RECONCILING *RIVERSIDE BAYVIEW HOMES*, *SACKETT*, AND *COUNTY OF MAUI*

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I. INTRODUCTION

Near the end of the 2022 term, the Supreme Court issued its decision in *Sackett v. EPA*.[1] The case has been described as "the most important Clean Water Act case the Court has ever decided, and . . . probably . . . one of the most impactful environmental decisions in the Court's history."[2] For the fourth time, the Court interpreted the meaning of the term "navigable waters" in the Clean Water Act (CWA),[3] and the *Sackett* Court narrowed the interpretation of the term in a manner that critics claim will eliminate federal protection for more than 50% of the wetlands in the United States and 50–80% of streams in the United States.[4] Many states are unlikely to fill the gap to protect those waters.[5] In addition, to the extent that those waters are not protected under the CWA, they lose important protections under the

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

2. Dave Owen, Sackett v. Environmental Protection Agency *and the Rules of Statutory Misinterpretation*, 48 HARV. ENV'T. L. REV. 333, 333 (2024); *see also* Cale Jaffe, Sackett *and the Unraveling of Federal Environmental Law*, 53 ENV'T. L. REP. 10801, 10801 (2023) (discussing *Sackett*).

3. *Sackett*, 598 U.S. at 671. The Court previously interpreted the scope of the term "navigable waters" in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133–38 (1985), *Solid Waste Agency of Northern Cook County v. Corps of Eng'rs*, 531 U.S. 159, 167–72 (2001), and *Rapanos v. United States*, 547 U.S. 715, 730–42 (2006).

4. Richard J. Lazarus, *Judicial Destruction of the Clean Water Act:* Sackett v. EPA, U. CHI. L. REV. ONLINE 1, 4–5 (2023), https://lawreview.uchicago.edu/sites/default/files/2023-08/Lazarus%20ESSAY%20POST.pdf; Sara Dewey, *Sackett v. EPA: Departure from Textualism Significantly Limiting Clean Water Protection*, HARV. L. SCH. ENV'T. & ENERGY L. PROGRAM (JUNE 16, 2023), https://eelp.law.harvard.edu/wp-content/uploads/Sackett-Analysis-6-16-23.pdf (citing Brief of Scientific Societies as Amici Curiae in Support of Respondents, Sackett v. EPA, 598 U.S. 651 (2023) (No. 21-454)). Most ephemeral and intermittent streams would be outside of federal protection under the *Sackett* test. *See* Lazarus, *supra*, at 4; Dewey, *supra*. Much of the data regarding the impact of the Court's decision derives from analyses that the EPA and scientists conducted to assess the potential impact of a regulatory redefinition of navigable waters adopted by the Trump Administration, which would have achieved a less drastic reduction in CWA jurisdiction than the test adopted by the *Sackett* Court. *See* Owen, *supra* note 2, at 346–47; Lazarus, *supra*, at 5; Jaffe, *supra* note 2, at 10804; 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. In addition to the harms discussed above, the decision will harm waters that are still regulated by the CWA by making it more difficult to limit pollution discharges into exempted waters that are hydrologically connected to the waters regulated by the Act. *See* Lazarus, *supra*, at 6–7; Dewey, *supra.* While the prior Supreme Court decisions interpreting the term "navigable waters" had viewed the hydrologic connection of waters to be an important factor to consider in determining the scope of the Act, *see, e.g.*, *Riverside Bayview Homes*, 474 U.S. at 134 (explaining how the hydraulic cycle leads to pollution in one part of an aquatic system polluting the entire system), the *Sackett* Court did not. *See* Jaffe, *supra* note 2, at 10808.

5. *See* Monika U. Ehrman & Robin Kundis Craig, *The Supreme Court's Wetland Saga Continues*, THE REGUL. REV., (July 13, 2023), https://www.theregreview.org/2023/07/13/ehrman-craig-the-supreme-courts-wetland-saga-continues/; James McElfish et al., *Analyzing the Consequences of Sackett v. EPA*, 53 ENV'T. L. REP. 10693, 10701 (2023) (remarks of Rebecca Kihslinger) (noting that nearly half of the States do not operate any independent permitting programs regulating discharge of dredged or fill material into waters in the State). On a related note, as more regulation of wetlands discharges shifts to States, the compensatory mitigation programs that are currently predominantly operated by the federal government will be increasingly taken over by States and are likely to be considerably less uniform. *See id.*

Endangered Species Act (ESA),[6] National Environmental Policy Act (NEPA),[7] and other federal environmental laws.[8]

While much of the academic and journalistic focus has been appropriately on the devastating environmental impacts of the decision, *Sackett v. EPA* is also a vivid example of the evolution of the Supreme Court's approach to statutory interpretation over the past half-century.[9] Many commentators have criticized the decision because the majority appeared to misapply traditional tools of statutory interpretation[10] and to rely on substantive policy canons[11] to adopt a tortured reading of the statute that aligned with the Justices' personal policy preferences.[12] The rhetoric used by

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6. 16 U.S.C. §§ 1531–44.

7. 42 U.S.C. §§ 4321–70.

8. *See* Owen, *supra* note 2, at 346–47, 349 (noting that the Court has become a counterweight to policy initiatives of progressive administrations and eager to reverse precedent); Jaffe, *supra* note 2, at 10808. NEPA and the ESA impose requirements on federal agencies to prepare studies and follow procedures to avoid violating those laws when the agencies are reviewing permits or licenses under other federal laws, including the CWA. *See* 42 U.S.C. § 4332(C) (providing the NEPA requirement that federal agencies prepare an environmental impact statement for major federal actions significantly affecting the quality of the human environment, which often include the issuance of permits or licenses); 16 U.S.C. § 1536 (providing the ESA requirement that federal agencies ensure that actions authorized by the agencies, including through permits or licenses, do not take endangered or threatened species or destroy or adversely modify their critical habitat). The CWA only requires permits for discharges of pollutants into navigable waters, 33 U.S.C. § 1311, so the *Sackett* Court's decision to read navigable waters narrowly exempts discharges of pollution into the exempted waters not only from the permit requirements of the Act, but also from the requirements of NEPA and the ESA that apply to the issuance of CWA permits. *See* Lazarus, *supra* note 4; Dewey, *supra* note 4 (discussing the loss of federal protections as a result of the Court's decision in *Sackett*).

9. *See supra* Part I (explaining how *Sackett* demonstrates a change in the Court's approach to statutory interpretation). *See also* Owen, *supra* note 2, at 367–68 (discussing broader implications of the Court's interpretation method in *Sackett*); Ehrman & Craig, *supra* note 5 (noting the trend away from deference to agency decisions and the rise of the major questions doctrine); McElfish et al., *supra* note. 5, at 10705 (remarks of Jonathan Adler) (discussing stare decisis and the potential impact of the decision on prior judicial interpretations of other environmental statutes). For a concise description of the transformation of the Court's interpretation of the federal environmental statutes over the last half-century, *see* Richard J. Lazarus, *The Scalia Court: Environmental Law's Wrecking Crew Within the Supreme Court*, 47 HARV. ENVTL. L. REV. 407, 409–10, 442–71 (2023) (hereinafter Lazarus, *Wrecking Crew*).

10. *See* Owen, *supra* note 2, at 335–36, 368 (referring to the opinion as a "case study in strategic but flawed statutory interpretation" and one that relies on "principles designed to shift rather than find statutory meaning"); Jaffe, *supra* note 2, at 10805 (noting that "the opinion of the Court reads more like a public-policy argument and less like a statutory interpretation"); Ehrman & Craig, *supra* note 5; William W. Buzbee, *The Lawlessness of* Sackett v. EPA, 74 CASE W. RES. L. REV. 317, 318, 327–38 (2023).

11. *See* Owen, *supra* note 2, at 335–36; Jaffe, *supra* note 2, at 10805–06. Justice Kagan criticized the majority's misuse of the substantive canons in her concurring opinion, writing, "congressional judgment is as clear as clear can be . . . . [a]nd so a clear-statement rule must leave it alone." Sackett v. EPA, 598 U.S. 651, 713 (2023) (Kagan, J., concurring).

12. *See* Owen, *supra* note 2, at 335–36; Jaffe, *supra* note 2, at 10805–06; Ehrman & Craig, *supra* note 5 (suggesting that Justice Alito's concerns for private property rights and the concerns of Justices Thomas and Gorsuch regarding federal regulation strongly influenced the opinions authored by those Justices); Buzbee, *supra* note 10, at 328 (describing the Court's approach as "textual gerrymandering" to achieve a preferred-policy outcome). As Professor Richard Lazarus has noted, "[t]he best explanation for the *Sackett* majority opinion is unfortunately the distasteful one that the Justices in the majority simply do not like the Clean Water Act as a matter of policy." *See* Lazarus, *supra* note 4, at 19.

the majority throughout its opinions clearly demonstrated the Justices' opposition to the policy choices made by Congress in the CWA.[13] Many critics have complained that the majority inappropriately usurped the role of Congress by reading the statute in a manner that ignores the legislative intent and the statute's purposes.[14] Similarly, critics charge that the majority expropriated the role assigned to the Executive Branch by Congress and failed to accord appropriate deference to the expertise of the Executive Branch.[15] The approach taken by the *Sackett* Court is markedly different from the approach taken by the Court in reviewing statutory challenges to the federal environmental laws in the first decades after they were enacted by Congress.[16]

The issue that was raised in *Sackett* was very similar to the issue that the Court addressed almost forty years earlier in *United States v. Riverside Bayview Homes*.[17] A comparison of the Roberts Court's *Sackett* decision and the Burger Court's *Riverside Bayview Homes* decision vividly demonstrates the manner in which the Court's method of interpreting statutes has changed

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13. Owen, *supra* note 2, at 335–36. *See also* Lazarus, *supra* note 4, at 19–20 (explaining that the most likely reason for the Court's holding in *Sackett* is the majority's disdain for the CWA); Jaffe, *supra* note 2, at 10805 (arguing the *Sackett* opinions seems driven by public-policy preferences).

14. *See* Owen, *supra* note 2, at 335–36; Lazarus, *supra* note 4, at 20; Jaffe, *supra* note 2, at 10801–02, 10805. Justice Kagan raised those concerns in her concurring opinion, noting that "'the Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the . . . Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.' . . . [That] is not how the Constitution thinks our Government should work." *Sackett*, 598 U.S. at 715 (Kagan, J., concurring).

15. *See* Owen, *supra* note 2, at 336; Lazarus, *supra* note 4, at 21; Ehrman & Craig, *supra* note 5; Jaffe, *supra* note 2, at 10801–02, 10805.

16. *See* Lazarus, *Wrecking Crew*, *supra* note 9, at 409–10, 442–71. As Professor Richard Lazarus noted, for a half-century after the enactment of the laws, "[f]ederal environmental law's extraordinary success . . . has depended on a partnership between Congress and the Executive, long upheld by the courts. . . . Congress deliberately chose to delegate lawmaking authority to expert agencies . . . [but] Congress also knew . . . that it always retained the authority either to override, build upon, or statutorily codify agency rulemaking, all of which it has done repeatedly over the years. The iterative environmental lawmaking process between Congress, the executive branch, and the courts worked exceedingly well in the era of congressional compromise and productivity [but broke down] when partisan gridlock effectively shut down congressional environmental lawmaking." *Id.* at 409. Lazarus asserts that the biggest change to that approach occurred when the Supreme Court decided *West Virginia v. EPA*, 597 U.S. 697 (2022), a decision that he claims "calls into question the sustainability of that legislative and executive branch partnership established by Congress for federal environmental law." *See* Lazarus, *Wrecking Crew*, supra note 9, at 409–10. In what Lazarus asserts is an extreme example of judicial activism in that case, "the least democratically accountable branch placed a constitutional straightjacket on the ability of the most democratically accountable branches—the Congress . . . and the Executive . . .to address the nation's most pressing public health and environmental problems." *Id.* at 410.

