

JUDICIAL DESTRUCTION OF THE CLEAN WATER ACT: *SACKETT v. EPA**Richard J. Lazarus**

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Introduction

In 1972, Congress passed the Clean Water Act¹ by overwhelming bipartisan majorities. The initial vote in the Senate in favor of passage was 74 to 0.² The House vote was 366 to 11.³ When President Richard Nixon vetoed the bill, both the House and the Senate overrode the presidential veto the next day. The Senate vote was 52 to 12 and the House vote was 247 to 23.⁴ The Act has since been one of the United States' great environmental success stories, making great strides toward achievement of the Act's overriding objective stated in its very first section: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁵

More than fifty years later, on May 25, 2023, the votes of only five people—all Justices on the Supreme Court—were all that was needed to devastate the Clean Water Act. In *Sackett v. EPA*,⁶ under the guise of judicial interpretation of the Act, the Court effectively reduced the Act's coverage of the nation's streams by as much as 80%, and of the nation's wetlands by at least 50%. As a practical matter, moreover, the Court's ruling will make it exceedingly hard, if not impossible, to protect even those waters that the five Justices in the majority agree are still covered. Contrary to the majority's proffered reasoning, nothing in the relevant statutory language compelled such an unprovoked hit job on the nation's ability to protect its waters from harmful pollution.

However, even that extraordinary result pales in comparison to the views of two of the five Justices who joined the majority—Justices Clarence Thomas and Neil Gorsuch—who made clear their shared

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¹ 33 U.S.C. §§ 1251–1387.

² David E. Rosenbaum, *Congress Votes \$24-Billion Bill to End Water Pollution by 1985*, N.Y. TIMES, Oct. 4, 1972, at A24.

³ *Id.*

⁴ John W. Finney, *Congress Quits After Overriding Water Bill Veto*, N.Y. TIMES, Oct. 18, 1972, at A1.

⁵ 33 U.S.C. § 1251(a).

⁶ 143 S. Ct. 1322 (2023).

view that the courts need to go further in cutting back on the Clean Water Act in future cases. In addition to joining the majority “in full,” Justice Thomas authored a separate concurring opinion, which Justice Gorsuch joined, which denied that Congress ever intended in the Clean Water Act to address the adverse effects of pollution on water quality at all. Indeed, the two Justices even questioned whether Congress had the constitutional authority under the Commerce Clause to do so. Not surprisingly, their supporting legal analysis is not remotely persuasive. What is surprising, however, and unsettling too, is the thinness and misleading nature of the concurrence’s legal analysis—the kind of work product one might expect from an unduly zealous and partisan advocate but not from a Supreme Court Justice.

This Essay is divided into three Parts. The first Part describes the ruling, reasoning, and impact of the majority opinion in *Sackett*. The second Part describes the proffered ruling, reasoning, and—if ever adopted by the courts—impact of Justice Thomas’ concurring opinion, which Justice Gorsuch joined. The third Part demonstrates why the majority’s reasoning lacks merit and then, far worse, why the Thomas concurrence falls far short of the kind of competent, principled legal analysis that the public can fairly demand of its Supreme Court Justices.

I. Justice Alito for the Court

Justice Samuel Alito authored the opinion for the five-Justice majority in *Sackett*, which Chief Justice John Roberts and Justices Thomas, Gorsuch, and Amy Coney Barrett all joined. The *Sackett* majority significantly cuts back on the geographic reach of the Clean Water Act and, consequently, on its effectiveness.

The Clean Water Act restricts discharges of pollutants into “navigable waters” and in turn defines “navigable waters” as “waters of the United States.”⁷ For most of the past fifty years,⁸ the two federal

⁷ 33 U.S.C. § 1362.

⁸ In the years immediately following the Clean Water Act’s enactment in 1972, the Army Corps of Engineers and EPA initially adopted very different interpretations of the Act’s jurisdiction. The Corps concluded that “waters of the United States” referred to no more than a slightly expanded version of the 1870 *The Daniel Ball*’s definition of “navigable waters.” See generally *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). Ultimately, several district courts rejected the Corps’ view in favor of EPA’s contrastingly expansive view that Congress had intended to exercise its full Commerce Clause authority to extend to pollution of all waters affecting interstate commerce. The Corps and EPA have since been in agreement. See *Sackett*, 143 S. Ct at 1354–55 (Thomas, J., concurring).

agencies administering the Act—the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps)—have together embraced a very broad view of the meaning of “waters of the United States” that defines the Act’s jurisdiction. They have taken the position that the Act’s jurisdiction extends far beyond those traditional “navigable waters of the United States” covered by nineteenth century federal laws, such as those defined by the Court’s 1870 decision in *The Daniel Ball*.⁹

Prior to *Sackett*, the agencies had looked to three Supreme Court cases that addressed the meaning of “waters of the United States” to decide how to define the scope of that expansive jurisdiction: *United States v. Riverside Bayview*, decided in 1985,¹⁰ *Solid Waste Agency v. Northern Cook County*, decided in 2001,¹¹ and *Rapanos v. United States*, decided in 2006.¹² Reading those cases together, the agencies had defined the jurisdictional reach of the Clean Water Act as extending beyond the scope of traditional navigable waters to include any waters with a “significant nexus” to those traditional navigable waters. According to the agencies, those waters may include, inter alia, tributaries (perennial, ephemeral, or intermittent streams, for

⁹ 77 U.S. (10 Wall.) 557 (1870).

¹⁰ 474 U.S. 121 (1985). In *Riverside Bayview*, the Court unanimously upheld the Corps’ assertion of Clean Water Act jurisdiction over a wetland that was not itself navigable but that was in close physical proximity to a navigable water body.

