Essay

The Clean Water Act and Avoidance Creep

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In Sackett v. EPA*, the Supreme Court set out a test for the Clean Water Act's jurisdiction over wetlands. The Act, the Court held, protects only those wetlands that have a continuous surface connection to relatively permanent bodies of water like streams, rivers, and lakes. If the connection lies below the surface, or is at the surface but discontinuous, the wetlands are presumed to fall outside the Act's protections. The ruling, which abruptly curtailed how each administration since the 1970s had understood the Clean Water Act's jurisdiction, has generated persuasive criticism from environmental scholars.*

In this Essay, prepared for the Minnesota Law Review Symposium, I suggest that the Sackett *opinion is an example of a trend in recent Supreme Court cases called constitutional avoidance creep. As scholars have observed outside the environmental law context, an overly expansive reliance on constitutional avoidance principles can lead courts to read statutes in implausible ways. Later decisions that interpret the earlier ones then magnify the problem, getting further away from the statutory language's ordinary meaning. Here, the Court's use of an avoidance principle, briefly mentioned in a prior Clean Water Act case, contributed to a reading of the Act that is difficult to square with textualist principles. Connecting the environmental law and*

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avoidance creep literatures can generate insights into the Court's new methods of interpretation.

INTRODUCTION

When, almost two years ago, the Supreme Court narrowed the Clean Water Act's reach over wetlands, it was a significant doctrinal rupture. Each administration since the 1970s had thought that building permeable structures between wetlands and the rivers that lie beside them does not remove the wetlands from the Clean Water Act's jurisdiction.[1] Each administration, the Court held, had been wrong.[2] In *Sackett v. EPA*, the Court concluded that the Act protects only those wetlands that have a "continuous surface connection" to "relatively permanent" bodies of water like streams, rivers, and lakes.[3] If the connection lies below the surface, or is at the surface but discontinuous, the wetlands are presumed to fall outside the Act's protections.[4]

The response among environmental law scholars was aptly critical. The decision, one scholar wrote, was "unusually lawless even for a Court that in the last few years has often shown itself willing to overrule precedents."[5] Another concluded that "under the guise of judicial interpretation . . . the Court effectively reduced the [Clean Water Act's] coverage of the nation's streams by as much as 80%, and of the nation's wetlands by at least 50%."[6] The Court's "textual analysis," wrote a third, "reads like the brief of a clever advocate whose weak position leaves him stuck grasping at straws."[7] These criticisms were not limited to commentators. Justice Kagan, concurring in the judgment but not in the new test, voiced similar concerns, writing that the Court had appointed "itself as the national decision-maker on environmental policy . . . . 'The Court will not allow the Clean

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1. Sackett v. EPA, 143 S. Ct. 1322, 1365 (2023) (Kavanaugh, J., concurring).

2. *Id.* The challenged program reached far more than just wetlands, and the Court's ruling also reached, for example, streams that run dry for parts of the year. *Id.* at 1340–41 (majority opinion). Many American streams have this feature, especially in the Southwest. For the purposes of clarity, this Essay will focus on the wetlands question.

3. *Id.* at 1341 (majority opinion).

4. *Id.* at 1340.

5. William W. Buzbee, *The Lawlessness of* Sackett v. EPA, 74 CASE W. RSRV. L. REV. 317, 318 (2023).

6. Richard J. Lazarus, *Judicial Destruction of the Clean Water Act:* Sackett v. EPA, U. CHI. L. REV. ONLINE, Aug. 11, 2023, at 1, 1.

7. Dave Owen, Sackett v. Environmental Protection Agency *and the Rules of Statutory Misinterpretation*, 48 HARV. ENV'T L. REV. 333, 335 (2024).

[Water] Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.'"[8]

These are disagreements over the Clean Water Act's meaning, but they are not just that. They go to the Court's methods of interpretation, and even to its role in the republic. Along with several other recent environmental opinions,[9] *Sackett* has prompted renewed concern among environmental scholars about the Supreme Court's statutory interpretation methods.[10] Following a trend in Supreme Court decisions, the *Sackett* majority opinion is long and contains a range of different arguments. In this Essay, I focus on one aspect of the opinion, the interpretation of the word "adjacent," and suggest that it provides an example of a recent phenomenon in Supreme Court cases called constitutional avoidance creep.[11] Constitutional avoidance principles tell courts to try to avoid reading statutes in ways that raise constitutional questions,[12] but expansive reliance on such principles can lead courts to read statutes in implausible ways. Later decisions that interpret the earlier ones magnify the problem, getting further away from all evidence about what the statutory language means. This is a plausible way to read the *Sackett* opinion. The Court's use of an avoidance principle, briefly mentioned in a prior Clean Water Act case, led it to read the Act atextually.

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8. *Sackett*, 143 S. Ct. at 1362 (Kagan, J., concurring) (alteration in original) (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2643 (2022) (Kagan, J., dissenting)).