17. 474 U.S. 121, 123 (1985). *See* Ehrman & Craig, *supra* note 5; Lazarus, *supra* note 4, at 3 (noting that the three prior Supreme Court decisions had established that the term "navigable waters" generally included all waters with a "significant nexus" to traditional navigable waters.). Although the *Sackett* Court did not expressly overrule *Riverside Bayview Homes*, Professor Cale Jaffe argues that the precedent is now a dead letter to the extent that it held that jurisdiction of waters under the CWA could be established through a significant hydrological connection between the waters. *See* Jaffe, *supra* note 2, at 10802–04, 10808 (outlining the evolution of the Court's interpretation of the CWA).

over the past four decades.[18] The Court has firmly adopted textualism, relies significantly on substantive policy canons as opposed to legislative history, and increasingly is jettisoning deference to agency expertise.[19] At the same time, there is another decision from the Roberts Court, *County of Maui v. Hawaii Wildlife Fund*,[20] that appears, on first glance, to depart from the clear evolution of the Court's approach to statutory interpretation by interpreting broad statutory language in accordance with an identified purpose and citing legislative history to support the decision.[21]

This Article will primarily contrast the Court's *Sackett* and *Riverside Bayview Homes* decisions to illustrate the dramatic changes in the Court's approach to statutory interpretation.[22] However, it will also attempt to reconcile the Court's *County of Maui* decision with the modern approach to statutory interpretation.[23]

Part II of the Article generally outlines the evolution of the Supreme Court's interpretation of the CWA over the past half-century by recounting the findings of a study by the author of all the Supreme Court CWA statutory interpretation decisions from the enactment of the modern CWA through 2020.[24]

Part III of the Article contrasts the Court's decisions in *Riverside Bayview Homes* and *Sackett* to vividly demonstrate the change in the Court's approach to statutory interpretation.[25]

Finally, Part IV of the Article briefly focuses on the Court's *County of Maui* decision to demonstrate how the decision, which initially seems to

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18. *See* Owen, *supra* note 2, at 338–39, 344, 347. Early signs of the evolution were apparent in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, another Supreme Court decision interpreting the meaning of the term "navigable waters" in the CWA. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001). Although this Article focuses primarily on the interpretation of the CWA, the trends in statutory interpretation identified in this Article are trends that carry across the Court's statutory interpretation generally. *See id.* The evolution is not surprising, as courts do not generally accord precedential value to the theories or tools that are used to interpret statutes. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018); STEPHEN M. JOHNSON, STATUTORY LAW: A COURSE SOURCE 93 (eLangdell Press ed. 2023). There is no methodological stare decisis. Gluck & Posner, *supra*.

19. *See infra* Part II (outlining the Court's interpretation of the CWA to the modern CWA of 2020).

20. 590 U.S. 165 (2020).

21. *See infra* Part IV (showing how the Court's *County of Maui* decision can be reconciled with the modern statutory interpretation approach). The decision was "an increasingly rare environmentalist victory" before the Supreme Court. *See* Richard J. Lazarus, *Justice Breyer's Friendly Legacy for Environmental Law*, 95 SO. CAL. L. REV. 101, 125 (2022) [hereinafter Lazarus, *Justice Breyer's Friendly Legacy*].

22. *See infra* Part III (comparing the *Sackett* and *Riverside Bayview Homes* decision to show how the Court's approach to statutory interpretation has changed).

23. *See infra* Part IV (attempting to reconcile the *County of Maui* decision with the Court's modern statutory interpretation approach).

24. 33 U.S.C. §§ 1251–1387.

25. *See infra* Part III (distinguishing *Riverside Bayview Homes* and *Sackett* to illustrate the change in the Court's statutory interpretation approach).

depart from the Court's modern approach to statutory interpretation, can be reconciled with that approach.[26]

II. EVOLUTION OF THE SUPREME COURT'S STATUTORY INTERPRETATION OF THE CLEAN WATER ACT

On the 50th anniversary of the CWA, I reviewed all of the Supreme Court's decisions involving statutory interpretation under the CWA to explore the evolution of the Court's approach to statutory interpretation under the Act over time.[27] The review demonstrated a clear shift in the Court's approach to statutory interpretation, including (1) a shift from purposivism to textualism; (2) an erosion of consensus on the Court; (3) an increase in judicial activism associated with the trend toward textualism; (4) a decline in rulings supporting environmental positions; (5) a decline in the government's success rate in litigation; (6) a decline in deference to agency expertise and an increase in anti-government rhetoric; and (7) a decline in congressional response to judicial interpretations of the statute.[28]

A. A Shift from Purposivism to Textualism

One of the primary findings from the review of the Court's opinions was that there has been a pronounced shift in the Court's approach to interpreting the CWA over time.[29] While the Burger Court based many of its decisions on the plain meaning of the text of the statute, the Court frequently adopted a

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26. *See infra* Part IV (expressing how the *County of Maui* decision is compatible with the modern statutory interpretation approach).

27. *See* Stephen M. Johnson, *From Protecting Water Quality to Protecting States' Rights: Fifty Years of Supreme Court Clean Water Act Statutory Interpretation*, 74 SMU L. REV. 359, 374–85 (2021). The study examined the thirty decisions issued by the Supreme Court between 1972 and 2020 interpreting language under the Act, so it did not include the 2023 *Sackett* decision. *Id.* at 375. "[E]ach case was coded for twenty-seven different variables, including the statutory provision at issue; whether the challenged action involved a regulation or a decision made through adjudication; the identity of the petitioner; the identity of the original challenger and nature of the challenge; whether there was a circuit split below; the circuit from which the case arose; whether the lower court decision was affirmed or reversed; the voting alignment in the cases, including the author(s) of the majority, concurring, and dissenting opinions; whether the Court primarily considered legislative history, purpose, or text in its analysis; whether the Court used *Chevron* analysis to resolve the statutory interpretation question, and if so, whether the Court resolved the issue at Step One or Step Two; whether the Court adopted the position supported by the government; whether the decision was ideologically ordered; and whether the decision could be characterized as one supporting an environmental position." *Id.* at 376. The study focused on the evolution of statutory interpretation from the Burger Court through the Rehnquist Court to the Roberts Court. *Id.* at 375.

28. *See* Johnson, *supra* note 27, at 362. In the first few decades after the enactment of the CWA, Congress frequently legislated to overturn or affirm Court decisions interpreting the Act. *Id.* at 362–63. However, since the 1990s, Congress has refrained from affirming or overturning any judicial interpretations of the Act. *Id.* at 363, 392–93. Indeed, since 1999, Congress has rarely overturned judicial interpretations of *any* statute. *Id.* at 393.

29. *Id.* at 377.

purposivist reading of the statute, as it relied heavily on legislative history and routinely justified its decisions as being consistent with Congress's purpose in § 101(a) to protect water quality.[30] The Burger Court cited legislative history in more than three-fourths of its CWA decisions and supported its reading of the statute with a discussion of the purpose in more than two-thirds of its decisions.[31] Reliance on the law's purpose declined during the Rehnquist era, and the Roberts Court rarely discusses legislative history or the water quality goals of the CWA in its decisions interpreting the statute.[32]

The trend from purposivism to textualism apparent in the study is reflective of a more general trend on the Court over the past several decades to interpret statutes based on textualism, without consideration of a statute's purposes or legislative history,[33] which has led Justice Kagan to famously quip, "[w]e are all textualists now."[34] In traditional purposivism, if statutory

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30. *Id.* at 376–78. Professors David Driesen, Thomas Keck, and Brandon Metroka found a similar pattern in the Burger Court's interpretation of the Clean Air Act when they reviewed the Court's decisions interpreting that law over its first fifty years. *See* David M. Driesen et al., *Half a Century of Supreme Court Clean Air Act Interpretation: Purposivism, Textualism, Dynamism, and Activism*, 75 WASH. & LEE L. REV. 1781, 1807, 1810 (2018).

31. *See* Johnson, *supra* note 27, at 377–78.

32. *Id.* The Roberts Court only discussed legislative history in one of the cases during the study period and only discussed the purpose of the statute in 20% of the decisions. *Id.* In a broader study of the Supreme Court's statutory interpretation decisions beyond environmental statutes, Professor Anita Krishnakumar also found a significant decline in the reliance on legislative history by the Roberts Court compared to prior Courts. *See* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 891 (2017).

33. *See* Owen, *supra* note 2, at 347–48; Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 75 (2018) (discussing the decline in reliance on legislative history and the increasing reliance on canons in the Roberts Court). *But see* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1278–79 (2020) (asserting that many of the modern opinions that are identified as textualist are adopting a "backdoor" purposivist approach to interpreting statutes). For further discussion of the general trend from purposivism to textualism, *see* Driesen et al., *supra* note 30, at 1825; David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97, 115–17 (2013); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 15 (2006); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 183 (2001); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7 (2001); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 366 (1994); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 34 (1994). For further discussion of the decline in the reliance on legislative history by the Court, *see* Krishnakumar, *supra*, at 1277; James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 220 (2006); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. LEGIS. 369, 369–70 (1999); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WISC. L. REV. 205, 220 (2000); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 207 (1983). *See also* JOHNSON, *supra* note 18, at 112–13, 163 (summarizing criticisms of reliance on legislative history and criticisms of purposivism).

34. *See* Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE at 8:28 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg. She later clarified that sentiment in her dissenting opinion in *West Virginia v. EPA*, when she wrote, "It seems I was wrong. The current Court is textualist only when being so suits it. When that method

language is unclear, judges will interpret a statute in a manner that advances the purposes of the statute.[35] Textualism, on the other hand, focuses primarily on interpreting a statute according to the plain meaning of the language of the statute.[36] While its most extreme form rejects consideration of legislative history and any other extrinsic sources of interpretation, more moderate textualists will examine the structure of a statute and similar statutes, the context of language, and similar extrinsic sources to determine the meaning of otherwise ambiguous language.[37]

B. A Shift, When Discussing Purpose, from Focusing on 101(a) to 101(b)

While the review of the Court's CWA decisions over time identified a decrease in the focus on the statute's purposes generally, it also demonstrated that there was a shift in the manner in which the Court relied on the purposes of the statute when it actually cited statutory purposes.[38] The central purpose of the statute, found in § 101(a), is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters."[39] In addition to that

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would frustrate broader goals, special canons . . . magically appear as get-out-of-text-free cards." 597 U.S. 697, 779 (2022). The Court's increased focus on those "special canons" is addressed later in this Article. *See infra* Section II.F (discussing the increase in reliance on clear statement cannons).

35. *See, e.g.*, Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892) (construing doubtful statutes while considering the evil the statute is designed to remedy); Driesen et al., *supra* note 30, at 1799–1800 (citing 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 58:6 (7th ed. 2008)) (discussing the Court's purposivist approach in CWA holdings from 1970 to 2004); Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 961 (2005) (discussing the reasoning behind purposivism); Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003–04 Term*, 42 HOUS. L. REV. 565, 574 (2005) (discussing criticisms of purposivism); Note, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1229 (2017) (discussing differences between purposivism and textualism). As Professor Anita Krishnakumar notes, purposivism "typically involves inquiries into legislative history, the societal problem that prompted the legislature to enact the statute, legislative intent, and other sources that might shed light on a statute's objectives. It can entail guesswork and judicial discretion, but is often defended on the ground that reliance on legislative history and purpose helps restrict judicial discretion and fulfill congressional intent." *See* Krishnakumar, *supra* note 33, at 890.

36. *See* Johnson, *supra* note 27, at 370; Craig, *The Stevens/Scalia Principle*, *supra* note 35, at 972; Molot, *supra* note 33, at 2–3; Lin, *supra* note 35, at 572–73.

37. *See* Johnson, *supra* note 27, at 370; Manning, *supra* note 33, at 17; Merrill, *supra* note 33, at 352. Academics argue that both textualism and purposivism have evolved over time, so that the differences between the theories are less pronounced today, *see* William N. Eskridge, Jr. et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1612–13 (2023) (discussing the "new" textualism); *see generally* Tara Leigh Grove, *Which Textualism*, 134 HARV. L. REV. 265 (2020) (discussing different visions for a "new" textualism); Krishnakumar, *supra* note 33, at 1277–91 (discussing the competing views of John Manning and Richard Re regarding a "new" purposivism), but they do not dispute that the Court cites legislative history and statutory purposes less frequently when interpreting statues today. *Id.*

38. *See* Johnson, *supra* note 27, at 362, 377 (noting a shift from citations to § 101(a) to citations to § 101(b)).