¹¹ 531 U.S. 159 (2001). In *Solid Waste Agency*, the Court rejected the Corps’ assertion of Clean Water Act jurisdiction over ponds in an abandoned gravel pit, rejecting the Corps’ reliance on its Migratory Bird Rule, which purportedly based jurisdiction on the presence of migratory birds.

¹² 547 U.S. 715 (2006). In *Rapanos*, the Court rejected the Corps’ assertion of jurisdiction over four wetlands, but without a majority opinion for why. Justice Antonin Scalia authored the plurality opinion that rejected jurisdiction on sweeping grounds based on a dictionary definition of the meaning of the word “waters,” which excluded the four wetlands at issue. *Id.* at 731–58. However, Justice Anthony Kennedy supplied the controlling vote in favor of the judgment of reversal, and his reasons were far narrower than those of the plurality. Justice Kennedy’s concurrence contended that any waters that EPA and the Corps could demonstrate possessed a “significant nexus” to traditional navigable waters would fall within the Clean Water Act’s reach, even potentially the four wetlands at issue in *Rapanos* on remand. *Id.* at 759–87.

example), lakes, and wetlands that possess that necessary hydrologic nexus.¹³

In *Sackett*, the Court cut back on the Clean Water Act’s geographic reach in three significant respects. First, all nine Justices rejected the “significant nexus” test upon which EPA and the Corps had relied, which was itself rooted in Justice Anthony Kennedy’s separate concurring opinion in *Rapanos*,¹⁴ because they found its application unsupported by the statutory language and untenably vague in application.¹⁵ Second, relying on the dictionary definition of “waters” first invoked by Justice Antonin Scalia in his *Rapanos* plurality opinion, the five-Justice majority ruled that “waters” were limited to “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[all] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”¹⁶ Finally, although the majority agreed that there was statutory language that made clear that Congress had intended to include “adjacent wetlands” within the Clean Water Act’s jurisdiction, the only wetlands covered would be those that are “indistinguishably part of a body of water that itself constitutes ‘waters’ under the [Clean Water Act].”¹⁷

The environmental impact of this reduction in geographic jurisdiction is massive. Many of the nation’s waters that have benefited from the Clean Water Act’s protection would be removed entirely from the Act based on the Court’s embrace of a dictionary definition. For example, ephemeral and intermittent streams—a natural product of the seasonal nature of rainfall in vast parts of the country—would readily seem to fall outside the scope of “relatively permanent, standing or continuously flowing bodies of water.”¹⁸ EPA

¹³ See Department of the Army Corps of Engineers and Environmental Protection Agencies, *Revised Definition of ‘Waters of the United States’*, 88 Fed. Reg. 3,004, 3,011–19 (2023) (summarizing the history of the agencies’ interpretation of “waters of the United States”).

¹⁴ See note 12, *supra*.

¹⁵ *Sackett*, 143 S. Ct. at 1342 (majority opinion); *id.* at 1362, 1369 (Kavanaugh, J., concurring, joined by Sotomayor, Kagan, & Jackson, J.J.).

¹⁶ *Id.* at 1336 (quoting *Rapanos*, 547 U.S. at 739 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954) (original alterations omitted))).

¹⁷ *Id.* at 1339.

¹⁸ *Rapanos*, 547 U.S. at 739 (plurality opinion).

internal documents suggest this would eliminate 50% to 80% of the Act's coverage of streams in the United States.¹⁹

The Court's conclusion that the only wetlands that meet Congress's reference to "adjacent wetlands" are those that are "indistinguishably part of a body of water that itself constitutes 'waters' under the [Clean Water Act]" is no less dramatic in its environmental impact.²⁰ As of the date of the Court's release of the opinion, no wetlands scientist knows what that test means, because it bears no relation to any existing scientific understanding of how wetlands relate to traditional navigable waters within close physical proximity. Internal EPA inquiry suggests, however, that the Court's adoption of the *Rapanos* plurality's "continuous flow" requirement for adjacency could readily lead to at least a 50% reduction of the Clean Water Act's coverage of wetlands in the United States.²¹

Prior to *Sackett*, a peer-reviewed scientific publication warned that if the Court were to adopt the new jurisdictional tests that it has now adopted, it would cause "a drastic reduction in Clean Water Act protections."²² The arid regions in the nation will be most affected "where there is a high proportion of ephemeral streams."²³ The study

¹⁹ It is too soon after the *Sackett* ruling to assess the precise number of waters now excluded from Clean Water Act coverage. The estimates in the text, however, are fairly based on an internal analysis conducted by EPA experts in 2017, when considering the impact of the agency's adoption of the *Rapanos* jurisdictional test, which is what the Court has now done six years later in *Sackett*. The content of these communications was made available apparently pursuant to a Freedom of Information Act request and the related documents are available from the author. See E-mail from John Goodin, U.S. Environmental Protection Agency, to Stacey Jenson, U.S. Army Corps of Engineers (Sept. 4, 2017, 6:08 pm) (including graph pie chart "Breakdown of Flow Regimes in NHD Streams Nationwide" indicating percentage of "ephemeral" and "intermittent" streams).

²⁰ *Sackett*, 143 S. Ct. at 1339.

²¹ See Goodin email, *supra* note 19 ("The proposed option of defining 'continuous surface connection' as directly touching a waters of the U.S. may result in about 51% of NWI-mapped potential wetland acreage not being considered adjacent.").

²² See Brief Amicus Curiae of Scientific Societies in Support of Respondents, *Sackett*, No. 21-454, at *24 (citing Roger Meyer & Andrew Robertson, Clean Water Rule Spatial Analysis: A GIS-Based Scenario Model for Comparative Analysis of the Potential Spatial Extent of Jurisdictional and Non-Jurisdictional Wetlands, <https://perma.cc/EL7H-MH5G>).

