The Statutory Interpretation of Environmental Law: Analyzing Sackett v. EPA within a New Normative Framework

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Introduction

The decision in *Sackett v. Environmental Protection Agency*,[2] has generated a divisive set of responses.[3] The *Sackett* decision has, temporarily, brought to a close decades of debate about the scope of wetlands jurisdiction under the Clean Water Act (CWA).[4]

This blog forms the second in my two-part series analyzing *Sackett*.[5] In my previous blog I laid the groundwork for a *New Normative Framework* by combining Hans Kelsen's theories on positive law with contemporary theories on statutory interpretation grounded in textualism. The *New Normative Framework* allows legal

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[2] *Sackett v. Envtl. Prot. Agency*, 598 U.S. 651 (2023).

[3] Richard J. Lazarus, *Judicial Destruction of the Clean Water Act: Sackett v. EPA*, 8/11/23 U. Chi. L. Rev. Online 1 (2023) (available online at: https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa) (last accessed: 4/17/2024); Cale Jaffe, *Sackett and the Unraveling of Federal Environmental Law*, 53 ELR 10801 (2023) (available online at: https://www.elr.info/sites/default/files/files-general/53.10801.pdf) (last accessed: 4/17/2024).

[4] *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*); *Rapanos v. United States*, 547 U.S. 715 (2006).

[5] K.A. Stenseng, *The Statutory Interpretation of Environmental Law: Establishing a New Normative Framework* (2024), (available online at: https://law.lclark.edu/live/blogs/252-the-statutory-interpretation-of-environmental-law) (last accessed: 4/22/2024).

scholars to distinguish facts and morals from true positive law and then analyze whether legal decisions conform with positive law and textualism.[6]

The shortcoming of criticisms directed at the *Sackett* decision is that they focus on consequentialist and purposivist outcomes.[7] This is particularly true in the case of Justice Kagan's concurrence in *Sackett*. These blogs demonstrate that a *New Normative Framework* for analyzing the law can lead to better outcomes.

Environmental law and policy benefit from a positivist textualist approach because rather than relying on agencies or courts to side with environmental policy-makers, the burden is redirected to the appropriate branch of government for policy-making: Congress.[8]

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[6] *Id.*

[7] Consider a webpage on *Sackett* from Earthjustice: "Scientists say wetlands need protection: The Clean Water Act puts scientists and experts at government agencies in charge of determining which waters require protection to fulfill the law's goals. These agencies have determined that "waters of the U.S." includes wetlands." EARTHJUSTICE, *Supreme Court Catastrophically Undermines Clean Water Protections*, https://earthjustice.org/brief/2023/supreme-court-sackett-clean-water-act (last accessed: 4/22/2024). In reality, the CWA does not ask about a scientific determination of the hydrological relationship between "navigable waters" and wetlands. Earthjustice's comments attempt to masquerade scientific and policy choices as legal choices. *See* Craig M. Pease, *Where Statutory Language Turns Up Missing, Don't Invoke Science*, Vol. 40 no. 5, The Environmental Forum 17 (September/October 2023) (available online at: Gale OneFile: LegalTrac, link.gale.com/apps/doc/A779054877/LT?u=lcc&sid=bookmark-LT&xid=0bf76690) (last accessed 4/22/2024) ("Science best enters environmental decisionmaking when the line between science versus law, politics, and policy is sharp, and the role of science is limited. Best that science sticks to science. And best that inherently political and legal decisions be explicitly recognized as such, and not be camouflaged under the rubric of science.").

[8] One case, *Held v. Montana*, has been universally celebrated by environmentalists for its progressive view of climate change. *See e.g.,* Sam Bookman, *Held v. Montana: A Win for Young Climate Advocates and What It Means for Future Litigation*, Harvard Law School – Environmental & Energy Law Program Blog (August 30, 2023), https://eelp.law.harvard.edu/2023/08/held-v-montana/ (recognizing the narrowness of the holding as it applies to Montana state law). In *Held*, a trial-court level decision held that the plaintiffs had a constitutional right to a healthy environment. *Held v. Montana,* No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023) (available online at: https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814_docket-CDV-2020-307_order.pdf) (last accessed: 4/17/2024). News articles that celebrate this holding often misapprehend and misconstrue the fundamental reason *why* the court agreed with the plaintiffs—Montana possesses positive law establishing this protection. *Compare* Mont. Const. § 1 cl. 1 ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present

In this blog, I expand on the components of the *New Normative Framework*. Second, I analyze the majority opinion in *Sackett* authored by Justice Alito under the *Framework* and analyze the shortcomings of Justice Kagan's concurrence under the *Framework*.