39. 33 U.S.C. § 1251(a). Congress established a goal of eliminating all discharges of pollution into navigable waters by 1985 and an interim goal of making such waters safe for fishing and swimming by 1983. *Id.*

primary goal, Congress articulated several policies in § 101(b), including a policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources."[40] While the Court focused primarily on § 101(a) for several decades when examining the purposes of the statute, it has increasingly shifted its focus to § 101(b) instead of § 101(a) over time.[41] During the Burger era, the Court frequently bolstered its reading of the CWA with discussion of the water quality protection goals of § 101(a) and rarely cited § 101(b).[42] The Court began to focus increasingly on § 101(b) during the Rehnquist era, corresponding to that Court's increased focus on protecting States' rights generally.[43] The shift in focus from § 101(a) to § 101(b) was most apparent, though, in the Roberts Court.[44] To the extent that the Roberts Court cited § 101(a), it only cited that provision in cases when it cited § 101(b) as well.[45] The shift in focus is frustrating to many supporters of the CWA because the statute was originally enacted in response to the failure of States to adequately respond to the problems created by water pollution.[46]

C. Erosion of Consensus on the Court and an Increase in Judicial Activism Accompanying the Shift to Textualism

In the first few decades following the enactment of the CWA, there was significant consensus on the Court regarding the interpretation of the statute.[47] More than 60% of the opinions issued by the Burger Court were decided by a unanimous Court, and 85% of the cases were decided by a majority of at least seven Justices.[48] Since that time, though, the consensus

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40. *Id.* § 1251(b).

41. *See* Johnson, *supra* note 27, at 377–81. While the Court has cited § 101(a) in almost twice as many cases since 1972 as it has cited § 101(b), the Court has cited the two provisions almost equally after Justice Rehnquist was appointed Chief Justice in 1986. *Id.* at 379.

42. *Id.* (noting that the Burger Court only cited § 101(b) once and cited it in a footnote).

43. *Id.* at 377, 380, 384–85. The revival of federalism is a defining feature of the Rehnquist Court. *See* Mark Latham, *The Rehnquist Court and the Pollution Control Cases: Anti-Environmental and Pro-Business?*, 10 U. PA. J. CONST. L. 133, 135–36 (2007); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 907–08 (2006); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 2 (2004); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 76 (2001); Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 13–14 (2001); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 438 (2002). *See also* Johnson, *supra* note 27, at 390–92 (discussing the Rehnquist Court's focus on protecting States' rights).

44. *See* Johnson, *supra* note 27, at 381.

45. *Id.*

46. *Id.* at 365–66. In addition, many of the remaining intransigent water pollution problems are caused by non-point source pollution, which is addressed primarily by States under the CWA. *Id.* at 368.

47. *Id.* at 377, 383.

48. *Id.* at 383.

has broken down.[49] Across the Rehnquist and Roberts' Courts, fewer than 30% of the opinions have been decided unanimously, and almost half of the cases have been decided by five Justices or a plurality of the Court.[50]

More significantly, though, as the Court has moved increasingly to textualism, there has been an increase in ideological decision-making by the Court.[51] Supporters of textualism argue that it constrains the ability of judges to interpret statutes in accordance with ideological views,[52] while purposivism facilitates such judicial activism.[53] A review of the Court's rulings on the CWA, however, paints a different picture.[54] My study of the Court's CWA rulings relied on an analysis of the "ideological ordering" of the opinions to determine whether the opinions appeared to be motivated by ideology.[55] Political scientists have developed a tool, the Martin-Quinn scores, to rate judges or legislators along a conservative to progressive spectrum based on their voting history.[56] When judges vote in a manner that would be predicted by their Martin-Quinn scores, the opinion of the court is "ideologically ordered."[57] When, however, at least one judge votes in a way that would not be predicted by their Martin-Quinn score (i.e., votes outside

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49. *Id.* Professor David Driesen and colleagues found a similar pattern when reviewing all of the Supreme Court decisions interpreting the Clean Air Act over a fifty year timeframe. *Id.*

50. *Id.*

51. *Id.* at 362. Professor Driesen and colleagues found a similar shift in the Court's analysis of the Clean Air Act over time. *Id.* at 377, 383.

52. *See* Driesen et al., *supra* note 30, at 1800–01; Lin, *supra* note 35, at 575–76, 580. *See also* ANTONIN SCALIA ET AL., A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (Amy Gutmann ed., 1997).

53. *See, e.g.*, Driesen et al., *supra* note 30, at 1800–01 (discussing whether purposivism leads to judicial activism); W. Matt Morgan, *What Did They Mean?: How Principles of Group Communication Can Inform Original Meaning Jurisprudence and Address the Problem of Collective Intent*, 23 WM. & MARY BILL RTS. J. 1215, 1224 (2015) (arguing that purposivism leads to judicial activism); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1176 (2011) (comparing purposivism to imaginative reconstruction); Lin, *supra* note 35, at 574–76 (explaining the history and definition of textualism); Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117, 131 (1995) (discussing difficulties in ascertaining purpose in light of political undercurrents in the passage of statutes); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 250–51 (1992) (discussing public choice theory in statutory interpretation). Critics of textualism counter that judges retain significant discretion in textualism to use the canons of construction to interpret statutes in a manner that aligns with their ideologies. *See* Lin, *supra* note 35 at 580–81, 601–02; Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 649 (1992); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1331 (1990).

54. *See* Johnson, *supra* note 27, at 383.

55. *Id.*

56. *Id.* at 373. *See generally* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–99*, 10 POL. ANALYSIS 134 (2002) (describing the methodology for calculating and using Martin–Quinn scores).

57. *See* Johnson, *supra* note 27, at 373.

of the predicted ideological lines), the opinion is "ideologically disordered."[58] Relying on that means of analysis, every CWA opinion from the Burger Court was either unanimous or *ideologically disordered*.[59] As the Court moved more firmly to textualism during the Roberts era, though, five of the six decisions that were not unanimous were *ideologically ordered* (i.e., decided in the manner that would be predicted by ideology).[60]

D. A Decline in Rulings Supporting Environmental Positions and a Decline in the Government's Success Rate

While many of the Supreme Court's early opinions interpreting the CWA read the law in a manner that could be viewed as "pro-environment," in the sense that they adopted the position advocated by environmental groups or advanced the water quality protection goals of the statute, very few of the Court's more recent opinions can be described in that manner.[61] While 40% of the Burger Court's decisions and 50% of the Rehnquist Court's decisions could be viewed as pro-environment, only 20% of the Roberts Court's decisions would qualify as pro-environment.[62]

The nature of the government's involvement in the CWA cases heard by the Court has evolved significantly over the years as well. In all of the cases heard by the Burger Court, except one, the United States was either a petitioner or a party to the lawsuit.[63] After the Burger era, though, the United States has rarely been a petitioner and has only been a party in about half of the cases.[64] While the government's position has prevailed in almost

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58. *Id.* For the 2021 Supreme Court term, Justice Thomas had the most conservative Martin–Quinn score, while Justice Alito had the next most conservative score. *See* Andrew D. Martin & Kevin M. Quinn, *Martin-Quinn Scores: Measures*, U. MICH., http://mqscores.wustl.edu/measures.php (last visited Sept. 19, 2024). Thus, if eight Justices joined an opinion and Justice Alito was the sole dissenter, the opinion would be ideologically disordered because Justice Thomas, the most conservative Justice, joined with other more liberal Justices, while Justice Alito, in essence, jumped over Justice Thomas to dissent alone. *See id.*

59. *See* Johnson, *supra* note 27, at 383.

60. *Id.* at 384. The shift began during the Rehnquist Court when four of the six non-unanimous opinions were ideologically ordered. *Id.*

61. *Id.* at 385–86. The test that I used to characterize an opinion as pro-environment is similar to the test used by Professor Richard Lazarus when he reviewed environmental opinions of the Supreme Court to compare the Justices' environmental voting records. *See* Lazarus, *Justice Breyer's Friendly Legacy*, *supra* note 21, at 116. As he acknowledges, though, that system is imperfect for a few reasons. *Id.* First, he notes that an environmental advocate may be "making an argument that leads to a win in that case but to losses in other future environmental cases." *Id.* He also notes that "the legal position favored by environmentalists in a particular case may be very weak on the merits and warrant rejection." *Id.*

62. *See* Johnson, *supra* note 27, at 385–86. The only pro-environment cases in the Roberts Court would be *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) and *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020). Overall, only about one third of all of the Court's decisions interpreting the CWA could be described as pro-environment. *See* Johnson, *supra* note 27, at 385.

63. *See* Johnson, *supra* note 27, at 398.

64. *Id.*

two-thirds of the cases in which it was a party, the winning percentage has declined from 75% during the Burger era to 40% during the Roberts era.[65]

E. A Decline in Chevron Deference or Deference to Agency Expertise in General

The review of the Supreme Court's CWA decisions also exposed a clear shift in the Court's attitude regarding deference toward agencies' decisions. As would be expected, when the Court applied the *Chevron* analysis, the government prevailed significantly more frequently than when the Court did not apply *Chevron.*[66] However, the Court did not apply *Chevron* in any of the CWA cases decided after 2009.[67] This is consistent with an erosion of *Chevron* deference in the Supreme Court and lower courts more generally beyond environmental statutes.[68] As *Chevron* aged, several Supreme Court Justices criticized the doctrine in concurring or dissenting opinions,[69] and courts have created several exceptions to the doctrine.[70] The Supreme Court last relied on *Chevron* to uphold an agency interpretation of a statute in 2016,[71] and the Court overruled the precedent in 2024, in *Loper Bright Enterprises v. Raimondo*.[72]

As the Court shifted away from according agencies deference in the CWA cases, the rhetoric used by the Court in those cases shifted as well.[73] In the early years of the CWA, opinions from the Burger Court frequently expressed support for the Environmental protection Agency (EPA)'s efforts to administer and enforce a significant regulatory statute with limited

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65. *Id.* at 399, n.302.

66. *Id.* at 396. The government prevailed in 87% of the cases when the Court applied the *Chevron* analysis, but in only 60% of the cases when the Court did not. *Id.*

67. *Id.*

68. *See* Michael Kagan, *Loud and Soft Anti-Chevron Decisions*, 53 WAKE FOREST L. REV. 37, 39 (2018); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970, 982 (1992) ("the *Chevron* framework is used in only about half the cases that the Court perceives as presenting a deference question.").

69. *See, e.g.*, Burlington N. Santa Fe Ry. v. Loos, 568 U.S. 310, 322 (2019) (Gorsuch, J. and Thomas, J., dissenting) (criticizing *Chevron*); Pereira v. Sessions, 585 U.S. 198 (2018) (Kennedy, J., concurring and Alito, J., dissenting) (both criticizing *Chevron*); Michigan v. EPA, 576 U.S. 743 (2015) (Thomas, J., concurring) (criticizing *Chevron*); City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) (expressing skepticism toward *Chevron*). In addition, prior to joining the Court, Justice Brett Kavanaugh criticized *Chevron* as having "no basis in the Administrative Procedure Act," orchestrating a "shift of power from Congress to the Executive Branch," being difficult to apply, and encouraging the Executive Branch to be aggressive when interpreting statutes. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150–51 (2016).

70. *See* JOHNSON, *supra* note 18, at 503–05. A recent review of federal appellate decisions, however, suggests that the lower federal courts appeared to be continuing to apply the *Chevron* doctrine with vigor. *See* Kent Barnett and Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 9 (2017).

71. *See* Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261 (2016).

72. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2247 (2024).