²³ *Id.*

examined specific watersheds across the country, including one in New Mexico where “wetland jurisdiction likely would be reduced by more than 50%, and stream jurisdiction likely would be reduced by more than 90%.”²⁴

Finally, even those stunning percentage reductions understate the enormous impact of the Court’s ruling because the majority’s reasoning will make it practically impossible for EPA and the Corps to protect even those waters that the Justices agreed are covered. As Justice Scalia explained in his *Rapanos* plurality opinion upon which the Court subsequently relied in *County of Maui v. Hawaii Wildlife Fund*,²⁵ EPA and the Corps have authority to regulate discharges into noncovered waters that flow into covered waters.²⁶ True, but going forward that is an illusory promise. Once the waters are not covered, the federal government will have no way of knowing about those other sources of pollution in noncovered waters.

Under what had been settled law, the government knew about all those other discharges located outside traditional navigable waters. This was because under the “significant nexus” theory of jurisdiction, those responsible for the discharges had to secure a permit from the government and submit daily monitoring reports of the discharges. None of that will automatically happen going forward. To regulate those other sources, the government will first have to identify a water quality problem in a covered water, then expend considerable resources to identify and track down pollution sources located outside the government’s presumptive jurisdiction, and then prove those

²⁴ *Id.*

²⁵ 140 S. Ct. 1462, 1475 (2020) (quoting *Rapanos*, 547 U.S. at 743).

²⁶ As Justice Scalia explained:

Though we do not decide this issue, there is no reason to suppose that our construction today significantly affects the enforcement of § 1342, inasmuch as lower courts applying § 1342 have not characterized intermittent channels as “waters of the United States.” The Act does not forbid the “addition of any pollutant *directly* to navigable waters from any point source,” but rather the “addition of any pollutant *to* navigable waters.” § 1362(12)(A) (emphasis added); § 1311(a). Thus, from the time of the CWA’s enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit “directly into” covered waters, but pass “through conveyances” in between.

Rapanos, 547 U.S. at 743 (emphasis in original).

sources are the ones from which pollutants are reaching the covered waters.

It is a Herculean task at best. Even gaining physical access to the locations of the discharges on private property will not be easy, if not practically impossible. And, of course, avoiding such a potentially insurmountable hurdle was precisely why Justice Kennedy, EPA, and the Corps had all concluded that waters should be covered by the Clean Water Act so long as they possessed a significant hydrologic nexus to traditional navigable waters. Otherwise, the government could not possibly achieve the Act's stated objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²⁷

II. Justices Thomas and Gorsuch Concurring

As massive a cutback as the majority's ruling is on the jurisdiction of the Clean Water Act, it is mere child's play in comparison to the interpretation of the Act advanced in the concurring opinion by Justice Thomas, which Justice Gorsuch joined. It is no exaggeration that, under their view, the Clean Water Act would become a virtual nullity. The landmark 1972 Act that Congress enacted in the heyday of the nation's embrace of environmentalism would accomplish little more than the several Rivers and Harbors Acts that Congress passed during the 1890s.

The concurrence began by endorsing "in full" the majority's narrow, dictionary-driven view of the meaning of "waters of the United States."²⁸ But then Justice Thomas announced he was writing "separately to pick up where the Court leaves off" by addressing how the additional statutory terms "navigable" and "of the United States" further limit the Clean Water Act's applicability.²⁹ In short, he was inviting the lower courts to take these next steps.

According to the Thomas concurrence, the Clean Water Act covers only traditional navigable waters, essentially the same as those governed by the Rivers and Harbors Acts of the 1890s. That would include waters that "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries,"³⁰ "waters that are not currently capable of supporting

²⁷ 33 U.S.C. § 1251(a).

²⁸ *Sackett*, 143 S. Ct. at 1344.

²⁹ *Id.* at 1344–45.

³⁰ *Id.* at 1350, quoting *The Daniel Ball*, 77 U.S. (10 Wall.) at 563.

interstate commerce, though they once did,”³¹ and “waters that could be made navigable with reasonable and feasible improvement.”³² That is a slightly expanded version of *The Daniel Ball* definition of navigable waters based on subsequent Supreme Court rulings extending the term to “past” navigable waters.³³

Even for those waters covered, moreover, the Act would regulate only discharges of pollutants that affected the water’s navigability or otherwise affected suitability of the waters for interstate commerce. The Act would not otherwise cover activities that “merely ‘affect’ water-based commerce.” Accordingly, outside the Clean Water Act’s reach would be activities regulated by state “[i]nspection laws, quarantine laws, health laws of every description, as well as laws regulating the internal commerce of a State.”³⁴ None would be “within Congress’ channels-of-commerce authority.” Water quality–based protections—an example of “health laws of every description”—would presumably fail this jurisdictional test.³⁵

The linchpin of the concurrence’s legal argument for this truly extraordinary result is the declaration that the Court used “navigable waters” and “waters of the United States” interchangeably and synonymously for decades prior to congressional enactment of the Clean Water Act of 1972. Accordingly, Justice Thomas argues, there is no reason to conclude that the Act’s defining of “navigable waters” as “waters of the United States” was intended to expand the Act’s coverage beyond traditional nineteenth century navigable waters.³⁶

In support of his assertion that “navigable waters” and “waters of the United States” refer to the same set of waters, Justice Thomas claims that the “courts and Congress had long used the terms ‘navigable water,’ ‘navigable water of the United States,’ and ‘the

³¹ *Id.* at 1351 (citing *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123–24 (1921)).