I. *New Normative Framework*

a. Introduction to Analysis under the *Framework*

The *New Normative Framework*, unifies Hans Kelsen's *Pure Theory of Law* with textualism to form a new normative method of statutory interpretation.[9] The *Framework* is normative in the sense that it establishes a structured approach to statutory interpretation. Kelsen's legal positivism treats facts and morals as independent from positive law.[10] Textualism, as a tool of statutory interpretation, then allows legal scientists to discern the objective meaning of a text.[11]

b. Legal Positivism

The *Framework* focuses on positive law because, as described in my previous blog, external facts and morals like legislative history (sometimes used to construe

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and future generations.") (available online at: https://leg.mt.gov/bills/mca/title_0000/article_0090/part_0010/section_0010/0000-0090-0010-0010.html) (last accessed: 4/17/2024) *with* Rachel Frazin, *Court sides with kids who sued Montana over climate change,* THE HILL (August 14, 2024 2:41 p.m.), https://thehill.com/policy/energy-environment/4152016-court-sides-with-kids-who-sued-montana-over-climate-change/ (last accessed: 4/22/2024) ("However, the Montana case invoked a provision in the state's constitution that establishes a right to a "a clean and healthful environment" — which the judge appeared to reference in her decision.") (underlining added). Whether the Montana Supreme Court will agree remains to be seen but, for now, *Held v. Montana* demonstrates how positive law can lead to *positive* environmental outcomes.

[9] Stenseng, *supra* note 5.

[10] *Id.*

[11] *Id.*

"legislative intent") "cannot be positive law because [they] do not meet the formalist requirements of what constitutes a legal norm under our legal order."[12] For our purposes "legislative intent" refers to materials courts erroneously rely on in an effort to divine the intent of the legislature in passing laws.[13] In the American system of law, legislative intent is not positive law and it should be avoided because it does not represent the act of will creating the norm.[14]

There are a few additional things to remember under the *Framework*. First, Kelsen argues that any method of interpretation is valid, but this presumes there are no normative restraints against the use of legislative intent.[15] Second, legislative intent is just an example of external concepts that are not positive law. Facts, like the receiving capacity of a body of water, could also be irrelevant under the *Framework* where those considerations are not contained within positive law.[16] The problem with these external sources of interpretation is that they avoid the objective meaning of the text, which is the legal norm constituting the act of will by Congress.[17]

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[12] *Id.*
[13] "Even if legislative intent did exist, there would be little reason to think it might be found in the sources that the courts consult." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 376 (2012) (discussing the sources for and flaws in relying upon "legislative intent").
[14] Despite the philosophical, constitutional, logical, and practical issues with utilizing legislative history, it continues to be relied on by courts with some states permitting or requiring its use. *Id.* at 44; 244-45 (discussing the constitutional issues with legislatures interfering with judicial interpretation); 369-96 (discussing at length the usage of legislative history and its problems when interpreting texts). The constitutional problems with legislative history are precisely what is meant by saying that they violate the normative system of law of our legal order.
[15] Stenseng, *supra* note 5; Hans Kelsen, *The Pure Theory of Law* 352-56 (Max Knight trans., University of California Press 2d ed. 1970) (1960).
[16] *See e.g.*, *Weyerhaueser Co. v. Costle,* 590 F.2d 1011 (D.C. Cir. 1978).
[17] Congress is used as the example here, but my rationale would apply to state and local legislatures as well.

Third, there is no limitation on what content legal norms may contain except for those prohibited by the legal order.[18] For example, the Congressional declaration of goals and policy section of the Clean Water Act states: "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[19] This clear statement of policy is incorporated into the positive law of the Clean Water Act. However, interpretive reasoning limits these types of passages from exceeding their reasonable bounds.[20] Fourth and finally, under legal positivism, legal interpretation is viewed as the process of ascertaining a possible outcome within a given legal frame.[21] To couch this in less abstract terms: the text passed by Congress is the law—everything else is not.

c. Textualism and Interpretation

As I argued in my previous blog, for the purposes of statutory interpretation, legal positivism is only useful to the extent it can establish the theoretical