73. *See* Johnson, *supra* note 27, at 362.

resources.[74] The Roberts Court, by contrast, frequently criticizes the federal government for imposing significant regulatory burdens on businesses and individuals when interpreting and enforcing the CWA.[75]

The changing nature of the Court's attitude toward agencies is reflected more broadly in the ascendancy of the "major question doctrine" in the Court's opinions.[76] The canon creates a presumption that Congress will not address issues of vast economic or political significance unless it speaks clearly in a statute.[77] Professor Richard Lazarus has noted the effect of the shift from *Chevron* deference to the major questions doctrine in interpreting environmental statutes.[78] As he noted, when Congress enacted the federal environmental laws in the 1970s, it used broad language to delegate expansive authority to expert agencies to utilize the laws to address significant pollution problems and, in the *Chevron* era, courts deferred to the agencies' interpretations.[79] However, in the era of the major questions doctrine, he notes, such broad language is no longer sufficient to authorize expert agencies to respond to pressing environmental and public health problems.[80]

F. An Increase in Reliance on Clear Statement Canons

Beyond the changes identified in my study of the Supreme Court's CWA cases, the Court's method of interpreting statutes has changed in other important ways.[81] In a recent review of decisions by the Roberts Court, Professor Nina Mendelson has noted that as the Supreme Court increasingly relies on textualism and rejects legislative history as a tool for interpreting statutes,[82] it increasingly relies on canons, including substantive policy canons.[83] Substantive policy canons counsel courts to interpret statutes in

74. *Id.* at 386–87.

75. *Id.* at 387.

76. *See*, *e.g.*, West Virginia v. EPA, 597 U.S. 697 (2022) ("'announc[ing] the arrival' of this major questions doctrine"); Nat'l Fed'n Indep. Bus. v. OSHA, 595 U.S. 109, 110 (2022) (requiring statutory clarity when Congress is "exercis[ing] powers of vast economic and political significance"); Ala. Assoc. of Realtors v. Dep't of Health and Hum. Servs., 594 U.S. 758, 764 (2021) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance'" (internal quotations omitted)); King v. Burwell, 576 U.S. 473, 486 (2015) (explaining that courts should hesitate in the face of extraordinary delegations of power).

77. *See Nat'l Fed'n Indep. Bus*., 595 U.S. at 117.

78. *See* Lazarus, *Wrecking Crew*, *supra* note 9, at 442, 457–59.

79. *Id.* at 442, 457.

80. *Id.* at 457.

81. Mendelson, *supra* note 33, at 74–75; Krishnakumar, *supra* note 32, at 838.

82. *See* Mendelson, *supra* note 33, at 74–75; Krishnakumar, *supra* note 32, at 838.

83. *See* Mendelson, *supra* note 33, at 78. Professor Mendelson's study examined 838 statutory interpretation opinions issued over the first ten years of the Roberts Court. *Id.* at 77. Although Professor Anita Krishnakumar argued in an earlier article that the Court's reliance on substantive canons was declining, *see* Krishnakumar, *supra* note 32, at 829–30, Professor Mendelson argues that Professor Krishnakumar reached a different conclusion because she did not consider several substantive canons in her study and excluded opinions where the Court considered, but decided not to apply, canons. *See*

ways that advance specific substantive policies or values.[84] Frequently, the canons require courts to avoid interpreting a statute in a way that interferes with the policy advanced by the canon unless the statute clearly indicates that the legislature intended to do so.[85] Some of the more popular substantive policy canons are the constitutional avoidance canon and the federalism canon.[86] As critics have noted, to the extent that the canons elevate concerns about specific substantive policies over the plain meaning of the language used in the statute,[87] there is a tension between the use of the canons and a textualist interpretation of the statute.[88] Nevertheless, textualists regularly employ the canons, and that is reflected in the examination of the three CWA cases that follow.[89]

III. COMPARING RIVERSIDE BAYVIEW HOMES AND SACKETT

The evolution of the Supreme Court's statutory interpretation over the past half-century can be vividly demonstrated by a comparison of the Court's decisions in *United States v. Riverside Bayview Homes* and *Sackett v. EPA*.[90] In each case, the Court was trying to decide whether wetlands that were hydrologically connected to more traditional "navigable waters" were "waters of the United States" that were subject to regulation under the

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Mendelson, *supra* note 33, at 78. Other academics have also discussed the increased use of substantive policy canons that seems to be accompanying the rise in textualism. *See* Krishnakumar, *supra* note 32, at 826–27.

84. *See* Mendelson, *supra* note 33, at 82–83; Krishnakumar, *supra* note 32, at 833–34.

85. *See* Mendelson, *supra* note 33, at 81–83.

86. *Id.* at 92. For a discussion of the expansion of the federalism canon, *see id.* at 119–20; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619 (1992).

87. *See* Mendelson, *supra* note 33, at 82 (describing the canons as "a judicial thumb on the scale in favor of a particular norm"); Krishnakumar, *supra* note 32, at 827 (describing the canons as "an interpretive trump card, allowing judges to reject statutory readings dictated by other tools of construction in favor of readings based on external policy considerations").

88. *See* Krishnakumar, *supra* note 32, at 826–27 (citing John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 125 (2001)). *See also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 121–25 (2010) (discussing the tension between the use of canons and faithful textualism); SCALIA ET AL., *supra* note 52, at 28 (discussing the use of canons in statutory interpretation); Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L. Q. 1263, 1303 (1995) (arguing that the proponents of textualism undermine themselves when they use canons). Critics of substantive canons argue that they are counter-majoritarian and subject to judicial invention and reinvention. *See* Krishnakumar, *supra* note 32, at 828.

89. *See* Mendelson, *supra* note 33, at 73; Amanda Frost, *Congress in Court*, 59 U.C.L.A. L. REV. 914, 929 (2012); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1655 (2001); William N. Eskridge Jr, *Book Review, Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1542–43 (1998); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 552 (1997).

90. *See* United States v. Riverside Bayview Homes, 474 U.S. 121 (1985); Sackett v. EPA, 598 U.S. 651 (2023).

CWA.[91] While the issues in the two cases were remarkably similar, the conclusions that the Court reached were not.[92] *Riverside Bayview Homes* represents a bygone era when the Court examined the legislative history and purpose of a statute and gave weight to the opinions of expert agencies in interpreting statutes.[93] *Sackett* represents the modern approach of textualist courts to reject legislative history, purposes, and agency interpretations in favor of the text and substantive policy canons.[94] Comparing the two decisions clearly demonstrates the principle that there is no methodological stare decisis with respect to statutory interpretation.[95]

A. United States v. Riverside Bayview Homes

The dispute in *United States v. Riverside Bayview Homes* arose when Riverside Bayview Homes placed fill material in marshland that it owned to prepare the property for construction of a housing development, and the United States Army Corps of Engineers (Corps) determined that the placement of fill material in the marshland violated the CWA because the marshland was part of the waters of the United States under the Act.[96] The Corps reached that conclusion because its regulations defined the statutory term "waters of the United States" to include wetlands that are "adjacent" to traditional navigable waters, and the Corps concluded that the marshlands were wetlands that were adjacent to a "traditional navigable water" because the wetlands were saturated by groundwater from a traditional navigable water.[97] The Corps sued Riverside Bayview Homes and sought an injunction to prevent the company from filling the wetlands.[98] When the case reached the Supreme Court, the Court addressed two issues: (1) whether the marshlands at issue were "adjacent wetlands" under the Corps' regulations; and (2) whether the Corps had authority under the CWA to regulate wetlands that were adjacent to traditional navigable waters.[99]

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91. *See Riverside Bayview Homes*, 474 U.S. at 121; *Sackett*, 598 U.S. at 651.

92. *Compare Riverside Bayview Homes*, 474 U.S. at 139 (holding that the Corps' definition was reasonable and owed deference) *with Sackett*, 566 U.S. at 131 (holding that the EPA's decision was subject to judicial review).

93. *See supra* Sections II.A, II.E (discussing the shift in courts' attitudes towards agency deference).

94. *See infra* Section III.B (discussing the Court's decision in *Sackett*).

95. *See* Gluck & Posner, *supra* note 18.

96. 474 U.S. at 124. The CWA prohibits the addition of pollutants, including dredged or fill material, into navigable waters except in accordance with the permit provisions of the statute. 33 U.S.C. § 1311. The statute defines navigable waters as "waters of the United States." 33 U.S.C. § 1362(7). The Corps administers the permit program created by the statute to regulate discharges of dredged or fill material into navigable waters. 33 U.S.C. § 1344.

97. 33 C.F.R. § 323.2; *Riverside Bayview Homes*, 474 U.S. at 124, 129–31.

98. *Riverside Bayview Homes*, 474 U.S. at 124.

99. *Id.* at 126. The district court held that the property was within the waters of the United States, but the United States Court of Appeals for the Sixth Circuit reversed on the grounds that the Corps' regulatory definition of adjacent waters should be read narrowly to only include wetlands that are subject to flooding by surface water from traditional navigable waters and should not include wetlands that are

The Supreme Court's decision in *Riverside Bayview Homes*, like the Court's decisions in most cases interpreting the CWA during the Burger Court, was unanimous.[100] The Court concluded that the Corps correctly interpreted its regulations to include wetlands that were saturated by groundwater as adjacent wetlands[101] and that the term "waters of the United States" in the statute included wetlands that were adjacent to traditional navigable waters.[102] The Court's ruling was also consistent with many of the early Supreme Court's CWA decisions in that the government prevailed in the lawsuit, and the Court adopted a reading of the statute that was favored by environmental groups.[103]

Unlike more recent opinions, the *Riverside Bayview Homes* decision is not a textualist opinion.[104] Indeed, at the outset of the opinion, the Court acknowledged that "[o]n a purely linguistic level," it seems unreasonable to classify "lands" (i.e., wetlands) as "waters."[105] Nevertheless, the Court did just that.

The Court read the statute to interpret "waters of the United States" to include adjacent wetlands because the Court focused on the purpose of the statute, the legislative history, and the agency's interpretation of the statute.[106] The Court routinely relied on those tools at the time, even though they have gone out of vogue today.[107]

Specifically, when considering whether the Corps appropriately interpreted waters of the United States to include adjacent wetlands, the Court wrote that it was necessary to examine "the realities of the problem of water pollution that the Clean Water Act was intended to combat" and the

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saturated by groundwater. *Id.* at 125. The Supreme Court then granted certiorari to consider the proper interpretation of the Corps' regulation and the scope of the Corps' jurisdiction under the CWA. *Id.* at 126.

100. *Id.* at 139. Justice White wrote the opinion for a unanimous Court. *Id.* at 123.

101. *Id.* at 121. The Court's review of the Corps' interpretation of its regulation was not a statutory interpretation question but an administrative law deference question. *Id.* at 131. Although the Court did not cite the precedent by name, the *Riverside Bayview* Court analyzed the Corps' regulation pursuant to the standard that the Supreme Court established in *Auer v. Robbins*, which provided that a court should not overturn an agency's interpretation of its own regulation unless it is "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)). The Court examined the plain language of the regulation and the history of the development of the regulation and concluded that the Corps' reading of its regulations to include, as "wetlands," lands that were saturated by groundwater from other navigable waters was not clearly erroneous. *Riverside Bayview Homes*, 474 U.S. at 129–31. The Court also determined that the Corps' conclusion that the wetlands in the case extended to Black Creek, a traditional navigable water, so that they were adjacent to a navigable water under the Corps' regulations was not clearly erroneous. *Id.* at 131.

102. *Id.* at 139.

103. *Id.* The Court upheld the Corps' interpretation of the statute and its regulations and reversed the ruling of the Sixth Circuit. *Id.*

104. *Id.* at 132. (ignoring the linguistic meaning of the text when upholding the Corps' interpretation of the statute).

105. *Id.*

106. *Id.* at 131.

107. *Id.*

"underlying policies of its statutory grants of authority."[108] When the Court focused on those policies, it focused specifically on § 101(a) and noted that the statute's primary goal was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[109] Adopting a purposivist approach to statutory interpretation, the Court concluded that the Corps' broad reading of "waters of the United States" to include adjacent wetlands was appropriate to advance the "broad, systemic view of the goal of maintaining and improving water quality."[110] The Court reasoned that "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to [traditional navigable waters]."[111]

The Court also relied on legislative history to support its interpretation of the statute.[112] For instance, the Court relied on reports from the House and Senate to support its conclusion that a broad interpretation of "waters of the United States" was necessary to advance the purposes of the CWA to protect water quality.[113] In addition, when the Court explained the significance of Congress's choice to define navigable waters in the statute as waters of the United States, it cited the Conference Committee report for the legislation and statements of Representative John Dingell as support for its conclusion:

In adopting [the] definition of 'navigable waters,' Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.[114]

The Court did not limit its focus to the legislative history surrounding the enactment of the CWA, but also bolstered its reading of the statute with discussion of subsequent congressional inaction.[115] Specifically, the Court noted that after the Corps of Engineers interpreted the term "waters of the United States" by regulation in 1975 to include some waters that were not actually navigable, Congress amended the CWA in 1977 and did not make any changes to overturn the agency's reading of the statute.[116] The Court

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108. *Id.* at 131–32.