³² *Id.* (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408–09 (1940)).

³³ *Id.* at 1353 (describing “the expanded *Daniel Ball* test”).

³⁴ 143 S. Ct. at 1346 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 78 (1824)).

³⁵ *Id.*

³⁶ *Id.* at 1349 (“Consistent with that backdrop, the term ‘navigable waters’—used interchangeably with ‘waters of the United States’ and ‘navigable waters of the United States’—referred to the waters subject to Congress’ traditional authority over navigable waters until the enactment of the CWA.”) (Thomas, J., concurring).

waters of the United States’ interchangeably to signify those waters to which the traditional channels-of-commerce authority extended.”³⁷ In particular, the concurrence argues that “[t]he River and Harbor Acts of 1890, 1894, and 1899 illustrate the limits of the channels-of-commerce authority,” and “they use the terms ‘navigable water,’ ‘water of the United States,’ and ‘navigable water of the United States’ interchangeably.”³⁸

In support of the further assertion that both terms refer to no more than traditional navigable waters, as defined by the expanded *Daniel Ball* test, Justice Thomas claims that “[b]y the time of the CWA’s enactment,” “critically, the statutory terms ‘navigable waters,’ ‘navigable waters of the United States,’ and ‘waters of the United States’ were still understood as invoking only Congress’ authority over waters that are, were, or could be used as highways of interstate or foreign commerce.”³⁹ According to the concurrence, “[t]he text of the CWA extends jurisdiction to ‘navigable waters,’ and—*precisely tracking The Daniel Ball*—clarifies that it reaches ‘the waters of the United States,’ rather than the navigable waters of the States.”⁴⁰ “Thus,” the concurrence concludes, “the CWA’s use of the phrase ‘the waters of the United States’ reinforces, rather than lessens, the need for a water to be at least part of ‘a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.’”⁴¹

Justices Thomas and Gorsuch also supported their view by repudiating what they acknowledged had been the longstanding view of EPA, the Corps, and the lower courts—that Congress sought in the Clean Water Act to exercise the kind of expansive Commerce Clause authority that the Supreme Court had recognized in upholding federal legislation during the New Deal.⁴² Their concurrence grudgingly acknowledged that “[b]y the time of the Clean Water Act’s enactment, the New Deal era arguably had relaxed the . . . limitation” that

³⁷ *Id.* at 1352.

³⁸ *Id.* at 1346–47.

³⁹ *Sackett*, 143 S. Ct. at 1345.

⁴⁰ *Id.* at 1354 (emphasis added).

⁴¹ *Id.*

⁴² *Id.* at 1353 (citing *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1323–29 (6th Cir. 1974); *P. F. Z. Properties, Inc. v. Train*, 393 F. Supp. 1370, 1381 (D.D.C. 1975); *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); *United States v. Holland*, 373 F. Supp. 665, 669, 672–74 (M.D. Fla. 1974)).

“Congress could regulate . . . only for purposes of . . . navigability.”⁴³ According to the concurrence, however, Congress chose to continue adhering to that limitation in defining the Clean Water Act’s jurisdiction and faulted EPA and the Corps for “treat[ing] the statute as if it were based on New Deal era conceptions of Congress’ commerce power. . . . [W]hile not all environmental statutes are so textually limited, Congress chose to tether federal jurisdiction under the [Clean Water Act] to its traditional authority over navigable waters.”⁴⁴

III. Unpersuasive and Misleading Legal Analysis

No Justice dissented from the Court’s judgment reversing the Ninth Circuit’s ruling favorable to the federal government. Although four Justices—Sonia Sotomayor, Elena Kagan, Brett Kavanaugh, and Ketanji Brown Jackson—declined to join the majority opinion and sharply criticized its reasoning in two concurring opinions, they agreed “with the Court’s bottom-line judgment that the wetlands on the Sacketts’ property are not covered by the Act and are therefore not subject to permitting requirements.”⁴⁵

Justice Kavanaugh’s decision not to join the majority was certainly a surprise. It makes no precedential difference, of course, whether the Court’s majority is supported by five or six Justices. Justice Kavanaugh’s decision to split from the majority appears, however, to have had a dramatic effect on the views expressed and not expressed by Justices Sotomayor, Kagan, and Jackson.

Even more surprising than Justice Kavanaugh’s decision not to join the majority was the decision of Justices Sotomayor, Kagan, and Jackson to join the judgment, and not to otherwise express any strong views in the case that Justice Kavanaugh might find off-putting. They apparently thought it more strategically prudent for the longer term to embrace Justice Kavanaugh and his independence than more aggressively take on the broader implications of either the majority opinion or the Thomas concurrence. Their decision, however, was not without cost.

In *Rapanos*, Justice John Paul Stevens filed a 23-page stinging dissent, joined by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer that directly challenged Justice Scalia’s narrow

⁴³ *Sackett*, 143 S. Ct. at 1345.

⁴⁴ *Id.* at 1359.

⁴⁵ *Id.* at 1362 (Kavanaugh, J., concurring, joined by Sotomayor, Kagan, & Jackson, J.J.).

definition of “waters of the United States.”⁴⁶ The dissent singled out for criticism the plurality’s reliance on a “dictionary for a proposition that it does not contain”—that “streams can never be intermittent or ephemeral” and fall within the reach of the Clean Water Act.⁴⁷ The dissent sharply rebuked the plurality for “needlessly jeopardiz[ing] the quality of our waters” and contended that the wetlands at issue in *Rapanos*, which are very similar to those in *Sackett* in terms of their proximity to more traditional navigable waters, fell within the scope of the Clean Water Act.⁴⁸

By contrast, in *Sackett*, neither the Kavanaugh nor Kagan concurring opinions even discussed the broader legal issue addressed by the majority, including its reliance on a dictionary to remove ephemeral and intermittent streams from the Clean Water Act’s coverage. The only issue that either of those two concurring opinions discussed was whether the majority had correctly construed the term “adjacent” in determining which wetlands were covered by the Act. Both disagreed with the majority that only those wetlands with a “continuous surface connection” to and otherwise “indistinguishable” from a covered navigable water met the test.⁴⁹ In contrast to *Rapanos*, the two concurring opinions were otherwise completely silent on the no less sweeping legal issues addressed by the majority that cut back on other aspects of the Clean Water Act’s geographic reach.