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[18] Kelsen, *supra* note 15, at 354. Consider the *Chevron* doctrine, *Chevron* gives agencies "broad power to construe statutory provisions over which they have been given interpretive authority." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting). Under *Chevron*, when Congress has "directly spoken to the precise question at issue . . . that is the end of the matter." *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). "A contrary agency interpretation must give way." *Id.* Conversely, where "Congress has not expressed a specific intent, a court is bound to defer to any "permissible construction of the statute," even if that is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding."" *Id.*, (quoting *Chevron*, 467 U.S. at 843, and n. 11). In other words, the legal norms of the American system recognize a limited set of authority for agency interpretation of statutes to have the force of law. Recently, this deference has come into question. *See Loper Bright Enterprises v. Raimondo*, Docket No. 21-5166 (U.S. Supreme Court); *Relentless Inc., v. Dep't of Commerce*, Docket No. 21-5166 (U.S. Supreme Court). Some scholars have questioned the application of *Chevron* in light of the Court's recent applications of the "major questions doctrine," particularly *West Virginia v. EPA*, 597 U.S. 697 (2022). *See e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262 (2022).

[19] 33 U.S.C. § 1251.

[20] Scalia & Garner, *supra* note 13, at 35.

[21] Kelsen, *supra* note 15, at 351; Stenseng, *supra* note 5.

boundaries of the *Framework* and identify what is and isn't positive law.[22] Textualism, the second step in the *New Normative Framework,* provides the necessary analytical tools for interpreting statutes.

"Textualism, in its purest form, begins and ends with what the text says and fairly implies."[23] At its most basic, textualism focuses on the meaning of the text, rather than the intent of the writer.[24] Justice Scalia suggests that when interpreting statutes, courts should seek out the objective intent of the legislature.[25] Objective intent means "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[26]

More than this, "[a] fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear."[27] The purpose of this rule of construction is aimed at discerning the meaning of words through their context.[28]

Justice Scalia and Bryan Garner authorize the "fair reading" method of interpretation.[29] A "fair reading" is where the meaning of a text is derived from

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[22] Stenseng, *supra* note 5.
[23] Scalia & Garner, *supra* note 13, at 16.
[24] *Id.* at 29.
[25] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 17 (Princeton University Press, A New Edition 1997) ("*Interpretation*") (citing Joel Prentiss Bishop, Commentaries on the Written Laws
and Their Interpretation 57–58 (Boston: Little, Brown, & Co. 1882) (emphasis added) (citation omitted)).
[26] *Id.*
[27] Scalia & Garner, *supra* note 13, at 31.
[28] For example, the term *water* can refer to the beverage your waiter brings to your table when you sit down. On the other hand, *water* can also refer to "[t]he fluid surrounding the fetus in the uterus; amniotic fluid." The American Heritage Dictionary New College Edition 1447 (1975). There was little confusion one night when my wife woke me calmly declaring, "my water just broke."
[29] Scalia & Garner, *supra* note 13, at 33.

"how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued."[30] Frederick J. de Sloovère gave the following requirements for attaining an objective analysis of a text: "(1) by faithful reliance upon the natural or reasonable meanings of language; (2) by choosing always a meaning that the text will sensibly bear by the fair use of language; and (3) by employing a thoroughly worked out but rational method for choosing among the several possible meanings."[31] Beyond these principles, innumerable canons of interpretation exist which have guided jurists for generations. The most common canons (and their inverse falsities) are discussed at length in *Reading Law: The Interpretation of Legal Texts*.[32]

II. Sackett Majority

The *Sackett* case centers on the long-debated meaning of the term "the waters of the United States" and its reach over wetlands.[33] The main issue was whether CWA jurisdiction extended to wetlands that were being filled with soil and gravel by the Sackett family on their property near Priest Lake in Northern Idaho.[34] The Court also revisited its earlier decisions dealing with the same issue; the reach of the CWA.[35] In sum, the Court concluded that CWA jurisdiction did not extend to the