9. *See, e.g.*, *West Virginia*, 142 S. Ct. 2587 (holding that the Clean Water Act does not give authority to impose emissions gaps).

10. *See, e.g.*, Robin Kundis Craig, *The Impact of* Loper Bright v. Raimondo*: An Empirical Review of the First Six Months*, 109 MINN. L. REV. 2671 (2025); Kamaile A.N. Turčan, *The Bogeyman of Environmental Regulation: Federalism, Agency Preemption, and the Roberts Court*, 109 MINN. L. REV. 2529 (2025); Joshua Ulan Galperin, *Interpreting Congress*, 2025 WIS. L. REV. 89 (discussing how the Court interprets statutes based on congressional norms).

11. *See* Charlotte Garden, *Avoidance Creep*, 168 U. PA. L. REV. 331, 337 (2020) (defining avoidance creep as a magnification of constitutional avoidance in which statutes are construed against plain meaning and congressional intent).

12. *See, e.g.*, John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1655 (2001) ("[M]any textualists will accept a less natural (though textually plausible) interpretation of a statute in order to avoid a conflict with serious constitutional questions or, for that matter, with the policies underlying an array of constitutionally inspired clear statement rules." (footnote omitted)).

The Clean Water Act confers jurisdiction on the Environmental Protection Agency and the Army Corps of Engineers over the "waters of the United States" and makes clear that this jurisdiction extends to wetlands that are "adjacent" to "all waters which are subject to the ebb and flow of the tide."[13] By requiring a continuous surface connection between the wetlands and the waters subject to the ebb and flow of the tide, the *Sackett* majority interprets the word "adjacent" to mean continuously connected at the surface.[14] But, as two other opinions in the case point out, that is a narrower understanding of the word "adjacent" than people use in ordinary language.[15] Two houses are adjacent to one another when there is a narrow lawn and fence between them, for example: The two houses need not be connected.[16]

The majority's response to the concurrences' observation falls back on background principles of interpretation that instruct Congress to speak especially clearly "if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[17] In this invocation of a constitutional avoidance principle, the Court tracks several sentences in one of its previous Clean Water Act cases, *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers* (*SWANCC*).[18] There, the court had invoked a similar principle to hold that the Act did not cover two isolated ponds.[19] Without saying much more about this principle, the *Sackett* Court appeals to it once again, this time to read vast tracts of wetlands out of the Act's jurisdiction, in a way that is difficult to square with the text of the word adjacent.[20]

Part I of this Essay provides an overview of the concept of constitutional avoidance creep. Part II describes the *Sackett* decision in relation to previous interpretations of the Clean Water

13. 33 C.F.R. §§ 328.1, 328.3 (2024).

14. Sackett v. EPA, 143 S. Ct. 1322, 1341 (2023).

15. *See infra* Part II.

16. *Sackett*, 143 S. Ct. at 1359 (Kagan, J., concurring).

17. *Id.* at 1341 (majority opinion) (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020)).

18. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 171 (2001).

19. *Id.*

20. *See Sackett*, 143 S. Ct. at 1341.

Act's jurisdiction, then argues that this history matches the concept of avoidance creep.

I. THE AVOIDANCE CREEP CONCEPT

Constitutional avoidance principles are meant to guide courts when interpreting a statute that might have several plausible meanings.[21] If one reading of a statute raises constitutional problems, or suggests that the statute violates the Constitution, then courts should choose the reading of the statute that does not raise such problems.[22] The principle has different justifications, including judicial restraint and deference to Congress.[23] But it is meant to help courts choose between two permissible or plausible readings of a statute.[24] The principle is not intended to provide courts with a way of making new constitutional rulings.[25]

"Constitutional avoidance creep," a phenomenon recently described by Charlotte Garden,[26] has the following structure. Expansive reliance on constitutional avoidance principles has led courts to read statutes in implausible ways.[27] This effect can compound when subsequent court decisions rely on past decisions to avoid reaching purported constitutional problems that seem insubstantial under existing constitutional caselaw.[28]

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21. *See, e.g.*, Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948–49 (1997) (discussing how courts should decide statutory issues to preclude constitutional claims); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 569 (1988) (where "an otherwise acceptable construction would raise serious constitutional problems," courts should "construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent").

22. *See* Vermeule, *supra* note 21, at 1949.

23. *See* Garden, *supra* note 11, at 335–36 (discussing varying characterizations of avoidance); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112 (2015); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457 (1989). The assumptions underlying both of these justifications have come under criticism. *See* Garden, *supra* note 11, at 337 ("Perhaps Congress would rather that the judiciary put the most likely reading of a statute to the test by actually ruling on its constitutionality.").

24. Garden, *supra* note 11, at 332.

25. *Id.* at 337.

26. *See generally id.*

27. *Id.* at 337.