Even more remarkably, not even Justice Kagan’s separate concurrence took on the issues addressed by Justice Thomas’ separate concurrence. Justice Thomas was consequently never challenged for his legal arguments that would effectively eliminate the Clean Water Act’s ability to protect the nation’s waters from pollution. As a result, lower courts may well accept Justice Thomas’s invitation to take up the additional legal issues he raises in his concurrence, without the benefit of any other Justice making clear why those views are baseless.

This Essay seeks to fill that gap. It assesses the reasoning of the majority, which, while unpersuasive, at least had the pretense of rational legal discourse. And this Essay challenges the legal arguments of the Thomas concurrence, which are beyond any plausible notion of legal tenability.

⁴⁶ *Rapanos*, 547 U.S. at 787–810.

⁴⁷ *Id.* at 801.

⁴⁸ *Id.* at 788–92, 796, 809.

⁴⁹ See *Sackett*, 143 S. Ct at 1359–62 (Kagan, J., concurring); *id.* at 1362–69 (Kavanaugh, J., concurring).

A. Majority's Reasoning

First, the majority relies exclusively on its preferred dictionary for its ruling that “waters of the United States” is limited to “those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”⁵⁰ However, as Justice Stevens well explained in his *Rapanos* dissent, even that dictionary does not support the proposition asserted by Justice Scalia in *Rapanos* or now by the *Sackett* majority. “The dictionary treats ‘streams’ as ‘waters’ but has nothing to say about whether streams must contain water year round to qualify as ‘streams.’ . . . [C]ommon sense and common usage demonstrate that intermittent streams, like perennial streams, are still streams.”⁵¹

Moreover, not only is there zero evidence in the legislative record to suggest that Congress was aware of this particular dictionary definition, let alone the atextual gloss the *Sackett* majority adds to it, but the majority completely ignores the Act’s legislative history. That historical record includes contemporaneous congressional reports explicitly stating that the purpose of defining “navigable waters” as “waters of the United States” was to expand the Clean Water Act’s geographic reach through the exercise of the full scope of congressional Commerce Clause authority.⁵² Notably, the House of Representatives’ original clean water bill did in fact define the proposed legislation’s geographic reach more strictly: using “navigable waters” and “*navigable* waters of the United States” interchangeably, but not using “navigable waters” and “waters of the United States” interchangeably—the latter term never appeared in the House bill.⁵³ However, as described by the Ninth Circuit in 1978,

When the two [House and Senate] bills went to Conference Committee, the word “navigable” was deleted from the definition. The Conference Report explained that “[t]he conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation

⁵⁰ *Id.* at 1336–37 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

⁵¹ *Rapanos*, 547 U.S. at 801.

⁵² See S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.); S. REP. NO. 92-414, at 77 (1972).

⁵³ H.R. 11896, 92d Cong. (introduced Nov. 19, 1971).

unencumbered by agency determinations which have been made or may be made for administrative purposes.”⁵⁴

This is the same legislative history upon which the Supreme Court itself heavily relied in its unanimous *Riverside Bayview* opinion in 1985, which upheld the federal government’s broad assertion that the Clean Water Act permitted authority over nonnavigable wetlands hydrologically connected to nearby navigable waters.⁵⁵ Quoting from a Senate report, the Court then reasoned that “Congress 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.’”⁵⁶ This was also why, according to the Court, Congress made “it clear that the term ‘navigable’ as used in the Act is of limited import.”⁵⁷

Finally, beyond a dictionary, the only support the *Sackett* majority could muster for devastating the Clean Water Act’s protections was its invocation of two “background principles of construction,” which the Court, for reasons known only to itself, declined to refer to by the normal judicial nomenclature of “canons” of statutory construction.⁵⁸ The first background principle is a newly invented canon that requires strict readings of any federal statutes that impinge on private property rights. The second requires a narrow reading of a federal statute’s reach when, as is true for the Clean Water Act, violation of the Act’s requirements includes the possibility of serious criminal penalties. Neither background principle, or canon of statutory construction, is persuasive.

As described by the majority, the first background principle provides that Congress must use “exceedingly clear language” if Congress seeks to “alter . . . the power of the Government over private property.”⁵⁹ One wonders, however, where the Court finds the historical pedigree for this supposed background principle. The only support the Court can purport to muster for its unprecedented invocation of this background principle is its 2020 decision in *U.S.*

⁵⁴ *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754 n.15 (9th Cir. 1978) (quoting S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.)).

⁵⁵ See generally *Riverside Bayview*, 474 U.S. 121.

⁵⁶ *Id.* at 462 (quoting S. REP. NO. 92-414, at 77 (1972)).

⁵⁷ *Id.*

⁵⁸ *Sackett*, 143 S. Ct. at 1341.

⁵⁹ *Id.*

Forest Service v. Cowpasture River Preservation Ass'n.⁶⁰ *Cowpasture*, however, is wholly inapposite. In *Cowpasture*, the only legal issue before the Court was whether the federal Mineral Leasing Act granted the Forest Service the authority to grant rights of way within national forests traversed by the Appalachian Trail.⁶¹ The Court ruled in favor of the Forest Service on the issue. The case did not directly implicate the distinct question, raised in *Sackett*, of whether the federal government possesses regulatory authority over activities occurring on private property.