109. *Id.* at 132–33.

110. *Id.*

111. *Id.* at 133.

112. *Id.* at 132.

113. *Id.* (first citing H.R. Rep. No. 92-911, at 76 (1972) ("the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained."); then S. Rep. No. 92-414, at 77 (1972) ("Protection of aquatic ecosystems . . . demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'").

114. *Id.* at 133 (citing S. Rep. No. 92-1236, at 144 (1972); 118 CONG. REC. 33756–57 (1972) (statement of Rep. Dingell)).

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

116. *Id.* at 135–36.

indicated that Congress's failure to overturn the Corps' broad reading of "waters of the United States" demonstrated that "Congress acquiesced in the administrative construction."[117]

The Court's opinion is also the product of a bygone era in that the majority interpreted the statute using the *Chevron* analysis and deferred to the government in light of the agencies' technical expertise.[118] The Court acknowledged that it was difficult to determine where land ends and where "waters" begin, as "[w]ater moves in hydrologic cycles, and the pollution of [one] part of the aquatic system . . . will affect the water quality of other waters within that aquatic system."[119] Nevertheless, the Court noted that the Corps had concluded that wetlands that are adjacent to traditional navigable waters filter and purify waters flowing into the navigable waters, slow surface runoff to other waters, preventing flooding and erosion, and serve significant biological functions for aquatic species.[120] In light of those findings, instead of substituting their judgment for the agencies and interpreting the statute de novo, the *Riverside Bayview Homes* Court deferred to the conclusion of the Corps and the EPA that wetlands adjacent to traditional navigable waters were waters of the United States even though they were not regularly flooded by those waters.[121]

One other aspect of the Court's decision sets it apart from more modern Supreme Court statutory interpretation decisions. The Court turned down the opportunity to rely on a substantive policy canon to interpret the statute.[122] In the proceedings below, the United States Court of Appeals interpreted the CWA narrowly to exclude regulation of the wetlands in the case based on the constitutional avoidance canon.[123] The appellate court was concerned that reading the statute to include the wetlands could constitute a taking of

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117. *Id.* at 136. The Court pointed out that the scope of the Corps' asserted jurisdiction over wetlands under the Act was brought to Congress's attention, and Congress rejected measures to limit the jurisdiction because of a concern that protection of wetlands under the law would be hampered by a narrower definition of navigable waters. *Id.* at 137. The Court wrote, "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress'[s] attention through legislation specifically designed to supplant it." *Id.* (citations omitted). The Court also noted that the changes to the definition of navigable waters that were suggested in Congress would still have allowed the Corps to regulate the wetlands at issue in the case. *Id.* at 138. Finally, the Court noted that the language that Congress used in various amendments to the CWA in 1977 confirmed that Congress was approving of the Corps' interpretation of the law to regulate wetlands adjacent to traditional navigable waters. *Id.* at 138–39 (first citing 33 U.S.C. § 1344(g)(1) (authorizing states to take over programs to issue permits for discharges of dredged or fill material into traditional navigable waters and "wetlands adjacent thereto"); and then 33 U.S.C. § 1288(i)(2) (appropriating money for a National Wetlands Inventory "to assist the States in the development and operation of programs under this Act")).

118. *Riverside Bayview Homes*, 474 U.S. at 131, 134.

119. *Id.* at 132–34.

120. *Id.* at 134–35.

121. *Id.*

122. *Id.*

123. United States v. Riverside Bayview Homes, 729 F.2d 391, 398 (6th Cir. 1984) *rev'd*, 474 U.S. 121 (1985).

property without just compensation in violation of the Fifth Amendment of the Constitution.[124] While the Roberts Court would embrace the opportunity to employ a substantive policy canon to read a statute narrowly, the *Riverside Bayview Homes* Court concluded that regulation of the wetlands at issue in the case would not constitute a taking, so there was no need to read the statute narrowly.[125]

B. Sackett v. EPA

An examination of the Supreme Court's decision in *Sackett v. EPA* demonstrates how profoundly the Court's method of interpreting statutes has changed in the almost forty years between the two decisions.[126] A review of the *Sackett* opinion is illustrative because the issue addressed by the Court was very similar to the issue addressed by the *Riverside Bayview Homes* Court.[127]

In *Sackett*, once again, the Court was asked to determine whether the federal government could regulate, as waters of the United States, wetlands that it alleged were adjacent to traditional navigable waters.[128] The case marked the fourth time that the Court considered the scope of the term "waters of the United States" in the CWA.[129]

The dispute at the center of the case began shortly after Michael and Chantell Sackett bought a small lot near Priest Lake in Idaho in 2004 and began to fill wetlands on the property in advance of building a house on the property.[130] Upon learning about the filling activities, the EPA issued a compliance order to the Sacketts and demanded that they cease filling the wetlands and restore them.[131] The EPA concluded that the wetlands on the Sackett's property were waters of the United States because they were

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124. *Id.* at 399.

125. *Riverside Bayview Homes*, 474 U.S. at 127–29. The Court pointed out that a requirement that a person obtain a permit before engaging in a particular use of their property does not itself "take" the property and that a taking would occur only if a permit were denied, and the effect of the denial is to prevent "economically viable" use of the land. *Id.* at 127. Since neither the imposition of the permit requirement nor the denial of a permit necessarily constitutes a taking, the Court wrote, "it follows that the Court of Appeals erred in concluding that a narrow reading of the Corps' regulatory jurisdiction over wetlands was 'necessary' to avoid 'a serious taking problem.'" *Id.* (citation omitted).

126. *Compare id.* (holding that the Corps' authority to regulate extends to adjacent waters), *with* Sackett v. EPA, 598 U.S. 651 (2023) (showing an interpretive change in the thirty-eight year gap).

127. *See Riverside Bayview Homes*, 474 U.S. at 132–35; *Sackett*, 598 U.S. at 662–63.

128. *Sackett*, 598 U.S. at 662–63.

129. *See supra* note 3 and accompanying text (pointing out this is the fourth time the Court has interpreted navigable waters). In an additional case, *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, the Court determined that challenges to the government's regulations defining "waters of the United States" should be brought in federal district courts. 583 U.S. 109, 120 (2018).

130. *Sackett*, 598 U.S. at 662.

131. *Id.*

adjacent[132] to a non-navigable tributary of Priest Lake (a traditional navigable water)[133] and because they had a "significant nexus" to Priest Lake.[134] The Sacketts challenged the EPA's determination in court, and the case ultimately reached the Supreme Court, which "granted certiorari to decide the proper test for determining whether wetlands are 'waters of the United States.'"[135]

The Court ultimately determined that (1) "waters" in the CWA are limited to "relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'";[136] and (2) wetlands that have a continuous surface connection to other "waters" so that they are "indistinguishable" from those waters are adjacent wetlands that can be regulated as waters of the United States.[137] The Court adopted a much narrower reading of "waters of the United States" than the *Riverside Bayview Homes* Court, which did not limit the reach of waters to relatively permanent, standing, or continuously flowing bodies of water, and which upheld regulation of wetlands, as adjacent wetlands, that were not saturated by flooding of surface waters from traditional navigable waters.[138] Nevertheless, the *Sackett* Court did not indicate that it was overruling *Riverside Bayview Homes*.[139]

The *Sackett* decision contrasts starkly with *Riverside Bayview Homes* across multiple dimensions. First, as has become more frequent as the Roberts Court reviews environmental statutes, the government lost the case, and the Court adopted a reading of the statute that was decidedly anti-

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132. *Id.* EPA's regulations, at the time, defined "adjacent" to include "neighboring" wetlands. *Id.* (citing 40 C.F.R. § 230.3(b)).

133. *Sackett*, 598 U.S. at 662–63. Priest Lake is an intrastate body of water that EPA designated as traditionally navigable. *Id.* at 663.

134. *Id.* at 662–63. More precisely, the wetlands were adjacent to a tributary of Priest Lake that flowed into a non-navigable creek that fed into Priest Lake. *Id.* Based on the Supreme Court's rulings in *Solid Waste Agency of Northern Cook County* and *Rapanos*, described above, prior to the *Sackett* decision, the Corps and the EPA regulated, as waters of the United States, waters that had a "significant nexus to traditional navigable waters." *Id.* at 662. The EPA's guidance at the time provided that a significant nexus exists when "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of a traditional navigable water. *Id.* (quoting Rapanos v. United States, 547 U.S. 715, 779–80 (2006) (Kennedy, J., concurring)).

135. *Sackett*, 598 U.S. at 663. The dispute actually reached the Supreme Court twice. *See id.* at 662. In 2012, the Court ruled that the EPA's compliance order was a "final agency action" that the Sacketts could challenge in court under the Administrative Procedure Act. *See* Sackett v. EPA, 566 U.S. 120, 127–28 (2012). Following that decision, the federal district court in Idaho and the Ninth Circuit concluded that the EPA could regulate the wetlands on the Sacketts' property as waters of the United States. *Sackett*, 598 U.S. at 663. The Supreme Court granted cert to review the Ninth Circuit's decision. *Id.* The EPA withdrew the compliance order. *See id.*

136. *Id.* at 671.

137. *Id.* at 675–78.

138. *See supra* notes 96–99 and accompanying text (describing the Court's previously more narrow interpretation).

139. *Sackett*, 598 U.S. at 677. The *Sackett* Court suggested that the *Riverside Bayview Homes* Court was simply upholding regulation of wetlands that abutted traditional navigable waters, unlike the wetlands in *Sackett*. *Id.*

environment.[140] As noted at the outset of this Article, critics claim that the decision will eliminate federal protection for more than 50% of the wetlands in the United States and 50–80% of streams in the United States.[141] In addition, in contrast to the early Supreme Court CWA decisions, *Sackett* was not a unanimous decision,[142] but rather, an ideologically ordered opinion (decided in a manner that would be predicted based on ideology).[143]

Not surprisingly, *Sackett* also contrasts with *Riverside Bayview Homes* in that the *Sackett* majority adopted a textualist reading of both the term "waters" and the term "adjacent" in the CWA.[144] At the outset of the opinion, the Court wrote, "[w]e start, as we always do, with the text of the CWA."[145] While the Court noted that the statute defined the term "navigable waters" broadly to mean "waters of the United States," the Court relied heavily on

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140. *Id.* at 683–84. The EPA was the defendant in the case and the Court struck down the EPA's interpretation of the scope of "waters of the United States." *Id.*

141. *See supra* note 4 and accompanying text (highlighting the percent reduction in waters falling under federal protection). Most of the reduction in coverage is due to the Court's rejection of the significant nexus test, which was the basis for the government's regulation of many "non-navigable" waters. *See id.*

142. *Sackett*, 598 U.S. at 710, 715 (Kavanaugh, J., concurring) (Kagan, J., concurring). Although all nine Justices agreed that the significant nexus test was not an appropriate test to use to determine the scope of "waters of the United States" and agreed that the wetlands at issue in the case were not waters of the United States under the CWA, the Justices disagreed regarding the scope of CWA jurisdiction over "adjacent" wetlands. *See id.* In two separate concurring opinions, Justices Kavanaugh and Kagan, joined by Justices Sotomayor and Jackson, criticized the Court's narrow reading of "adjacent" to be limited to wetlands that are adjoining or abutting traditional navigable waters and "indistinguishable" from those waters. *See id.*

143. *See supra* notes 55–60 and accompanying text (discussing ideological ordering of opinions). The three most liberal Justices, Justices Sotomayor, Kagan, and Jackson, were joined in concurrences by Justice Kavanaugh, who, along with Justice Roberts, would be the next Justice most closely aligned with the liberal Justices based on Martin-Quinn scores. *See supra* note 58 (discussing the scores of Justices Thomas and Alito to analyze the opinion's outcome based on their ideology).