28. *Id.*

Nonetheless, Professor Garden argued, the Supreme Court's methods of avoiding constitutional issues have changed in two respects in the last few decades.[29] The first change has been the increased use of a "clear statement rule," on which the court "adopts a statutory reading that avoids a constitutional question unless Congress responds by clearly stating its intent to the contrary."[30] The reading that the Court adopts is "usually . . . implausible," requiring "Congress to reiterate that it meant what it said the first time around."[31] The second change has involved expanding the zone of constitutional avoidance.[32] The Court "has sometimes adopted statutory interpretations in order to avoid constitutional questions that seem insubstantial," or questionable under the law as it currently exists.[33] In this way, expansive use of constitutional avoidance principles is in one sense bold, using the principles to make significant statutory rulings, and in another sense diffident, failing to make constitutional rulings that would explain why the statutory rulings are being made.[34]

The avoidance creep trend, Professor Garden suggests, is underappreciated.[35] In the Court's interpretation of recent labor law questions, including union fees and secondary boycotts, "under-explained avoidance rationales" have grown in their influence over time.[36] Cases relying on earlier avoidance judgments

29. *See id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Similar observations about clear statement rules have been made for decades. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) ("[C]lear statement rules [that protect constitutional structure] are remarkable. On the one hand, they require a clearer, more explicit statement from Congress in the text of the statute, without reference to legislative history, than prior clear statement rules have required. This would suggest that such rules are protecting particularly important constitutional values. But, on the other hand, the super-strong clear statement rules the Court has actually adopted protect constitutional values that are virtually never enforced through constitutional interpretation.").

35. Garden, *supra* note 11, at 335.

36. *Id.* at 341.

get further and further afield from ordinary statutory interpretation principles.[37]

II. AVOIDANCE CREEP AND THE CLEAN WATER ACT

The Clean Water Act directs the executive branch to regulate pollution in "navigable waters," a term that the Act defines to mean "the waters of the United States, including the territorial seas."[38] Such waters are widely agreed to include oceans, rivers, streams, and lakes. But other examples have been disputed. Some streams only flow for some parts of the year. Wetlands are in some ways like lakes and in some ways like dry land, and water often drains from them into lakes and rivers. Three such disputes had made it to the Supreme Court before it considered *Sackett v. EPA*.

In the *Riverside Bayview Homes* case of 1985, a unanimous Court upheld the conclusion that wetlands "adjacent to navigable or interstate waters and their tributaries" counted as waters of the United States.[39]

In the *SWANCC* case of 2001, the Court divided five-four and held that "isolated ponds . . . wholly located within two Illinois counties" which "are not adjacent to open water" did not count as waters of the United States.[40] In doing so, the Court relied on a clear statement principle involving the relationship between federal and state power, which would again be appealed to in *Sackett v. EPA*.[41]

In the *Rapanos* case of 2006, the Court considered the jurisdiction question more broadly and was unable to come to a consensus.[42]

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37. A case suggesting constitutional issues were raised from putting union dues toward advocacy for things other than collective bargaining was interpreted and expanded in a string of later cases. *Id.* at 346–53 (discussing cases like *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988), and *Janus v. Am. Fed'n of State Emps., Council 31*, 138 S. Ct. 2448 (2018)).

38. 33 U.S.C. §§ 1311, 1342, 1362(7).

39. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 129, 132 (1985) (applying *Chevron* deference).

40. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 171 (2001); *id.* at 168 (emphasis omitted).

41. *Id.* at 172–73.

42. Rapanos v. United States, 547 U.S. 715, 732 (2006) (advancing a textual analysis differentiating between "navigable waters" and "waters of the United States").

This third case, *Rapanos v. United States*, generated three different perspectives about how to understand the waters of the United States.[43] The Army Corps of Engineers had determined that "waters of the United States" included wetlands that were adjacent to waters that would count as waters of the United States in their own right, such as lakes, rivers, and streams, including "intermittent streams."[44]

Four Justices, in an opinion by Justice Stevens, would have upheld the regulation as "a quintessential example of the Executive's reasonable interpretation of a statutory provision,"[45] especially in light of the Court's unanimous declaration in 1985 that the Clean Water Act gave Army Corps jurisdiction over "wetlands adjacent to navigable bodies of water and their tributaries."[46]

Four other Justices joined an opinion by Justice Scalia that invalidated the regulation on the grounds that "waters of the United States" refers only to "relatively permanent, standing or continuously flowing bodies of water" commonly described "as streams, oceans, rivers, and lakes," and those wetlands with a "continuous surface connection" to them.[47]

Writing on his own, Justice Kennedy also concluded that the Army Corps regulation went too far but found the Scalia plurality's test too narrow. Instead, drawing on language in earlier caselaw, he concluded that "a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made" in order to count as waters of the United States.[48] Because this "significant nexus" test was the narrowest ground that could command five Justices'

43. *Id.*

44. *Id.* at 724 (citing 33 C.F.R. §§ 328.3(a)(1)–(7) (2004)).

45. *Id.* at 788 (Stevens, J., dissenting). Justice Breyer joined this dissent and also dissented separately. *Id.* at 811 (Breyer, J., dissenting). The dissents disagreed with the plurality on several other counts as well, which I omit here for brevity's sake.

46. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 129 (1985).

47. *Rapanos*, 547 U.S. at 739, 742.

48. *Id.* at 759 (Kennedy, J., concurring) (citing Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167, 172 (2001)).

agreement, it became the most commonly used test in the lower courts.[49]

The turn toward limiting the Clean Water Act's jurisdiction began in *SWANCC*, and the fractured opinions in *Rapanos* set the stage for *Sackett*.

A. THE *SACKETT* OPINION

Sackett v. EPA gave the Court another opportunity to answer the jurisdiction question. This time, five Justices endorsed the reasoning in the Scalia opinion in *Rapanos*—a purportedly textual reading of the words "waters of the United States"—and also two principles of statutory interpretation: federalism and lenity.[50]

In explaining the text, the *Sackett* majority follows the *Rapanos* plurality. The statute speaks of "the waters" in the plural, and not of water in the singular.[51] Looking at Webster's Dictionary, the *Rapanos* plurality concluded that waters must mean "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.'"[52] Seventeen years later, the *Sackett* majority agreed.[53] Because intermittent streams are not permanent, they do not

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49. *See, e.g.*, United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006) (applying Justice Kennedy's view in *Rapanos* as the most narrow ground); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999 (9th Cir. 2007) (citing *Gerke*, 464 F.3d at 724); United States v. Robison, 505 F.3d 1208, 1222 (11th Cir. 2007) (first citing *Gerke*, 464 F.3d at 725; and then citing *River Watch*, 496 F.3d at 999–1000); United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006) (concluding that the federal government could establish jurisdiction over any wetlands that met "either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*"); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009) (holding that the Army Corps of Engineers has jurisdiction over wetlands that satisfy either the plurality's or Justice Kennedy's test); United States v. Cundiff, 555 F.3d 200, 208 (6th Cir. 2009) (same). It may seem an odd result, as the Kennedy opinion garnered the sign-on of the fewest justices. But the cases follow the Supreme Court's rule in an older case, according to which "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977) (citation omitted).

50. *See supra* Part II.

51. Sackett v. EPA, 143 S. Ct. 1322, 1336 (2023).

52. *Id.* (alteration in original) (quoting *Rapanos*, 547 U.S. at 739).

53. *Id.* at 1340–41.

count as part of the waters of the United States.[54] And, because wetlands are not themselves streams, oceans, rivers, or lakes, only those wetlands with a "continuous surface connection" to such water bodies can count as part of the waters of the United States.[55]

But there are problems with how the *Sackett* majority uses the word "waters" to dispose of the case.[56] In ordinary language, there are "intermittent streams," which is to say, streams that flow for only parts of the year. Permanence is not, under the definition of the cited dictionary, a criterion for something to be a "stream."[57] So the fact that "waters" refers to bodies of water like "streams" does not reveal that waters need be permanent.[58]

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54. *Rapanos*, 547 U.S. at 731–32 (rejecting the Army Corps of Engineers regulation which included intermittent streams as part of the waters of the United States).

55. *Sackett*, 143 S. Ct. at 1340 ("'[W]aters' may fairly be read to include only those wetlands that are 'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the water ends and the wetland begins.'" (emphasis omitted) (quoting *Rapanos*, 547 U.S. at 742, 755)).

56. These are pointed out by concurrences in the judgment by Justices Kagan and Kavanaugh, as well as in the *Rapanos* dissent. *See id.* at 1360 (Kagan, J., concurring); *id.* at 1368 (Kavanaugh, J., concurring); *Rapanos*, 547 U.S. at 801 (Stevens, J., dissenting).

57. *See, e.g.*, *Rapanos*, 547 U.S. at 801 (Stevens, J., dissenting) ("The dictionary treats 'streams' as 'waters' but has nothing to say about whether streams must contain water year round to qualify as 'streams.' . . . From this, the plurality somehow deduces that streams can never be intermittent or ephemeral.").

58. *Id.* One also notices that the permanence requirement does not always comport with how people use the word "waters" in ordinary language and literature. *See* Owen, *supra* note 7, at 355 ("If it had done even a modestly careful search, the Court would have found multiple examples, in both legal speech and in ordinary parlance, of the phrase 'the waters' being used more expansively."). To take a prominent and influential text, in the King James translation of Genesis, Noah is said after the flood to have "sent forth a dove from him, to see if the waters were abated from off the face of the ground." *Genesis* 8:8 (King James). When the dove returns, "in her mouth was an olive leaf pluckt off: so Noah knew that the waters were abated from off the earth." *Genesis* 8:11 (King James). These famous waters were impermanent: They abated from off the earth. This usage seems to continue in contemporary translations. *See* Genesis 8:8 (New American Bible Revised Edition). The *Rapanos* plurality criticized the Army Corps' conclusion that wetlands are adjacent to covered waters if they are part of the same 100-year floodplain; this, for the plurality, extended the meaning of waters "beyond reason." *Rapanos*, 547 U.S. at 728, 746. But the Noah's ark flood happens less frequently than once per century—it happens just once