Unlike the first background principle, the Court's second background principle does enjoy a historical pedigree—it is the “rule of lenity”—though for reasons known only to the Court, it declines to mention that name. The rule of lenity provides that the Court will read ambiguous provisions in federal criminal statutes favorably to the defendant in light of due process concerns otherwise presented by convicting an individual for a serious offense based on vague or uncertain statutory language.⁶² Although the meaning of “waters of the United States” implicates federal criminal prosecutions under the Clean Water Act, the Court has never previously ruled that the potential application of such penalties is a basis for reading an entire law's jurisdictional scope in such a narrow way. The federal environmental laws are primarily civil laws. Potential criminal enforcement has never historically been a major dimension of these laws. Moreover, overbreadth problems can be fixed without cutting back on the entire law. Because, moreover, there are mens rea elements that prosecutors must prove to secure a conviction, a court can fairly dismiss any prosecution based on statutory language that the judge concludes is too vague to find such mens rea present.⁶³ Or a court can, as the Supreme Court has noted, “read a state-of-mind

⁶⁰ 140 S. Ct 1837 (2020).

⁶¹ *Id.* at 1841.

⁶² See, e.g., *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)) (referring to “the common-law tradition” and “the general injunction that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity’”).

⁶³ See 33 U.S.C. § 1319(c)(1) (negligent violations punishable as misdemeanors); § 1319(c)(2) (knowing violations punishable as felonies); § 1319(c)(3) (knowing endangerment violations punishable as more serious felonies).

component into an offense even when the statutory definition did not in terms so provide.”⁶⁴

Indeed, that is the gist of what the Court held in 1995 in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.⁶⁵ The decision in that case expressly rejected the argument that the potential for criminal prosecution for some Endangered Species Act violations warranted application of the rule of lenity to cut back on the statute’s overall reach.⁶⁶ The Court stated that the possibility of such unfairness in a discrete application was not a basis for cutting back the law generally, and suggested that a regulation could provide the notice that the statutory language by itself might lack.⁶⁷ How did the *Sackett* majority address this applicable, presumably binding precedent? By ignoring its existence.

Indeed, perhaps the *Babbitt* Court’s explicit rejection of the application of the rule of lenity to the statutory construction of a statute that, like the Clean Water Act, possesses both civil and criminal dimensions, is why the *Sackett* majority chose not to refer to its proffered background principle by its traditional rule of lenity name. The shift in nomenclature might prevent a ChatGPT research inquiry from finding the connection between the two lines of precedent. Binding Supreme Court precedent, however, cannot be avoided by such a transparently weak effort at judicial sleight of hand.

B. Concurrence’s Reasoning

As weak as the majority’s reasoning is, it at least falls within the bounds of principled legal argument. The Thomas concurrence, by contrast, does not. As described above, the linchpin of Justice Thomas’s legal argument, joined by Justice Gorsuch, is that “navigable waters” and “waters of the United States” had previously been used interchangeably and synonymously.⁶⁸ That is the beginning and end of their contention that the Clean Water Act’s geographic jurisdiction extends no further than the nineteenth century meaning of “navigable waters” and that the Act is concerned only with the impact of discharges into those waters that affect their navigability and use in interstate commerce, but not matters like public health.⁶⁹ So too, it

⁶⁴ *U.S. Gypsum Co.*, 438 U.S. at 437.

⁶⁵ 515 U.S. 687 (1995).

⁶⁶ *Id.* at 704 n.18.

⁶⁷ *Id.*

⁶⁸ *Sackett*, 143 S. Ct. at 1352.

⁶⁹ *See* text accompanying notes 36–44, *supra*.

was the exclusive basis of the concurrence’s contention that Congress had not intended in the Clean Water Act to exercise expanded “New Deal era” authority under the Commerce Clause—contrary to congressional reports expressly to the contrary.⁷⁰

In support of their argument, Justices Thomas and Gorsuch asserted that the Court’s 1870 ruling in *The Daniel Ball* used the terms “navigable waters” and “waters of the United States” interchangeably, as they say Congress did in the Rivers and Harbors Acts of 1890, 1894, and 1899. But here’s the problem. Neither *The Daniel Ball* nor those congressional enactments of the 1890s support the concurrence’s claim.

For instance, Justices Thomas and Gorsuch claim that the Clean Water Act “precisely track[s]” the language of *The Daniel Ball* in equating “navigable waters” with “waters of the United States.”⁷¹ If true, that might be a powerful argument, putting aside the obvious response that the 1972 law and its legislative history make clear Congress intended to do far more than replicate *The Daniel Ball* test or an 1899 law. The problem with their argument, however, is that their statement is not true.

How many times does *The Daniel Ball* use the term “waters of the United States?” Ten times? Three times? Two times? The answer is zero. *The Daniel Ball* never once uses the term “waters of the United States” in its opinion. The term that *The Daniel Ball* instead uses on four occasions is “navigable waters of the United States.”⁷² The Court never suggests that the terms “navigable waters” and “waters of the United States” are synonymous. That, of course, is the ball game because it is the legal significance of Congress’s *elimination* of the term “navigable” that is at issue in *Sackett*. Unlike the Clean Water Act, *The Daniel Ball* never eliminates the term.

Similarly misleading is the concurrence’s argument that the several Rivers and Harbors Acts enacted by Congress in the 1890s used the terms “navigable waters” and “waters of the United States” interchangeably. In almost every instance, those Acts do not use the term “waters of the United States” without a proximate reference to “navigable.”