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[30] *Id.*
[31] Scalia & Garner, *supra* note 13, at 34 (quoting Frederick J. de Sloovère, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. Rev. 538, 541 (1934)).
[32] Scalia & Garner, *supra* note 13.
[33] *Sackett*, 598 U.S. at 657.
[34] *Id.* at 662-63.
[35] *Riverside Bayview,* 474 U.S. at 131 (holding that a wetland adjacent to a navigable waterway was within the jurisdiction of the Corps); *SWANCC*, 531 U.S. at 171 (holding that isolated ponds are not covered by the CWA); and *Rapanos,* 547 U.S. at 742 (holding CWA jurisdiction over a wetland requires: 1) an adjacent "water of the United States" and 2) a continuous surface water connection) (plurality opinion)).

wetlands on the Sackett property although the Court was divided on what constituted "adjacent" under the CWA.[36]

Justice Alito, author of the majority opinion, recounts the background and history of the CWA and how the EPA and Corps, the two agencies with jurisdiction over wetlands issues, had interpreted the term "the waters of the United States."[37] Next he analyzes the meaning of "the waters of the United States."[38] In the third section, Justice Alito explains how the term "waters" can also encompass wetlands.[39] Last, he rebuts alternative readings that rely on the "significant nexus" test and Congressional ratification and policy arguments. I will focus only on the final three sections of the majority opinion.

a. "the waters of the United States"

In a prior Supreme Court case, *Rapanos v. United States*, Justice Scalia, writing for the plurality, held that CWA jurisdiction over wetlands required two things: 1) an adjacent body of water that is a "wate[r] of the United States;" and 2) the wetland must share a continuous surface water connection such that it is "difficult to determine where the "water ends" and the "wetland" begins."[40]

In the Sackett opinion, Justice Alito immediately adopts Justice Scalia's plurality from *Rapanos* stating that the CWA's use of the term "waters" includes

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[36] *Sackett*, 598 U.S. at 710-11 (Kagan, J., concurring); *Sackett*, 598 U.S. at 718 (Kavanaugh, J., concurring).
[37] *Id.*
[38] *Id.* at 671.
[39] *Id.* at 674-75.
[40] *Rapanos*, 547 U.S. at 742.

"only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[41] His analysis relies entirely on positive law and textualism.

The analysis starts with the actual law at issue.[42] The analysis makes no attempt to rely on anything other than positive law.[43] He avoids importing external morals to color the reasoning of the court. The decision does use a variety of dictionary definitions to impart meaning to the word "waters," but unlike the use of legislative history or legislative intent, the use of lexicographic sources is to determine how those terms were objectively used at the time of the enactment of the text.[44] The use of lexicographic sources, like dictionaries, also avoids the normative issues discussed earlier. We can conclude then, that Justice Alito relies only on positive law in formulating the basis of his analysis.

Following this, we now turn to *how* Justice Alito analyzes the actual law at issue. The analysis, despite criticisms from both Justice Kagan and Justice Kavanaugh, is textualist.[45] Like any good textualist, Justice Alito begins with the text of the statute.[46] The "fair reading" of the text is derived from: 1) the definition of "waters" found in lexicographic sources; 2) congruency of the term with the term

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[41] *Sackett*, 598 U.S. at 671 (quoting *Rapanos,* 547 U.S. at 739 (citations omitted)).
[42] *Id.*
[43] *Id.* at 671-74.
[44] *Sackett*, 598 U.S. at 671-72.
[45] *Sackett*, 598 U.S. at 710-11 (Kagan, J., concurring); *Sackett*, 598 U.S. at 718 (Kavanaugh, J., concurring).
[46] *Id.* at 671.

it is defining;[47] 3) use of the term "waters" elsewhere in the CWA and other laws; 4) statutory history; 5) use of the term "waters" in case law; 6) rejecting the contention that "waters" naturally encompasses anything with the presence of water.

The first portion of the analysis rests on a set of dictionary definitions of the term "waters."[48] Justice Alito leans on earlier caselaw from *Rapanos* and *Riverside Bayview* to jab at the contention of classifying "lands," wet or otherwise, as "waters."[49] Second, as Justice Alito observes, in order to reconcile the meaning of "the waters of the United States," it is necessary to read it in conjunction with the term it is defining: "navigable waters."[50] Citing *SWANCC*,[51] he recognizes that while the CWA covers more than traditional "navigable waters," the term navigable cannot be read out of the statute.[52]

Third, the majority opinion discusses a number of times that both the CWA and other laws used the term "waters" consistent with *Rapanos* plurality.[53] This same logic is then extended to the statutes preceding the CWA and how the Supreme Court has analyzed the use of "waters" historically.[54] The analysis is representative of how *positive law* is necessarily linked to a textual analysis. Prior enacted norms helpfully direct the Court's analysis in conjunction with the