The most significant issue with the Court's interpretation is that the Clean Water Act also makes clear that some wetlands must be part of the waters of the United States. A part of the Act regarding state programs includes "all waters which are subject to the ebb and flow of the tide . . . including wetlands adjacent thereto."[59] The *Sackett* majority opinion, following its understanding of the word "waters," interprets "adjacent" to mean a "continuous surface connection," including only those wetlands that adjoin other waters of the United States with an unimpeded border.[60]

But, as two of the concurrences in the *Sackett* judgment argue, "adjacent" means something more than that in regular speech.[61] "[I]n ordinary language," Justice Kagan notes, "one thing is adjacent to another not only when it is touching, but also when it is nearby . . . one house is adjacent to another even when a stretch of grass and a picket fence separate the two."[62] Justice Kavanaugh also makes this point:

> The Court's test narrows the Clean Water Act's coverage of "adjacent" wetlands to mean only "adjoining" wetlands. But "adjacent" and "adjoining" have distinct meanings: Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, *and* (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like.[63]

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in all of history. Floods are also mentioned in the plurality's preferred dictionary definition of waters which refers to "the flowing or moving masses, as of waves or floods, making up such streams or bodies." *Id.* at 732 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954); *see also* Owen, *supra* note 7, at 355 (noting other biblical examples).

59. 33 U.S.C. § 1344(g). As the *Sackett* majority notes, "[i]f . . . adjacent wetlands . . . were not part of . . . the waters of the United States . . . and therefore subject to regulation under the CWA, there would be no point in excluding them from that category [of waters into which states may permit pollution discharges]." *Sackett*, 143 S. Ct. at 1339. The Army Corps had already concluded that its jurisdiction extended to adjacent wetlands, and the 1977 amendment made this plain. *Id.* at 1364 (Kavanaugh, J., concurring).

60. *Sackett*, 143 S. Ct. at 1340–41 (majority opinion).

61. *Id.* at 1359–62 (Kagan, J., concurring); *id.* at 1362–69 (Kavanaugh, J., concurring). The two opinions are written as concurrences in the judgment because they agree with the result in the particular case, but they often read more similarly to dissents.

62. *Id.* at 1359 (Kagan, J., concurring).

63. *Id.* at 1362 (Kavanaugh, J., concurring); *see also* William N. Eskridge, Jr. et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1644 (2023)

This is a textualist challenge to the majority's conclusion. For almost fifty years, the Army Corps and EPA had assumed that manmade barriers did not sever jurisdiction over the wetlands.[64]

In response, the majority offers a principle of construction.[65] Congress, the Court concludes, must "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."[66] And because regulating land and water use "lies at the core of traditional state authority," an "overly broad

(observing that "adjacent wetlands" is a "vastly broader term[] than the traditional court-understood meaning of 'navigable waters'").

64. *Sackett*, 143 S. Ct. at 1362, 1365 (Kavanaugh, J., concurring). This is because the barriers do not prevent pollution from moving between the wetland and the river. *Id.* at 1360 (Kagan, J., concurring); *id.* at 1368 (Kavanaugh, J., concurring).

65. *See* Lazarus, *supra* note 6, at 14. Because the Clean Water Act includes criminal penalties, the Court also notes its inclination to read the statute in a way that is lenient toward the regulated parties. *Sackett*, 143 S. Ct. at 1342. This seems to be based on the rule of lenity, an ancient interpretive principle, but, perhaps curiously, the Court does not use the name. *Id.* The rule of lenity directs courts to read ambiguous criminal statutes in the light most favorable to the defendant. *See, e.g.*, Liparota v. United States, 471 U.S. 419, 427 (1985) (speaking of "our longstanding recognition of the principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" (citations omitted)); United States v. Kozminski, 487 U.S. 931, 952 (1988) ("The purposes underlying the rule of lenity [are] to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts . . . ."). But historically, the rule of lenity has applied in the criminal context, not in cases where only civil penalties might ensue. For example, in interpreting another provision of the Clean Water Act, the Second Circuit has treated identical portions of the statute differently depending on which penalty is at issue. *Compare* United States v. Plaza Health Lab'ys, Inc., 3 F.3d 643, 649 (2d Cir. 1993) (construing the term "point source" according to the rule of lenity in a case with a criminal defendant), *with* Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 115 (2d Cir. 1994) (declining to apply the rule of lenity when interpreting the same provision in a case with a civil defendant). *See also* Jeesoo Nam, *Lenity and the Meaning of Statutes*, 96 S. CAL. L. REV. 397, 402 (2022) (noting, in the context of federal tax law, the incongruousness of the lenity principle's "encroachment into civil matters where no punishment is at stake"). Lenity goes unmentioned in *Rapanos* and *Riverside Bayview*. *See* Rapanos v. United States, 547 U.S. 715 (2006); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). In *SWANCC*, an alternative argument was offered by the petitioner that the Court chose not to consider. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 n.8 (2001).