⁷⁰ See text accompanying notes 36–44, *supra*.

⁷¹ 143 S. Ct. at 1354.

⁷² *The Daniel Ball*, 77 U.S. (10 Wall.) at 563–64, 566.

For instance, Section 13 of the Rivers and Harbors Act of 1899,⁷³ known as the “Refuse Act,”⁷⁴ is understood as the statutory precursor to the Clean Water Act because it extended the earlier enactments by barring the unpermitted deposit or discharge of refuse either directly into or on the banks of any “navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such watershed.”⁷⁵ Prior to passage of the Clean Water Act in 1972, the Corps successfully invoked Section 13 to challenge discharges of pollution into navigable waters without regard to whether the pollution impeded navigability.⁷⁶ One of the 1899 law’s major limitations, however, was that it applied only to any “navigable water,” and its “tributaries” and “banks,” which is of course precisely why Congress declined to rely exclusively on that term in the 1972 Clean Water Act and took the additional step of defining “navigable waters” more expansively to mean “waters of the United States.”⁷⁷ The Refuse Act never uses the term “waters of the United States,” so the Act cannot be plausibly characterized as using “navigable waters” and “waters of the United States” interchangeably.

The 1899 law as a whole, moreover, never once uses the distinct term “waters of the United States” without the navigable modifier. The closest that the 1899 Act gets is in a distinct section, Section 10, which prohibits “the creation of any obstruction . . . to the *navigable* capacity of any of the waters of the United States” or the building of any “wharf, pier . . . or other structures in any port, roadstead, haven, harbor, canal, *navigable* river, or other water of the United States, outside established harbor lines”⁷⁸ In both of those Section 10 clauses, Congress expressly includes the navigable requirement.

The Rivers and Harbors Acts of 1890 and 1894 are no different. The former refers in Section 10 to the “*navigable capacity* of any

⁷³ 30 Stat. 1152.

⁷⁴ See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 329–30 (1981) (referring to Section 13 of the Rivers and Harbors Act of 1899 as the “Refuse Act”).

⁷⁵ 30 Stat. 1152; see ROBERT PERCIVAL, ALLAN MILLER, CHRISTOPHER SCHROEDER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 582–84 (9th ed. 2021) (describing the history of the Refuse Act).

⁷⁶ See, e.g., *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

⁷⁷ 30 Stat. 1152.

⁷⁸ 30 Stat. 1151.

waters, in respect of which the United States has jurisdiction.”⁷⁹ And the latter refers in Section 5 to “navigable rivers and other waters of the United States,” and in Section 6 to “any of its *navigable* waters.”⁸⁰ However, here again, the “navigable” qualifier is tenaciously proximate.⁸¹

That is a far cry from what Congress did in the 1972 Clean Water Act. As described by the Court in *Riverside Bayview* in 1985: “Congress chose to define the waters covered by the Act broadly,” and to “make[] it clear that the term ‘navigable’ is of limited import.”⁸² That same unanimous 1985 opinion flatly contradicts the ahistorical claim of Justices Thomas and Gorsuch in *Sackett* that Congress did not intend in the 1972 Clean Water Act to extend its jurisdiction beyond the nineteenth century’s limited conception of congressional Commerce Clause authority over navigable waters. According to all nine Justices in *Riverside Bayview*, by defining “navigable waters” as “waters of the United States” in the Clean Water Act, “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.”⁸³

In short, the entire premise is missing for the Thomas concurrence’s claim that the Clean Water Act of 1972 does no more than the congressional enactments of the 1890s, which were designed to protect only the navigable capacity of traditional navigable waters. The Court and Congress in the nineteenth century did *not* use the terms “navigable waters” and “waters of the United States” interchangeably and synonymously. Because that premise is not true, the argument in the concurring opinion collapses.⁸⁴

⁷⁹ 26 Stat. 454.

⁸⁰ 28 Stat. 362–63.

⁸¹ The only arguable exception is found in Section 6 of the Rivers and Harbors Act of 1864 reference to “in the waters of any harbor or river of the United States.” 28 Stat. 363. But it takes more than a Herculean leap to seize that one statement as evidence that Congress intended in 1972 to equate “navigable waters” as “waters of the United States.”

⁸² *Riverside Bayview*, 474 U.S. at 133.

⁸³ *Id.*

⁸⁴ The Thomas/Gorsuch historical argument appears to be largely cribbed from a legal publication to which the concurrence cites six times, whose authors at the time of the article’s publication were attorneys for a

Conclusion

The 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. That would certainly explain why the Court granted review in the case when it clearly did not have to do so. After all, the federal government had long ago informed the Sackett family that it would no longer enforce its administrative compliance order, meaning that the Sacketts were free to build on their property even if the Ninth Circuit held that the case was not legally moot.⁸⁵

The majority's disdain for one of the nation's most successful and important environmental protection laws was not subtle. While acknowledging with little masked irony that "the Act has been a great success,"⁸⁶ the majority referred to the Clean Water Act as a "potent weapon" with "crushing consequences"⁸⁷ "even for inadvertent violations."⁸⁸ According to the majority, "the permitting process can be arduous, expensive, and long."⁸⁹

According to Justices Thomas and Gorsuch, relying on Justice Scalia's hyperbole in *Rapanos*, the federal government is asserting Clean Water Act jurisdiction over anything "wet" and "virtually any

leading law firm representing industry in Clean Water Act litigation. See *Sackett*, 143 S. Ct. at 1347 (citing V. Albrecht & S. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ENV. L. REV. 11042, 11044 (2002)); *id.* at 1354 n.7 (citing the aforementioned article three times); *id.* at 1355 n.8 (quoting the aforementioned article once); *id.* at 1356 (quoting the aforementioned article once). That same law firm filed a brief in support of industry interests in the *Sackett* case on behalf of the U.S. Chamber of Commerce. See Brief Amicus Curiae of the Chamber of Commerce of the United States in Support of Petitioners, *Sackett*, No. 21-454. The concurrence, moreover, miscites the publication, which was not in the "ENV. L. REV." but in the "News & Analysis" section of volume 32 of the Environmental Law Institute's "Environmental Law Reporter" (ENVTL. L. REP.). The absence of correction prior to the opinion's publication may suggest a lack of close attention to the article by chambers.