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[47] *See e.g., Rapanos*, 547 U.S. at 734 (discussing the CWA's use of the traditional phrase "navigable waters" as the term to be defined under the CWA). "[I]t is one thing to give a word limited effect and quite another to give it no effect whatever." *Id.* (quoting *SWANCC*, 531 U.S. at 172).
[48] *Sackett,* 598 at 671-72.
[49] *Id.* (citing *Rapanos*, 547 U.S. at 740 (plurality opinion) (quoting *Riverside Bayview*, 474 U.S. at 132)).
[50] *Id.*
[51] 531 U.S. at 172.
[52] *Sackett*, 598 U.S. at 671-72.
[53] *Id.* at 672-73.
[54] *Id.*

normative scheme of our legal order—rather than utilizing facts and morals that conflict with the legal order.

The final section of analysis appropriately rejects the EPA's arguments for including "wetlands" within a reading of "waters" by demonstrating the lexical limits of the term. "Consider puddles, which are also defined by the ordinary presence of water even though few would describe them as 'waters'."[55] Again, Justice Alito points to earlier positive law to demonstrate that "waters" cannot be an infinitely expansive term.[56] On this point, the Court has consistently held that the term "navigable" cannot be read out of the statute.[57] In conclusion, the majority opinion rejected the EPA's expansive view of "waters of the United States" and adopted the narrower perspective from *Rapanos*.

b. Protection of Wetlands under the Clean Water Act

Justice Alito's conclusions about the phrase, "the waters of the United States," were far less controversial than his wetlands analysis. This analysis also fits into the *Framework* by utilizing only positive law and a textualist approach.

In this part of the opinion, Justice Alito focuses on the text of the CWA and how the term "wetlands" fits into that scheme. Here again, in order to understand the objective meaning, the Court relies on lexicographic sources to supplement its

[55] *Id.* at 674.
[56] *Id.*
[57] *Id.* at 671-72

analysis.[58] The Court avoids leveraging consequentialism or purposivism to direct its reasoning and avoids using legislative history.

Textually, this section is equally as sound as his earlier analysis, despite the strong reaction it drew from Justice Kavanaugh.[59] Justice Alito's textual analysis also leverages positive law for its analysis further demonstrating the textualism's positivist roots.[60] The textual analysis begins with § 1344(g)(1) of the CWA, which, as described by Justice Alito, accomplishes the following: "[i]n simplified terms, the provision specifies that state permitting programs may regulate discharges into (1) any waters of the United States, (2) except for traditional navigable waters, (3) "including wetlands adjacent thereto."[61]

The Court reasons § 1344(g)(1) presumes some wetlands must be "waters of the United States."[62] In order to determine which wetlands the CWA covers, Justice Alito carefully parses the language of § 1344(g)(1) to convincingly demonstrate that "adjacent wetlands" "must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA.[63]

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[58] *Id.* at 675-76.
[59] Justice Kavanaugh dedicates several pages to understanding how the term "adjacent" modifies wetlands. *Sackett*, 598 U.S. at 716-728 (Kavanaugh, J., concurring). Justice Kavanaugh's reasoning is not without some merit and within the context of the *Framework* is conceivable as still falling within the "legal frame." *See* Stenseng, *supra* at note 5; Kelsen, *supra* note 15, at 350-51. Conceivably, both Justice Kavanaugh and Justice Alito could come to "legally correct" conclusions—the only difference being Justice Alito's analysis carried the day and thus becomes the new legal norm. However, for reasons I take up while analyzing Justice Kagan's concurrence; Justice Kavanaugh's analysis of "adjacent" comes up short.
[60] "The meaning of a word "may only become evident when placed in context."" *Sackett.* 598 at 674-75 (quoting *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000)).
[61] *Id.*
[62] *Id.* at 675-76.
[63] *Id.*

Like the earlier section on "the waters of the United States" this analysis is bolstered by several dictionary definitions of the word "adjacent."[64] Justice Alito essentially rejects Justice Kavanaugh's alternative textualist argument here by explaining that because the statutory language necessarily requires adjacent wetlands to be *part of* "the waters of the United States" wetlands that are separate "cannot be considered part of those waters, even if they are located nearby."[65]

Additionally, Justice Alito reasons that to go beyond such a construction would require an implied amendment to the CWA to do so.[66] The remainder of the analysis rests on the Supreme Court's earlier decisions involving the reach of the CWA. Again, the Court relies on positive law—rather than external "legislative intent"—to derive meaning from the text of the statute. Regarding the wetlands issue, the Court held that § 1344(g)(1) presumes some wetlands must be "waters of the United States" and that they must be adjacent in order to qualify.