66. *Sackett*, 143 S. Ct. at 1341 (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020)).

interpretation" of the Clean Water Act would "impinge on this authority."[67]

The Court's treatment of this principle is short.[68] The justification for the principle seems to be the U.S. Constitution,[69] thus the discussion of the "balance" between federal and state power and the "traditional core" of state authority.[70] The *Rapanos* plurality had mentioned something of this nature, too—an expectation of a "'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."[71] *SWANCC* used similar language—again with only brief explanation—about "significant constitutional

67. *Id.*; *see* Richard J. Lazarus, *The Rise of Constitutional Alarmists on the Supreme Court and Its Portent for the Future of Environmental Law*, 85 OHIO ST. L.J. (forthcoming 2025) (on file with the Minnesota Law Review) (describing the principle as encompassing the "classic claims of constitutional alarmists about federal environmental law"); Owen, *supra* note 7, at 360–61 (describing the presumption as a "drafting requirement . . . imposed by a body to which the Constitution gives no legislative authority").

68. At one point, the Court appears to seek a justification for the principle within the Clean Water Act itself, arguing that the Act's express policy is "to recognize, preserve, and protect the primary responsibilities and rights of States" to control water pollution. 33 U.S.C. § 1251(b); *Sackett*, 143 S. Ct. at 1342. But this seems an impossibly cramped way to describe the Act's goals. The first sentence of its goals and policy declaration is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As one of the concurrences points out, "a thumb on the scale for property owners" is odd, because the "Act (i.e., the one Congress enacted) is all about stopping property owners from polluting." *Sackett*, 143 S. Ct. at 1361 (Kagan, J., concurring).

69. Because the principle does not cite any particular constitutional provision, its provenance is uncertain. *Cf.* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2008 (2009) (critiquing the idea that the U.S. Constitution adopted "an unspecified federalism norm"); Richard J. Lazarus & Andrew Slottje, *Justice Gorsuch and the Future of Environmental Law*, 43 STAN. ENV'T L.J. 1, 25 (2024) (describing the *Sackett* presumption as continuous with the Major Questions Doctrine). Justice Thomas' concurrence goes considerably farther in using purported constitutional principles to limit the Clean Water Act's reach. *Sackett*, 143 S. Ct. at 1344–59 (Thomas, J., concurring). The concurrence has been criticized elsewhere. *See, e.g.*, Lazarus, *supra* note 6, at 2 (arguing that the "thinness and misleading nature of the concurrence's legal analysis" is "surprising" and "unsettling").

70. *Sackett*, 143 S. Ct. at 1341.

71. Rapanos v. United States, 547 U.S. 715, 738 (2006) (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994)).

questions" regarding federal and state power.[72] The Court's evocation of constitutional avoidance principles is a reminder of how far it has drifted.[73] In 1985, the Court unanimously rejected the "spurious constitutional overtones" of a Sixth Circuit decision that had sought to analyze government jurisdiction over wetlands as a Takings Clause problem.[74]

As two of the concurrences in the *Sackett* judgment note, constitutional avoidance principles exist to clear up ambiguities—to choose between two plausible readings of a statute, one that raises constitutional questions and one that does not. But the Court's reading of the word "adjacent" does not seem plausible. Early studies suggest that *Sackett*'s holding poses significant challenges for keeping the nation's waters clean.[75] Vast

72. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001).

73. *See* Buzbee, *supra* note 5, at 337 ("Not only is this new substantive canon unmoored from any textual or legislative history support, but this move is also almost directly contradicted by the Court's analysis and conclusions in *Riverside Bayview Homes*.").

74. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 129 (1985). If this is to be a new principle of construction, it seems that it will have one clear result: limiting longstanding environmental protections. *See, e.g.*, Robert W. Adler, Sackett *and the Continued Atomization of the Clean Water Act*, 74 CASE W. RSRV. L. REV. 257, 263 (2023) (observing that the Court's "trend of atomizing the CWA . . . will frustrate attainment of the statutory goals and objectives"); Erin Ryan, Sackett v. EPA *and the Regulatory, Property, and Human Rights-Based Strategies for Protecting American Waterways*, 74 CASE W. RSRV. L. REV. 281, 285 (2023) ("The Court's self-aggrandizing move in *Sackett* will come at a cost for wise environmental governance."); Cale Jaffe, Sackett *and the Unraveling of Federal Environmental Law*, 53 ENV'T L. REP. 10801, 10801 (2023) (taking note of the "serious threat that the Court's decision poses for federal environmental law writ large"). For arguments developing something like the opposite—construction principles in favor of environmental protection—see Nicholas S. Bryner, *An Ecological Theory of Statutory Interpretation*, 54 IDAHO L. REV. 3, 44 (2018) ("[C]anons of construction should be extended to protect vulnerable ecological and intergenerational interests."); William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 UC DAVIS L. REV. 693, 697 (2012) (arguing that the public trust doctrine should be understood as a canon of construction under which "the protected status of public trust values, and government obligation to protect those values, would take the form of a background principle against which positive legislation and administrative actions are construed and reviewed").