144. *See Sackett*, 598 U.S. at 683; *Riverside Bayview Homes*, 471 U.S. at 139. Both Justice Kagan and Justice Kavanaugh argue, in their concurring opinions, that the majority ignores the text of the statute when interpreting the term "adjacent." *See Sackett*, 598 U.S. at 723 (Kavanaugh, J., concurring) (criticizing the Court's "unorthodox statutory interpretation" and arguing that the majority rewrote the definition of "adjacent" by creating ambiguity where none exists); *Id.* at 710 (Kagan, J., concurring). Similarly, many academics have criticized the majority for adopting a reading of the statute that is at odds with some of the principles of textualism or one that misapplies the principles of textualism to support a reading of the statute that aligns with the political preferences of the majority. *See, e.g.*, Owen, *supra* note 2, at 335, 353 (criticizing the Court's policy-driven choice of dictionary definitions and the misread language in the context of the statute); Lazarus, *supra* note 4, at 12–14 (discussing the *Sackett* majority's reasoning); Jaffe, *supra* note 2, at 10804–05, 10807 (parsing the majority opinion and concurrences in *Sackett*); Buzbee, *supra* note 10, at 325 (discussing the Court's holding in *Sackett*). Regardless of whether the majority faithfully applied all of the canons of construction in the manner that textualists, in theory, would apply them, the majority cloaked its decision in the language of textualism. *See* Owen, *supra* note 2, at 335 ("The decision professes to be faithful to traditional approaches"); McElfish et al., *supra* note 5, at 10696 (remarks of Jonathan Adler). In addition, textualists, *in practice*, do not always apply all of the canons of construction in the manner that textualists, *in theory*, would apply them. *See Sackett*, 598 U.S. at 710, 723 (Kavanaugh, J., concurring) (Kagan, J., concurring).

145. *Id.* at 671.

dictionaries,[146] as well as the ordinary meaning of navigable waters,[147] to support its narrow reading of waters to be limited to relatively permanent, standing, or continuously flowing bodies of water such as streams, oceans, rivers, and lakes.[148] Like good textualists, the majority also examined the context in which the term "waters" was used in other sections of the CWA to support its narrow reading of waters.[149]

When the majority turned its gaze to the meaning of adjacent, it focused again on the context of the statute, specifically 33 U.S.C. § 1344(g)(1),[150] and dictionary definitions of adjacent[151] to limit the scope of the term to wetlands that have a continuous surface connection to traditional navigable waters so that they are indistinguishable from them.[152]

Noticeably absent from the *Sackett* Court's analysis of the scope of "waters of the United States" was any discussion of the law's major purpose in § 101(a)—to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.[153] The *Riverside Bayview Homes* Court relied

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146. *Id.* at 671–72. The Court argued that Congress deliberately used the plural term "waters" in the statute, so it relied on dictionary definitions of "waters" from *Webster's*, *Random House*, and *Black's Law Dictionary* to conclude that "waters" referred to waters like rivers, streams, lakes, and oceans. *Id.* The Court also cited the plurality opinion in the *Rapanos* case to support its reading of the statute and cited the dictionary support provided by that Court for its reading. *Id.* at 671.

147. *Id.* at 672. The Court reasoned that its narrow interpretation of "waters" "help[ed] to align the meaning of 'the waters of the United States' with the term it [was] defining: 'navigable waters.'" *Id.* Critics argue that Congress defined navigable waters as "waters of the United States" to indicate an intent to regulate a broader category of waters than would be regulated under the reading of the *Sackett* Court. *See* Owen, *supra* note 2, at 356.

148. *Sackett*, 598 U.S. at 672.

149. *Id.* The Court argued that Congress's use of the term "waters" in other sections of the CWA and other laws indicated Congress's intent to define "waters" as "bodies of open water." *Id.* (citing 33 U.S.C. §§ 1267(i)(2)(D), 1268(a)(3)(i), 1324(d)(4)(B)(ii), 1330(g)(4)(C)(vii), 1343(c)(1), 1346(a)(1), 1375a(a)). In addition to those traditional textualist arguments, the Court relied on statutory history to support its reading of the CWA, noting the narrow definition of waters covered in the predecessor statutes to the Act. *Sackett*, 598 U.S. at 672–73.

150. *Id.* at 676–77. 33 U.S.C. § 1341(g)(1) authorizes States to take over the federal permitting program and regulate discharges of dredged or fill material into any waters of the United States, except for traditional navigable waters, "including wetlands adjacent thereto." 33 U.S.C. § 1341(g)(1). The Court read that provision of the statute to confirm that some wetlands adjacent to traditional navigable waters were included within the definition of "waters of the United States" under the CWA. *Id.* at 674–75. The Court reasoned that "because the adjacent wetlands in § 1344(g)(1) are 'includ[ed]' within 'the waters of the United States,' these wetlands must qualify as 'waters of the United States' in their own right. *Id.* at 676. In other words, they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." *Id.*

151. *Id.* While the Court conceded that the *Random House Dictionary*, *Webster's Third International Dictionary*, and *Oxford American Dictionary and Thesaurus* defined adjacent as either "contiguous" or "near," "contiguous" was the only reading of the term that "produce[d] a substantive effect that is compatible with the rest of the law." *Id.* (quoting United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assoc., 484 U.S. 365, 371 (1988)).

152. *Id.* at 676–77.

153. 33 U.S.C. § 1251(a). *See* Buzbee, *supra* note 10, at 329 (criticizing the Court for ignoring the clear purposes of the statute).

heavily on those purposes in interpreting the law,[154] and Justice Kagan, in her *Sackett* concurring opinion, stressed the importance of interpreting the law to achieve those purposes.[155] To the extent that the *Sackett* Court examined any policies in the statute to inform its reading of "waters of the United States," it focused on the provision in § 101(b) that addresses the role of States in administering the statute.[156] As critics have noted, the multitude of policies listed in § 101(b) are secondary to the statute's primary goals in § 101(a).[157]

Further, where the *Riverside Bayview Homes* Court bolstered its reading of the CWA with legislative history,[158] the *Sackett* Court ignored, without comment, the same legislative history that the *Riverside Bayview Homes* Court found instructive regarding the scope of "waters of the United States."[159] Similarly, while the *Riverside Bayview Homes* Court suggested that Congress's failure to amend the CWA to overturn the Corps and EPA's interpretation of navigable waters was evidence of congressional acquiescence in the agency's reading of the statute, the *Sackett* Court did not accord any significance, when interpreting the term "adjacent wetlands," to Congress's failure to amend the CWA to overturn the agencies' regulatory interpretation of the term.[160] As Justice Kavanaugh noted in his concurring opinion, the government's interpretation of adjacent wetlands that was reviewed in *Sackett* was an interpretation that was consistently held over forty-five years and across eight presidential administrations.[161] Nevertheless, the *Sackett* majority did not find that such congressional inaction constituted approval of the agency's interpretation of the statute.[162]

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154. *See supra* notes 102–04 and accompanying text (discussing the Corps' interpretation of the CWA).

155. *Sackett*, 598 U.S. at 710 (Kagan, J., concurring). Kagan discussed the problems that led to the enactment of the law, including the chemical fire on the Cuyahoga River, the rivers that were unfit for swimming, and the record number of fish kills. *Id.* Those problems led Congress to adopt an "all-encompassing program of water pollution regulation" with the goals outlined in § 101(a). *Id.* at 711 (quoting Milwaukee v. Illinois, 457 U.S. 304, 317 (1981)). Stressing the importance of those goals, Kagan wrote, "If you've lately swum in a lake, happily drunk a glass of water straight from the tap, or sat down to a good fish dinner, you can appreciate what the law has accomplished." *Id.*

156. *Id.* at 674–75 (citing 33 U.S.C. § 1251(b)).

157. *See* Owen, *supra* note 2, at 357–58 (criticizing the Court's focus on § 101(b) over § 101(a) and indicating that the Court misinterpreted § 101(b) in its application); Jaffe, *supra* note 2, at 10805.

158. United States v. Riverside Bayview Homes, 474 U.S. 121, 132–33 (1985).

159. *See* Lazarus, *supra* note 4, at 13 (contrasting the approach to legislative history taken by the *Riverside Bayview Homes* Court and the *Sackett* Court).

160. *See Sackett*, 598 U.S. at 675–79.

161. *Id.* at 718–28 (Kavanaugh, J., concurring). Justice Kavanaugh noted that while the eight Administrations "maintained dramatically different views of how to regulate the environment," they all agreed that adjacent wetlands included "wetlands separated from covered waters by man-made dikes or barriers, natural river berms, beach dunes, or the like." *Id.* at 722. The majority rejected that reading of adjacent and held that adjacent means "adjoining" or "contiguous." *See id.* at 716.

162. *Id.* at 681–82. The majority also rejected an argument raised by the EPA and the concurring Justices that when Congress amended the CWA to include 33 U.S.C. § 1344(g)(1), it implicitly ratified the federal agencies' interpretation of adjacent wetlands that was in existence at that time (and would be implemented by all of the succeeding presidential administrations). *Id.*

Justice Kavanaugh's suggestion, in the concurring opinion, that the agencies' "longstanding and consistent . . . interpretation" of adjacent wetlands supports a reading of the statute to include wetlands separated from other waters by man-made dikes or barriers, berms, dunes or the like[163] contrasts with the majority's refusal to accord any deference or significance to the views expressed by the EPA or the Corps regarding the interpretation of the CWA.[164] While the *Riverside Bayview Homes* Court relied on the *Chevron* test to defer to the agencies' reasonable interpretation of the CWA, the *Sackett* majority never mentioned *Chevron* and accorded no deference to the EPA's reading of the statute.[165]

While the *Riverside Bayview Homes* Court repeatedly discussed the expertise of the federal agencies administering the CWA and stressed the important role that the Act plays in protecting water quality,[166] the *Sackett* majority adopted a decidedly different tone regarding those agencies and the statute and peppered the opinion with anti-regulatory rhetoric.[167] The majority characterized the CWA as "a potent weapon" that has "'crushing' consequences 'even for inadvertent violations'"[168] and puts "a staggering array of landowners . . . at risk of criminal prosecution or onerous civil penalties" because the Act can "criminalize mundane activities like moving dirt."[169] It also characterized the permitting process under the Act as a process that "can take years and cost an exorbitant amount of money," leading many landowners to "simply choose to build nothing."[170] The majority's inflammatory rhetoric prompted a spirited rebuke from Justice Kagan in her concurring opinion.[171] After describing the CWA as "a landmark piece of environmental legislation, designed to address a problem of 'crisis proportions'" and praising the accomplishments of the law, she criticized the majority's decision as "the Court's appointment of itself as the national

163. *Id.* at 727–28 (Kavanaugh, J., concurring).

164. *See* Jaffe, *supra* note 2, at 10801–02.

165. *See* Owen, *supra* note 2, at 365–66 (discussing the problems created by the majority's failure to accord deference to the EPA's interpretation of the statute); Ehrman & Craig, *supra* note 5 (criticizing the majority's attempts to resolve complicated scientific questions by relying on dictionaries, rather than scientific knowledge); Jaffe, *supra* note 2, at 10805.

166. *See supra* notes 104–07 and accompanying text (describing the Court's deference to agencies in *Riverside Bayview Homes*).

167. *See* Owen, *supra* note 2, at 350–53 (contrasting the majority's extreme characterization of the law and permitting process, unsupported by data, with the realities and criticizing the majority's failure to discuss the economic benefits of the statute's protections); Dewey, *supra* note 4, at 2 (noting the majority's "deep skepticism" for the Act and the agencies); Lazarus, *supra* note 4, at 19–21 (arguing that the rhetoric clearly exposes the majority's policy-driven statutory analysis).

168. *Sackett*, 598 U.S. at 660 (quoting Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 602 (2016)).

169. *Id.* at 669.

170. *Id.* at 671.

