R. §1508.8.

89. Lisa Heinzerling, *Climate Contrast: Of Polar Bears and Power Plants*, GEO. L. FACULTY BLOG (May 15, 2008), [https://gulcfac.typepad.com/georgetown\\_university\\_law/2008/05/index.html](https://gulcfac.typepad.com/georgetown_university_law/2008/05/index.html).

90. ESA §7(a)(2), 16 U.S.C. §1536(a)(2).

91. National Wildlife Fed'n v. Norton, 332 F. Supp. 2d 170 (D.D.C. 2004).

92. 54 U.S.C. §306108.

93. Hough v. Marsh, 557 F. Supp. 74, 13 ELR 20610 (D. Mass. 1982).

94. Jaffe & Ono, *supra* note 87.

95. Cale Jaffe, *A Supreme Court Decision on Wetlands Might Have Affected Debt Ceiling Talks on the Mountain Valley Pipeline*, ROANOKE TIMES (June 6, 2023), [https://roanoke.com/opinion/column/commentary-a-supreme-court-decision-on-wetlands-might-have-affected-debt-ceiling-talks-on-the/article\\_9cfb2f92-03d0-11ee-b8ed-6b7dc29cd963.html](https://roanoke.com/opinion/column/commentary-a-supreme-court-decision-on-wetlands-might-have-affected-debt-ceiling-talks-on-the/article_9cfb2f92-03d0-11ee-b8ed-6b7dc29cd963.html) (similarly noting situations where "a developer does not need a Clean Water Act permit to begin with" post-*Sackett*).

96. *Sackett v. Environmental Prot. Agency*, No. 21-454, slip op. at 26 (U.S. May 25, 2023) (Thomas, J., concurring).