75. *See* Craig B. Brinkerhoff et al., *Ephemeral Stream Water Contributions to United States Drainage Networks*, SCIENCE, June 28, 2024, at 1476, 1482 (concluding that ephemeral streams, which fall outside of CWA jurisdiction after *Sackett*, make up more than half of the water drainage network in the

tracts of wetlands and miles of streams that were protected a few years ago now no longer count as jurisdictional waters.[76]

United States); Adam C. Gold, *How Wet Must a Wetland Be to Have Federal Protections in Post-*Sackett *US?*, SCIENCE, Sept. 27, 2024, at 1450, 1450 (predicting that between seventeen and ninety million acres of nontidal wetlands will lose Clean Water Act protections after the *Sackett* decision); Dave Owen, *Mapping the New Clean Water Act: New Research Helps Elucidate the Potential Scope and Impacts of Regulatory Changes*, SCIENCE, Sept. 27, 2024, at 1414 (summarizing the state of research on current CWA protections); Carol J. Miller, *"Experimental Populations" Final Rule: FWS' Response to Climate Change Threats*, 54 ENV'T L. REP. 10210, 10217 (2024) (stating that *Sackett* has removed an estimated "more than one-half of the wetlands (more than sixty million acres) in the United States from EPA jurisdiction").

76. In theory, future litigation might mitigate *Sackett*'s holding somewhat, though it would increase the EPA's and Army Corps' evidentiary burdens. *Cf.* William W. Buzbee, *Fears, Faith, and Facts in Environmental Law*, 39 J. LAND USE & ENV'T L. 1, 2–3 (2023) (suggesting that a "more rigorous documentation and testing of facts, science, and other effects observations, assertions, and predictions" might help avoid future court losses). There are also other policy possibilities, including coordinating to protect water quality at different levels of government. *See* Shawna Bligh, *Sustaining America's Non-Jurisdictional Wetlands Post-*Sackett *Through Conservation*, 92 UMKC L. REV. 789, 791 (2024) (discussing possibilities at the state level); Stephen D. Earsom, *Striking Before the Iron Is Hot: How Tribes in the East Can Assert Their* Winters *Rights to Protect Tribal Sovereignty & Mitigate Climate Change*, 42 VA. ENV'T L.J. 47, 66 (2024) (describing possibilities for tribal governments); John Stack, Note, *The Mississippi River Basin Compact: A New Governance Structure to Save the Mississippi River*, 108 MINN. L. REV. 2703, 2742–45 (2024) (discussing one such idea at the regional level). Intermittent streams and channels might count as "point sources" of pollution under the Act, if they convey pollution into larger, permanent water bodies. This idea is countenanced in the Scalia *Rapanos* plurality opinion, which concludes that the Act "categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,'" because it includes "them in the definition of 'point source.'" *Rapanos*, 547 U.S. at 735 (quoting 33 U.S.C. § 1362(12), (14)). And there is the Court's recent conclusion in the *County of Maui* case that "functional equivalent[s] of a direct discharge" license the regulation of point source pollution when the pollution travels, for example, through groundwater before reaching the waters of the United States. County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1468 (2020); *see also* Robin Kundis Craig, *Tribes and Water in the Wake of* Navajo Nation *and* Sackett*: Treaties,* Winters*,* Montana*, and Rights of Nature*, 48 WM. & MARY ENV'T L. & POL'Y REV. 687, 733 (2024) ("*County of Maui* doesn't plug every jurisdictional hole *Sackett* left . . . , [but] it does leave subject to the CWA . . . pollutants [that] flow to a jurisdictional water relatively quickly and in recognizable form."). Still, if a single-sentence principle of construction was enough to limit the plain meaning of "adjacent" in *Sackett*, there seems little reason to think that similar principles cannot be deployed in other cases.

B. *SACKETT* AND AVOIDANCE CREEP

The Court's expanded use of clear statement rules led it to an implausible reading of the Clean Water Act, one that avoided reaching constitutional questions that seem thin under existing constitutional case law.[77] The case is an example of avoidance creep in the environmental law context. The principle that Congress must speak clearly when regulating traditional domains of state power is just that: a clear statement principle.[78] And because two hallways are adjacent to one another even when they are separated by a wall, taking the Clean Water Act's use of the word adjacent to require a continuous surface connection is an implausible reading of the statute.[79] At the same time, using the clear statement principle to call into question longstanding bipartisan interpretations of the Clean Water Act implies constitutional issues that seem insubstantial under existing law.[80] No administration, and no Supreme Court majority, in the past half century had thought the program raised constitutional problems.