171. *Id.* at 711 (Kagan, J., concurring).

decision-maker on environmental policy."[172] In the concluding paragraph of her concurring opinion, she wrote:

> [T]he Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean [Water] Act to work as Congress instructed . . . . 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.[173]

In her concurring opinion, Justice Kagan also criticized the *Sackett* majority's reliance on "judicially manufactured clear-statement rule[s]" to interpret the statute.[174] While the *Riverside Bayview Homes* Court rejected arguments that the language of the CWA should be interpreted narrowly to avoid a potentially unconstitutional reading of the statute,[175] the *Sackett* majority relied on *two* substantive policy canons (clear statement rules) to interpret the scope of waters regulated under the Act narrowly.[176] First, the majority argued that "[r]egulation of land and water use lies at the core of traditional state authority" and that the Court "require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[177] Second, although the majority did not identify the canon by its familiar name,[178] the Court relied on the rule of lenity to read the statute narrowly in light of the fact that the statute imposes civil and criminal penalties for discharging pollutants into navigable waters.[179] The majority's

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172. *Id.* at 711, 715.

173. *Id.* at 715.

174. *Id.* at 713. She refers to such canons as "get-out-of-text-free cards." *Id.* at 714. As Kagan notes, as used by the majority, such canons place a "thumb on the scale for property owners." *Id.* at 713. Regardless of whether the canons *should* apply, Kagan argues that the majority misapplies them because the canons should only be used to resolve ambiguities in statutory language, and she argues that there is no ambiguity in the CWA language to resolve. *Id.* at 713–14.

175. *See supra* notes 110–12 and accompanying text (using Congress's inaction as proof of acquiescence).

176. *See* Owen, *supra* note 2, at 335–36, 339 (criticizing the majority for relying on canons that reflected policy preferences of the Justices but rejected by Congress in the CWA); Lazarus, *supra* note 4, at 13; Jaffe, *supra* note 2, at 10805–06.

177. *Sackett*, 598 U.S. at 679 (quoting U.S. Forest Service v. Cowpasture River Preservation Ass'n, 590 U.S. 604, 621–22 (2020)). This canon is often referred to as the "federalism canon." *See* Owen, *supra* note 2, at 360. As Professor Dave Owen argues, though, the text and structure of the CWA demonstrates that Congress acted intentionally to "build a new partnership between the federal government and the states . . . for the specific purpose of limiting . . . property owners from polluting." *Id.* at 361. Congress enacted the law because state regulation of water pollution was ineffective. *Id.* at 357. The Supreme Court previously relied on the canon to read the CWA narrowly to exclude regulation of certain waters that were not connected to other traditional navigable waters in *Solid Waste Agency of Northern Cook County v. Corps of Engineers*, 531 U.S. 159, 174 (2001).

178. *See* Lazarus, *supra* note 4, at 14.

179. *Sackett*, 598 U.S. at 680. The majority wrote, "EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties. Due process requires Congress to define penal statutes 'with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Id.* The EPA's interpretation of "waters of the United States," the majority wrote, "remains 'hopelessly indeterminate.'" *Id.*

reliance on substantive policy canons is consistent with the broader trend of the Court to rely on such canons when interpreting statutes.[180]

IV. PUTTING *COUNTY OF MAUI* IN CONTEXT

Although the Supreme Court's approach to statutory interpretation has evolved dramatically over the fifty years since the CWA was adopted, the Court issued an opinion in 2020 in *County of Maui v. Hawaii Wildlife Fund* that appeared to depart from the modern approach that the Court has taken, as outlined above.[181] At first glance, there are many aspects of the Court's decision that appear inconsistent with the Roberts Court's focus on textualism and rejection of legislative history.[182] However, a more thorough examination of the opinion demonstrates that the *County of Maui* Court relied on most of the modern tools of construction to resolve the statutory interpretation question in the case.[183]

A. Background of the Case

County of Maui v. Hawaii Wildlife Fund was a citizens' suit brought by several environmental groups under the CWA against the County of Maui, based on the County's operation of a wastewater reclamation facility.[184] The County collected sewage at the facility, partially treated it, and then pumped about four million gallons of the treated sewage every day into four underground wells.[185] Since the sewage in the wells subsequently traveled through groundwater half of a mile to the ocean, the environmental groups argued that the County was discharging pollutants into "navigable waters" without a permit in violation of the CWA.[186] The County and the EPA argued that groundwater is not regulated as navigable waters under the CWA so that the discharge *through* groundwater was not a discharge into navigable waters.[187] The trial court held that a permit was required under the CWA because the path from the County's discharge to the ocean was clearly ascertainable.[188] The U.S. Court of Appeals upheld the trial court's ruling, but based on the reasoning that pollutants in the ocean were "fairly traceable" to the discharge from the County.[189]

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180. *See* Lazarus, *supra* note 4, at 13.
181. County of Maui v. Haw. Wildlife Fund, 590 U.S. 165, 165 (2020).
182. *Id.* at 179–80.
183. *Id.* at 181–85.
184. *Id.* at 171.
185. *Id.*
186. *Id.* at 171–72.
187. *Id.* at 172.
188. *Id.* at 171–72.
189. *Id.* at 172.

The Supreme Court ultimately adopted a different test to determine whether a permit was required for the County's discharge.[190] According to the Court, the CWA requires a permit for discharges of pollutants from point sources "that reach navigable waters after traveling through groundwater if [the] discharge is the functional equivalent of a direct discharge from the point source into navigable waters."[191] The Court identified a non-exclusive list of factors that should be considered in determining whether a discharge is the "functional equivalent" of a direct discharge, noting that "[t]ime and distance are obviously important."[192]

B. Departures from the Modern Approach to Statutory Interpretation

In some ways, the majority opinion, written by Justice Breyer, appears to depart from the modern approach to statutory interpretation employed by the Roberts Court. First, the statutory language, prohibiting "any addition of any pollutant to navigable waters from any point source" without a permit,[193] is very broad and the Court interpreted it broadly and flexibly when it adopted a multi-factor "functional equivalence" test to clarify when pollutants discharged from point sources through groundwater to navigable waters require a permit.[194] That is quite unusual in the era of the "major questions doctrine."[195] Applying that doctrine, if a court found that regulating discharges of pollutants through groundwater would have a vast economic or political impact, the court would not interpret the statute to require a permit for the discharges because Congress did not clearly state that the law applied to discharges through groundwater.[196] Although the major questions doctrine

190. *Id.* at 183–84.

191. *Id.* at 186.

192. *Id.* at 183–85 (emphasis omitted). The factors identified by the Court included "(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." *Id.*

193. 33 U.S.C. § 1362(12). Section 301 prohibits the "discharge of [a] pollutant" without a permit, *see id.* § 1311(a), and the statute defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12).

194. *County of Maui*, 590 U.S. at 184. As the majority noted, "[T]he Act defines 'pollutant' broadly," defines "point source" and "discharge of a pollutant" broadly, *and* § 301 "broadly states" that the discharge of pollutants without a permit is unlawful. *Id.* at 170–71.

195. *See supra* notes 73–80 and accompanying text (discussing the Court's shift to the major questions doctrine and its implications). The Court relied on the doctrine to decide three significant cases in the two years following its decision in *County of Maui. See supra* note 76 (discussing the use of the major questions doctrine).

196. *See* Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 117–19 (2022) (requiring clear authority from Congress for delegations of vast economic and political significance).

has taken center stage in many recent Supreme Court decisions, the *County of Maui* Court did not discuss it.[197]

The majority's decision also has a bit of a purposivist tone at times. For instance, Breyer began his analysis by citing § 101(a) of the CWA and noting that "Congress'[s] purpose [in the CWA] . . . 'is to restore and maintain the . . . integrity of the Nation's waters.'"[198] Later in the opinion, Breyer wrote that "[t]he object in a given scenario will be to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve."[199] At several other points in the opinion, Breyer suggested that the Court's reading of the statute was based on the "language, structure, and purposes" of the law.[200] In addition, when the Court rejected the EPA's argument that the law should be read to exclude any discharges of pollutants through groundwater, the majority wrote, "to follow EPA's reading would open a loophole allowing easy evasion of the statutory provision's basic purposes."[201]

The opinion departs from the modern statutory interpretation trends in another important respect, as the Court cites legislative history to support its reading of the statute.[202] Although the majority ultimately concludes that discharges *through* groundwater to other navigable waters may require permits in some circumstances, it rejects a reading of the statute that would include groundwater as navigable waters by pointing out that Congress considered an amendment to the CWA when it was passed in 1972 that would have authorized the EPA to regulate groundwater under the law but that Congress did not adopt that amendment.[203] The majority also analyzed testimony at congressional hearings and language from Congressional Committee reports to reach its conclusion that Congress did not intend to regulate groundwater as navigable waters under the Act, but to leave primary regulatory authority over groundwater to the states.[204]

The final difference between the *County of Maui* decision and most of the other Supreme Court opinions that the Roberts Court has issued interpreting the CWA is that the *County of Maui* majority adopted a reading of the CWA that was "pro-environment," in that it extended the statute's

197. *See generally County of Maui*, 590 U.S. 165 (interpreting the code and agency action without using the major questions doctrine). The Court normally relies on the doctrine to narrow agencies' authorities under statutes, so it is not surprising that the Court did not rely on the doctrine in *County of Maui*, because the Court was reading the statute to give EPA broader authority than EPA asserted it had under the statute. *See supra* note 76 (interpreting the statute using the major questions doctrine).

198. *County of Maui*, 590 U.S. at 170.

199. *Id.* at 185.

200. *Id.* at 181–86.

201. *Id.* at 180.

202. *Id.* at 176–77.

203. *Id.*

204. *Id.* at 176 (citing remarks of William Ruckleshaus, the EPA Administrator, and Representative Les Aspin).

regulatory authority over discharges that the government had not been regulating and that regulated entities had opposed.[205]

C. Reconciling the Conflict with the Modern Approach to Statutory Interpretation

While the *County of Maui* decision appears to depart from the modern approach to statutory interpretation taken by the Supreme Court in the few ways identified above, in most respects, the decision is consistent with most of the trends in statutory interpretation outlined at the beginning of this Article.[206]

As in most of the CWA statutory interpretation cases decided by the Roberts Court, the *County of Maui* Court rejected the interpretation of the statute advocated by the government.[207] Similarly, the Court did not apply the *Chevron* test in the case[208] or defer to the EPA's reading of the CWA in

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205. *County of Maui*, 590 U.S. at 173. Although the Court's decision was protective of the environment, the environmental group plaintiffs preferred a broader reading of the CWA that would have regulated discharges that are fairly traceable to a point source, provided that the point source discharge was a "proximate cause" of the addition of pollutants to navigable waters. *Id.* Professor Robin Craig provides another explanation for the different approach that the Supreme Court occasionally takes to interpreting navigable waters in CWA cases. *See* Robin Kundis Craig, *There Is More to the Clean Water Act Than Waters of the United States: A Holistic Jurisdictional Approach to the Section 402 and Section 404 Permit Programs*, 73 CASE W. L. REV. 349 (2022). She notes that although the § 402 permitting program and the § 404 permitting program both apply to discharges of pollutants into navigable waters, the Court has viewed the two permitting programs very differently in its opinions. *Id.* at 349, 369. While the Court tends to view the § 402 program as akin to the prevention of a public nuisance by protecting public health and public welfare from pollution, the Court views the § 404 program more skeptically as infringing on private property rights and states' Tenth Amendment prerogatives. *Id.* at 352–53. To some extent, Professor Craig notes, the different analyses of the cases arising under § 402 and § 404 are also motivated by the manner in which the two programs were created by Congress. *Id.* at 358–60. Thus, even though the CWA protects the same waters under the § 402 and § 404 permitting programs, the Court appears to take different values into account when interpreting the term in § 402 cases than in § 404 cases. *Id.* at 352–53, 369. Based on her reasoning, it is less surprising that the Court interpreted the CWA in an environmentally friendly manner in *County of Maui*, because the case arose in the § 402 permitting context rather than the § 404 permitting context. *Id.* Although the Supreme Court has reviewed the scope of navigable waters differently in § 404 permit cases and § 402 permit cases, Professor Craig argues that the Court's *County of Maui* decision takes on added significance in light of the Court's narrow reading of CWA jurisdiction in *Sackett. See* McElfish et al., *supra* note 5, at 10698 (remarks of Professor Craig). Professor Craig notes that even though *Sackett* read the definition of navigable waters narrowly, under the reasoning of *County of Maui*, a CWA permit could be required for discharges of dredged or fill material into waters that are not navigable waters under *Sackett* if the discharges are the functional equivalent of discharges to other waters that meet the *Sackett* definition of navigable waters. *Id.*

206. *See supra* Section I.A (discussing the trends of statutory interpretation of the CWA).