In conclusion, Justice Alito's analysis of the CWA's coverage of wetlands also fits within the *Framework*. As demonstrated, the analysis relies on positive law, avoids consequentialism and purposivism, and utilizes a textualist approach to render a "fair reading" of the statute. By combining these methods of interpretation,

[64] *Id.* at 676.
[65] *Id.* Criticisms of Justice Alito's analysis place an unwarranted outsized importance on the hydrologic relationship between wetlands and riparian systems. *See e.g.*, Jared Mott, *Sackett v. EPA Spells Disaster for Wetlands and Clean Water*, Izaak Walton League of America Blog, https://www.iwla.org/publications/blog/blog/blog/2023/10/03/sackett-v.-epa-spells-disaster-for-wetlands-and-clean-water (last accessed: 4/22/2024) ("This ruling defies science, the law and common sense by simply pretending that waters deemed "navigable" cannot be impacted by pollution in their tributaries or adjacent wetlands.") This style of critique ignores that the question before the Court is *legal* in nature and not *scientific*. Pro-environmental advocates prefer resolving the CWA's jurisdiction scientifically because it is outcome determinative. This ignores the normative structure of the law and ignores a textual interpretation of the relevant provisions.
[66] *Id.*

the Court approximates the legal norm of the statute thus reaching an objective meaning of the text.

III. Justice Kagan's Concurrence

Justice Kagan concurs in the majority's opinion because she differs on the precise meaning of the term "adjacent," although she seemingly agrees that the CWA would not have had jurisdiction over the Sackett property.[67] In applying the *Framework's* criteria to use the positive law at issue, Justice Kagan's analysis fails at the start because it relies on external facts and morals to ground its reasoning. Justice Kagan attempts to cabin her reasoning in the purpose of the CWA, arguing that "the Act created a program broad enough to achieve the codified objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."[68] Justice Kagan reminds us, "[i]f 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."[69]

Justice Kagan attempts to ground her reasoning in the CWA's purpose and its accomplishments because this forms the essential link between positive law and the hydrology of wetlands which she takes up next.[70] As Justice Scalia and Garner observe, "[w]hile such provisions as a preamble or purpose clause can clarify an

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[67] *Sackett*, 598 U.S. at 710 (Kagan, J., concurring).
[68] *Sackett*, 598 U.S. at 711 (Kagan, J., concurring).
[69] *Id.*
[70] The CWA's accomplishments are essentially irrelevant to analyzing its scope—especially where the analysis is supposedly textualist, which Justice Kagan claims. "Like Justice Kavanaugh, "I would stick to the text." Post, at 1369 (opinion concurring in judgment)". *Id.* at 710.

ambiguous text, they cannot expand it beyond its permissible meaning."[71, 72] Justice Kagan's attempt to overextend the CWA's purpose and its benefits also fails because it ignores other aspects of positive law under the CWA. Justice Kagan points to no other source of positive law within the CWA for her assertion that the scope of the CWA encompasses wetlands.[73]

Justice Kagan shifts to discuss the nexus between protecting wetlands and protecting our nation's waterways.[74] Again, Justice Kagan attempts to mask this contention using positive law by citing to *Riverside Bayview*, where the hydrology of wetlands was discussed.[75] Justice Kagan neglects to mention that the *Riverside Bayview* Court's purpose in discussing the benefits of wetlands was within the context of regulations promulgated by the Corps under *Chevron*.[76]

"Again, we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act."[77] In other words, the Court deferred to the judgment of the Corps under *Chevron* in interpreting that