Avoidance creep also begins to fit the *Sackett* opinion's role in Clean Water Act caselaw. An avoidance principle mentioned in the *SWANCC* case—to invalidate Clean Water Act jurisdiction over isolated ponds in an abandoned sand and gravel pit in Illinois—has expanded in its application in *Sackett* to include enormous tracts of wetlands across the United States.[81] When

77. For example, water quality has implications for interstate commerce under the Court's existing Commerce Clause jurisprudence. *See* United States v. Lopez, 514 U.S. 549, 558 (1995) (identifying the famous three "categories of activity that Congress may regulate under its commerce power"). Water is sold in interstate commerce, waterways, which are fed by non-navigable tributaries, are channels of interstate commerce, and water pollution substantially affects interstate commerce. There has similarly been a long history of federal protection of waterways, including the five decades of such protections over wetlands and ephemeral streams under the Clean Water Act. I am grateful to Dave Owen for suggesting these points.

78. *See supra* Part I.

79. *See supra* Part I.

80. *See supra* Part I.

81. *See supra* Part I. One might say that the *SWANCC* opinion was equally an appeal to constitutional questions that seem insubstantial under existing caselaw. Thus, one might think that *Sackett* is a continuous aspect of the same trend, rather than an example of the principle creeping into a widening set of circumstances. But I still think that the wide-ranging implications of *Sackett* do seem to demonstrate something more expansive—all wetlands, all ephemeral streams—making the case a plausible fit for the principle's "creep."

there is imprecision about the use of a constitutional avoidance canon, it can upset traditional principles of statutory interpretation. The risk is magnified here, where the principles undercut the express aims of the statute in question to use federal authority to improve water quality.[82] In this way, the avoidance creep diagnosis seems to be of a piece with other criticisms of the expansive use of substantive canons in statutory interpretation.[83]

By seeing *Sackett* as an example of avoidance creep, more observations might follow. Courts and commentators should be wary of future expansions of the *SWANCC* principle, especially without more specific elaborations of the principle's scope and how it applies. Avoidance should not be a method to issue new constitutional rulings without explanation.

The changing interpretation of the Clean Water Act also highlights avoidance creep's harms. In reading the Clean Water Act so differently from how the agencies had read it for fifty years, the Court's reasoning prompted many criticisms from

82. I am grateful to William Buzbee for raising this point.

83. *See* Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1409 (2002) (describing the canon of constitutional avoidance as "noxious"); Katyal & Schmidt, *supra* note 23, at 2112 (arguing that the avoidance canon "leads to . . . sloppy and cursory constitutional reasoning"); Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1423 (2017) (explaining that the Court's continued use of "antinovelty rhetoric . . . will continue to generate litigation and sometimes result in the invalidation of statutes"); William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1762 (2021) ("[J]udges deploy judge-made substantive canons to supplant actual evidence of meaning from the production economy, even when the statutory authors' views are undisputed."); Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 548 (2023) ("[T]he Court presumably ought to clear out any residue left behind by judge-made, formerly substantive canons and leave it to Congress alone to specify . . . any special interpretive conventions that it intends to employ."); Ryan D. Doerfler, *How Clear Is "Clear"?*, 109 VA. L. REV. 651, 691 (2023) (describing the canon of "modern avoidance" as a "very demanding clarity threshold"). *But see* Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 586 (2019) ("[W]hereas the early Roberts Court boldly invoked the [avoidance] canon to openly rewrite statutes whose plain meaning it found constitutionally problematic, in recent years the Court has tamped down its use of the avoidance canon."). Of course, such criticisms also go beyond avoidance creep. For example, the charge of textual gerrymandering might be raised about *Sackett*'s methodology more broadly: The Court views the provision it is interpreting in isolation, and in so doing it overlooks key language in the Act, particularly regarding the Act's goals and criteria.

environmental scholars and practitioners,[84] which might be understood simply as a disagreement with the *Sackett* majority's legal conclusion. But expanding the zone of unconstitutionality in avoidance widens courts' powers to strike down legislation on the grounds that it violates the Constitution.[85] Doing so without careful elaboration of the reasons for the expansion is another reason for criticism. If avoidance creep has this effect in the environmental context, it may have similar effects elsewhere.

CONCLUSION

This Essay has argued that the *Sackett* opinion is an example of an interpretive phenomenon called constitutional avoidance creep. A principle of uncertain provenance in *SWANCC* that was used to invalidate jurisdiction over two isolated ponds grew in stature in *Sackett* to read great portions of the nation's wetlands out of the Clean Water Act's jurisdiction. Connecting the environmental and avoidance creep literatures provides one example of how precedent can be used drastically to reinterpret existing law. The criticisms that *Sackett* has aptly prompted may find further structure and elaboration in the idea of constitutional avoidance creep.

84. *See supra* Introduction.

85. *See* Jeremy Waldron, *The Crisis of Judicial Review* 5, 21–25 (N.Y. Univ. Sch. of L., Working Paper No. 24-30, 2024) (describing the phenomenon as "strong judicial review").

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