207. *County of Maui*, 590 U.S. at 186. The EPA was not a party to the lawsuit, but the United States filed an amicus brief setting forth the government's interpretation of the statute, which had been set forth in an interpretive statement by the EPA. *Id.* at 179. The EPA maintained that all releases of pollutants to groundwater are excluded even when the pollutants are conveyed to navigable waters through groundwater. *Id.* at 180.

208. *Id.* The government did not ask the Court to accord its interpretation deference under *Chevron*, *id.*, and the Court would not have accorded the interpretation of *Chevron* deference even if the government

any way.[209] As in most of the CWA cases decided by the Roberts Court, the alignment of Justices in the *County of Maui* case was ideologically ordered, with Justices Alito, Thomas, and Gorsuch dissenting from the majority opinion authored by Justice Breyer.[210] The decision might also be characterized as "activist" in the sense that the Court established a test to administer the statute that would need to be developed by lower federal courts in a "common law" fashion.[211]

Most importantly, though, while the opinion flashes a purposivist tone at times, it is a predominantly textualist opinion.[212] Although Justice Breyer begins his majority opinion with a nod to the CWA's environmental protection *purpose* in § 101(a),[213] he does not advocate reading the statute to regulate discharges of pollutants through groundwater because it would protect the chemical, physical, and biological integrity of the Nation's waters.[214] Indeed, he does not mention that purpose again. Instead, as the Roberts Court routinely does when interpreting the CWA, the *County of Maui* Court focuses, at several times, on the *policy*, in § 101(b), of protecting States' rights to plan the development and use of land and water resources.[215] The Court relies on that language in the text of the statute as evidence that Congress primarily intended groundwater to be regulated by states rather than the federal government.[216] When the majority opinion claims to be reading

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requested such deference since the deference would not apply to agency interpretations set forth in interpretive statements. *See* United States v. Mead, 533 U.S. 218, 226–27 (2001).

209. *County of Maui*, 590 U.S. at 180. While the Court noted that a lesser standard of deference set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) applies in cases when *Chevron* does not, the Court held that the EPA's interpretation of the statute was not persuasive or reasonable. *Id.* The Court noted that the EPA had changed its interpretation of the statutory provision over time. *Id.* at 178. Although the Court did not defer to the EPA's reading of the statute, it considered the agency's prior practice of requiring permits for discharges to deep injection wells as evidence that some discharges of pollutants through groundwater to navigable waters could be regulated. *Id.*

210. *See supra* notes 50–58 and accompanying text (discussing ideological ordering of opinions) and note 60 (identifying Martin Quinn scores for Justices).

211. *County of Maui*, 590 U.S. at 186.

212. *See generally id.* (interpreting statutes in a textualist fashion).

213. *Id.* at 170.

214. *Id.* at 174–76.

215. *Id.* at 174–76, 180, 183.

216. *Id.* The Court never acknowledges that Congress created a federal permitting program for discharges to navigable waters in the CWA because the existing state programs were ineffective. *See, e.g.*, William L. Andreen, *Success and Backlash: The Remarkable (Continuing) Story of the Clean Water Act*, 4 J. ENERGY & ENVTL. L. 25 (Winter 2013) (discussing the inability and unwillingness of states to regulate water pollution in the years prior to the enactment of the CWA); William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local and Federal Efforts, 1789–1972, Part I*, 22 STAN. ENVTL. L.J. 145, 154–60, 189–99 (2003) (discussing the failure of state water pollution control programs prior to the enactment of the CWA). *See also* City of Milwaukee v. Illinois, 451 U.S. 304, 317–19 (1981) (deferring to experts in administrative agencies). In light of the context in which the Act was adopted, it is hard to conceptualize § 101(b) as a "purpose" of the Act, and Congress did not identify it as a "purpose" of the Act. Instead, it was merely a statement of policy, indicating Congress's intent to allow States to continue to act to prevent water pollution in conjunction with the new federal regulatory program. *See* 33 U.S.C. § 1252(b).

the statute in accordance with its "purpose," it is really simply reading the statutory language at issue in the context of the language in § 101(b), as would any textualist judge when looking at the structure of the statute and other provisions of the statute in the context of the whole act.[217]

The *County of Maui* Court begins its analysis of the statutory language as any textualist would by noting that the focus of the Court is on the meaning of the word "from" and arguing that the Court must read the phrase "from any point source" in context to ascertain its meaning.[218]

The Court's true textualist nature is exposed in the manner in which it rejects (1) the Ninth Circuit's "fairly traceable" test, (2) the arguments advanced by the County of Maui and the United States, and (3) the dissenting Justices' "immediate origin" test.[219] Responding to the Ninth Circuit's holding that the CWA permit requirement applies when pollutants in navigable waters are "fairly traceable" to indirect discharges to navigable waters, the Court held, first, that a literal reading of the Act's language would be absurd, as it could require a permit for pollutants carried on a bird's wing.[220] The Court then focused on the structure of the statute, citing several provisions that authorized states to regulate non-point source pollution and groundwater, and concluded that the structure of the statute suggested that Congress intended to leave substantial state responsibility over non-point source pollution and groundwater to states.[221] The Ninth Circuit's interpretation, the Court found, would be inconsistent with that congressional intent.[222]

The Court also focused solely on the text of the CWA to reject the County of Maui's argument that the statute does not require a permit if a discharge flows through any groundwater before reaching navigable waters.[223] First, the Court reasoned that Maui's reading of the statute would be absurd because it would allow persons to evade the permit requirement by simply moving a discharge pipe back a few yards away from navigable waters so that it had to travel through groundwater to reach navigable

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217. *See* JOHNSON, *supra* note 18, at 100–01, 272–73 (discussing textualism, statutory context and the whole act rule).

218. *Milwaukee*, 451 U.S. at 172. The majority notes that while "from" is a broad term, context imposes limits on its breadth. *Id.* The Court notes, "'Finland,' for example, is often not the right kind of answer to the question, 'Where have you come from?' even if long ago you were born there." *Id.*

219. *Id.* at 174, 182.

220. *Id.* at 174.

221. *Id.* (citing §§ 105 and 208 of the Act and § 316 of the Water Quality Act of 1987, an amendment to the Act). The Court also cited § 101(b), the "states rights" policy section, to support its reading of the Act. *Id.*

222. *Milwaukee*, 451 U.S. at 174.

223. *Id.* at 181.

waters.[224] The Court also relied on the ordinary meaning of the words "from" and "to" in rejecting the County's reading of the statute.[225]

When the Court rejected EPA's argument that the permit requirement does not apply to any discharge that travels through groundwater, it relied solely on the text, noting that (1) the statute does not include any exception for discharges through groundwater;[226] (2) the statute defines "point source" to include "wells" and wells generally do not discharge pollution to navigable waters except through groundwater;[227] and (3) the statute authorizes the EPA to delegate permitting authority to states only if the state has adequate authority to control the disposal of pollutants into wells, reinforcing the reading of the statute as requiring a permit for discharges of pollutants from wells through groundwater.[228]

Finally, when the Court rejected the dissents' alternative reading of the statute, it focused on the text of the statute. Justices Thomas and Alito argued, in separate dissents, that the statute should be read to require permits only when the "immediate origin" of the discharge of the pollutants to a navigable water was the point source itself.[229] The majority argued that there was "no linguistic basis" to limit the reading of the statute in that manner in light of the expansive language of the provision (any addition from any point source) and the context in which the language of the statute was used.[230] Even though pollutants that travel through groundwater come "from" groundwater, the majority argued, "that does not mean they are not also 'from the point source.'"[231] The majority also reasoned that the term "addition" in the statute did not mean direct addition, as Justice Thomas argued in his dissent.[232]

The Court's textualist analysis was punctuated by another tool that dominates modern statutory interpretation in the Roberts Court.[233] The majority based its reading of the CWA, in part, on the federalism canon

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224. *Id.* at 178.

225. *Id.* at 178–80. Maui argued that a permit is required under the Act only if a point source directly delivers a pollutant to navigable waters. *Id.* at 178. The majority acknowledged that "Congress sometimes adopts less common meanings of common words," but concluded that Maui's "esoteric definition of 'from,' as connoting a means, [did] not remotely fit in . . . context" since the statute coupled "from" with "to." *Id.* In a concurring opinion, Justice Kavanaugh pointed out that Justice Scalia, in his plurality opinion in *Rapanos v. United States*, previously read the statute to apply to discharges of pollutants through intermittent watercourses that are not navigable waters into navigable waters. *Id.* at 187 (Kavanaugh, J., concurring) (citing Rapanos v. United States, 547 U.S. 715, 126 (2006)). Thus, he argued, the majority's reading of the statute flowed naturally from Justice Scalia's *Rapanos* plurality opinion. *Id.*

226. *Id.* at 180–81. The Court reasoned that the provisions in the CWA that the EPA cited that provided funding and research support to states to address groundwater "would be a 'surprisingly indirect route' to convey 'an important and easily expressed message'—that the permit requirement simply does not apply if the pollutants travel through groundwater." *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 181–82.

230. *Id.*

231. *Id.* The majority noted that the statute did not say "directly" from or "immediately" from. *Id.*

232. *Id.* at 183.

233. *Id.* at 174–75.

identified above, one of the clear statement canons that are central to many recent Supreme Court statutory interpretation decisions.[234] As noted above, when the Court rejected the Ninth Circuit's reading of the Act, it wrote, "[w]e must doubt that Congress intended to give EPA the authority to apply the word 'from' in a way that could interfere as seriously with States' traditional regulatory authority . . . as the Ninth Circuit's . . . test would."[235]

Consequently, despite a few references to the "purpose" of the CWA and a citation to legislative history, the majority's textualist approach to statutory interpretation, rejection of deference to agency expertise, and reliance on a clear statement canon fits comfortably within the model of statutory interpretation adopted by the Roberts Court.[236]

V. CONCLUSION

The Supreme Court's decision in *Sackett v. EPA* has been justly criticized as a tortured reading of the CWA motivated by the personal policy preferences of a majority of the Court, but it is representative of the approach to statutory interpretation taken by the Roberts Court not just in the context of environmental law, but across all statutes.[237] The stark changes in the Court's approach to statutory interpretation are vividly demonstrated when the Court's *Sackett* opinion is contrasted with the *Riverside Bayview Homes* decision from the Burger Court.[238] While textualists argue that textualism constrains judicial activism, the Supreme Court's recent statutory interpretation decisions undermine that assertion.[239] The end result for environmental protection has not been promising.[240] Although some commentators may argue that the *County of Maui* decision demonstrates that the Court's approach to statutory interpretation is more complex, a closer look at the case demonstrates that the Court applied the modern statutory interpretation tools and issued an opinion that provides some protection for the environment, but only because the policy preferences of a majority of the Court in protecting States' rights aligned with limited regulation of pollution discharges through groundwater.[241] The modern textualist approach to interpreting environmental statutes adopted by the Roberts Court is no friend

234. *Id.*

235. *Id.* at 175–76. Although the Court relied on the canon to reject the Ninth Circuit's reading of the statute, the majority apparently did not feel that a reading of the statute to regulate some discharges through groundwater would interfere with traditional state powers since the majority did not support its reading of the statute with citation to a clear statement of Congress's intent to regulate those discharges. *Id.*

236. *Id.*

237. *See supra* notes 12–13 (discussing the political motivation of Justices).

238. *See supra* Part III (comparing *Sackett* with *Riverside Bayview Homes*).

239. *See supra* notes 53–56 (discussing the eroding consensus of the Court in conjunction with a shift to textualism).

240. *See supra* Section II.D (highlighting the decline in pro-environment rulings).

241. *See supra* Part IV (discussing *County of Maui* in the proper context).

to the environment.[242] As Courts do not generally accord precedential value to the theories or tools that are used to interpret statutes, though, perhaps the environment's best hope is through future changes in the membership of the Court.[243]

242. *See supra* Section II.D (highlighting the decline in pro-environment rulings).

243. *See supra* note 18 (explaining that courts do not give precedential value to theories or tools used to interpret statutes).