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[71] Scalia & Garner, *supra* note 13, at 35.
[72] The danger of purposivism (and the related consequentialism) are discussed at length by Justice Scalia & Bryan Garner in *Reading Law: The Interpretation of Legal Texts*, *supra* note 13, at 22-23.
[73] It would probably surprise the average American to learn that the EPA and Corps' asserted jurisdiction over vast swathes of wetlands stems from single provision from a statutory scheme dedicated to "Permits for dredged or fill material." In fact, Title 33 of the United States Code, Navigation and Navigable Waters, contains only 18 references to the term "wetlands" in the body text of the code and the only single relevant reference is within § 1344(g)(1) (which was analyzed by Justice Alito). It would be difficult to discern this fact from the EPA's website on the wetlands program: https://www.epa.gov/wetlands.
[74] *Sackett,* 598 U.S. at 711-12 (Kagan, J., concurring).
[75] *Id.*
[76] *Id.* (citing *Riverside Bayview*, 474 U.S. at 134-35).
[77] *Id.*

the CWA permitted the Corps to regulate adjacent wetlands. Naturally, the scope of what "adjacent wetlands" means is at the heart of *Sackett*.

Justice Kagan takes the Corps' reasoning for extending its protections over wetlands and passes it off as the CWA through *Riverside Bayview*. Thus, there is no grounding in positive law for Justice Kagan to consider the hydrology of wetlands and how they might benefit water quality or the purposes of the CWA. The hydrology of wetlands is irrelevant to answering the legal question before the Court: whether the Sackett's property is covered as "adjacent wetlands" under the CWA.

Next, Justice Kagan makes an actual legal argument against the majority's use of "clear-statement rules."[78] This argument is premised on several things. First, Justice Kagan argues that the requirement Congress adopt a "clear-statement rule" can only apply when it resolves problems of ambiguity and vagueness.[79] Because Justice Kagan has already concluded that the terms, "the waters of the United States" and "adjacent" and "wetlands" are unambiguous, and not vague, she is able to satisfy this predicate to her argument.

This argument fails anyway because Justice Kagan ignores the Court's prior precedent from *SWANCC* and *Rapanos*. "[T]his Court has required a clear statement from Congress when determining the scope of "the waters of the United States."[80] Justice Kagan admits this only constitutes a "thumb" on the scale and

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[78] *Sackett*, 598 U.S. at 713 (Kagan, J., concurring).
[79] *Id.*
[80] *Sackett*, 598 U.S. at 680 (citing *SWANCC*, 531 U.S. at 174; accord, *Rapanos*, 547 U.S. at 738).

from there she also attacks Justice Alito's remarks on vagueness.[81] Regardless, these criticisms struggle to overcome Justice Alito's point that if Congress meant to allow regulation over wetlands, independent of whether they encompassed "waters of the United States," it would not have stashed it into a single provision of § 1344.[82]

Finally, we come to Justice Kagan's textual argument which is essentially a concurrence with Justice Kavanaugh. Justice Kagan argues that adjacent means ""neighboring" whether or not touching."[83] This argument has the most weight of her arguments, but it fails to read the term "adjacent" in conjunction with the provision in which it appears; the rest of the statute; and the remaining *corpus juris*. For these reasons Justice Kagan's analysis fails under the *Framework*.

Conclusion

The *New Normative Framework* establishes a new normative method of statutory interpretation. As I stated in my previous blog, the *Framework* exists as a tool to evaluate court decisions and their critiques. The *Framework* helps clarify the jurisprudence of statutory interpretation, which in recent years has increasingly relied on purposivism and consequentialism to rationalize its outcomes. By

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[81] *Sackett*, 598 U.S. at 713-14 (Kagan, J., concurring). Both of these points are only incidental to the primary conclusions of the majority so for the sake of brevity I do not analyze them here.
[82] *Id.* at 677 ("In addition, it would be odd indeed if Congress had tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs. We have often remarked that Congress does not "hide elephants in mouseholes" by "alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). We cannot agree with such an implausible interpretation here.").
[83] *Sackett,* 598 at 713 (Kagan, J., concurring).

incorporating the *New Normative Framework* into how legal professionals approach the law, better law can be made and better environmental outcomes can be reached.

Criticisms of *Sackett* rely heavily on the hydrologic relationship between wetlands and riparian systems. These critiques ignore that the Court has been assigned the *legal* task of interpreting a statutory provision. Environmental advocates prefer resolving the CWA's jurisdiction using science because it is outcome determinative. Using consequentialism and purposivism ignores the normative structure of the CWA and is anti-textualist.

The current text of the CWA cannot accomplish the goal of providing comprehensive national wetlands protection. While protecting wetlands may be a worthy and important goal, Congress is the appropriate body to specify that goal, rather than the courts.