⁸⁵ See Brief for Respondents in Opp'n, *Sackett*, No. 21-454, at *7.

⁸⁶ *Sackett*, 143 S. Ct. at 1329.

⁸⁷ *Id.* at 1330 (quoting *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)).

⁸⁸ *Id.* (quoting *Hawkes Co.*, 578 U.S. at 602 (Kennedy, J., concurring)).

⁸⁹ *Id.* at 1331 (quoting *Hawkes Co.*, 578 U.S. at 594–95, 601).

parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow.”⁹⁰ The federal government’s definition of the Act, the concurrence argues, would “engulf[] entire cities and immense arid wastelands’ alike.”⁹¹ If the government’s view were upheld, “the only prudent move for any landowner in America would be to ask the Federal Government for permission before undertaking any kind of development.”⁹²

Why then, as the two Justices suggest should happen, have landowners over the past fifty years prior to *Sackett* not engaged in such a rush for a federal permit for any kind of development on their land? Why haven’t “entire cities” and “immense arid wastelands” been buried by landowner requests for thousands of Clean Water Act development permits?⁹³ The answer is easy: because the concurrence’s characterization of the federal government’s administration of the Clean Water Act is utter nonsense. Justices Thomas and Gorsuch’s rhetoric, like the majority’s own, is the stuff of an undisciplined political campaign rally and not the kind of serious, thoughtful, careful, and rigorous legal analysis expected of Supreme Court Justices.

What is most unsettling about this rhetoric, however, is the nakedness of the majority’s criticism of the Clean Water Act on substantive policy grounds. Given, moreover, the weakness of the legal arguments advanced by the majority and even more so by Justices Thomas and Gorsuch, the conclusion that the Justices are acting like legislators and not like Supreme Court Justices is irresistible.

The five Justices in the majority are of course entitled to have their own policy preferences. They can freely express their views that the Clean Water Act should be amended to avoid federal regulation of water pollution that they believe would be better left to states or not regulated at all. But here is the rub. When Justices are voting their policy preferences in this manner, they cannot impose their will by merely five votes out of nine. They are instead five votes out of 154.6 million, the number of voters who voted their own policy preferences in

⁹⁰ *Id.* at 1356–57, (quoting *Rapanos*, 547 U.S. at 722 (plurality opinion by Scalia, J.)).

⁹¹ *Id.* at 1357 (quoting *Rapanos*, 547 U.S. at 722 (plurality opinion by Scalia, J.)).

⁹² *Id.*

⁹³ *Id.*

the most recent 2020 presidential election.⁹⁴ The Justices can vote for the President of the United States that they believe should be in the White House. They can vote for their favored candidates for the U.S. Congress, governors, state legislatures, and local government leaders.

What they cannot do, however, is what five Justices did in *Sackett v. EPA*: destroy the Clean Water Act's effectiveness in defiance of clear congressional intent supported by outsized bipartisan majorities in 1972 and 1977, and as recognized by virtually every presidential administration,⁹⁵ whether Democratic or Republican, during the past half-century. That is out of bounds.⁹⁶

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⁹⁴ United States Census Bureau, Census Bureau Releases 2020 Presidential Election Voting Report (Feb. 17, 2022), <https://perma.cc/JQA8-PHSB>.

⁹⁵ The notable exception is the Trump administration's "Navigable Waters Protection Rule," published in April 2020 (85 Fed. Reg. 22,250 (2020)), which embraced much of Justice Scalia's *Rapanos* plurality (*see id.* at 22,277, 22,279–80). But as Justice Kavanaugh pointed out, even the Trump rule did not go as far as the *Sackett* majority in limiting the meaning of "adjacent wetlands." *Sackett*, 143 S. Ct. at 1362, 1365 (Kavanaugh, J., concurring) (describing how under the Trump rule, unlike the *Sackett* majority, "adjacent wetlands included wetlands that are 'physically separated' from certain covered waters" (quoting 85 Fed. Reg. 22,340)). Soon after the Trump rule's promulgation, moreover, a federal district court vacated the rule, based on the "seriousness of the Agencies' errors in enacting" the rule. *Pasqua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 956 (D. Ariz. 2021).

⁹⁶ In the last opinion that the Court decided before recessing this past summer, Chief Justice John Roberts warned against Justices in their dissenting opinions criticizing Court "decisions with which they disagree as going beyond the proper role of the judiciary." *Biden v. Nebraska*, No. 22-506, at 25 (June 30, 2023). The Chief worries that mistaking "plainly heartfelt disagreement for disparagement" may mislead the public in a way "harmful to this institution and our country." *Id.* at 26. I agree and share his worry that much public discourse and criticism of the Court is misdirected and expresses mostly policy disagreements with the outcomes rather than any serious grappling with the challenging legal issues actually before the Court. There are nonetheless, though far less often, still extreme rulings and concurring opinions in the mix that warrant being called out. Unfortunately, *Sackett* is such a case, especially the concurring opinion of Justices Thomas and Gorsuch, which should not go unanswered.

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