A Textualist's Guide to "Waters of the United States" and Federal Environmental Statutes

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Debates about textualism are now more practical than black-and-white arguments whether it is inadequate or the only true way to interpret law. This is likely because textualism is now the dominant method of interpretation on the U.S. Supreme Court. And yet, the textualist justices have begun interpreting environmental laws differently. Two current discussions help explain why. First is a methodological divide within textualism: flexible textualism versus strict ("formalist") textualism. Second is what Kevin Stack calls "the enacted purposes canon," which strict textualists use to resolve genuine textual ambiguities by staying true to textualism's principle of restraint. This Note first examines how textualism's plain meaning rule requires the enacted purposes canon. Next, it examines the Clean Water Act, which has a purposes section ideal for interpretation under the enacted purposes canon because of its clarity, specificity, and comprehensiveness. Finally, it examines the conservative split in Sackett v. EPA*, finding flexible textualism in Justice Alito's majority opinion and strict textualism in Justice Kavanaugh's concurrence. The* Sackett *example illustrates how interpreting the 1970s federal environmental statutes is the perfect test of whether textualism can work as intended: textualism's success depends on principled judges' good-faith restraint and deference to legislatures.*

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> I know what's legal, not what's right. And I'll stick to what's legal. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide . . . the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.[1]

1. Tennessee Valley Authority v. Hill, 437 U.S. 153, 195 (1978) (quoting ROBERT BOLT, *A Man for All Seasons* act 1, p. 147 (Heinemann ed. 1967)).

INTRODUCTION

"[C]urious," a "paradox," and "[not aligned] with some modicum of common sense and the public [interest]" is not how we expect Supreme Court justices to describe the practical consequences of their own opinions.[2] Chief Justice Warren Burger did not hide his disapproval of the Endangered Species Act in his famous and controversial majority opinion in *TVA v. Hill*. He noted that, in this case, a principled textualist approach would require sacrificing millions of dollars in public funds.[3] At oral argument, he even doubted the environmentalist plaintiffs' sincerity that they cared about the species at issue: "I am sure they just do not want this project."[4] Despite these misgivings, Burger ignored his personal view of reasonable public policy in favor of a textualist approach to the Endangered Species Act.

Does the story of *TVA v. Hill* show that textualism is, quite literally, an unreasonable failure of judicial interpretation? On the contrary, the whole story is a true success for conservative values, demonstrating textualism's potential for federal environmental law. Specifically, textualism urges judges' deference to legislatures to promote some of American conservatism's classical-liberal[5] values: democratic rulemaking by elected officials rather than judges, the rule of law, and holding elected legislators politically accountable. Despite Chief Justice Burger having no love for the Endangered Species Act's purposes or design,[6] he applied a textualist reading in good faith without succumbing to the temptations of a "judicial rewrite."[7]

2. *Id*. at 172, 194.

3. *Id*. at 174.

4. Oral Argument at 01:07:02, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (No. 76-1701), https://www.oyez.org/cases/1977/76-1701.

5. Classical liberalism is the political tradition historically shared by the American "Left" and "Right" that includes, *inter alia*, lawmaking only with consent of the governed, rule of law that applies equally to all citizens, and legal protection of rights. Because this is a broad political tradition, it includes a variety of ideologies ranging from libertarianism to limited government intervention that promotes citizens' rights and welfare. SHANE D. COURTLAND, GERALD GAUS & DAVID SCHMIDTZ, LIBERALISM, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2022 ed. 2022) (noting many classical liberals advocated professional licensing, health and safety regulations, banking regulations, government infrastructure, improving the economic welfare of the poor, and sometimes even unionization). To be clear, this Note uses "classical liberalism" to refer to the values traditionally shared by the Left and the Right, rather than just one of the various ideologies that fall under its umbrella, such as libertarianism. *Id*. (noting that "[a]lthough classical liberalism today often is associated with libertarianism," the latter should not be confused with "the broader classical liberal tradition").

6. *See generally*, Holly Doremus, *The Story of Tennessee Valley Authority v. Hill: A Little Fish, a Pointless Dam, a Stubborn Agency, and a Narrow Escape for a Broad New Law*, *in* ENVIRONMENTAL LAW STORIES: AN IN-DEPTH LOOK AT TEN LEADING CASES ON ENVIRONMENTAL LAW (Oliver A. Houck & Richard J. Lazarus eds., 2005).

7. *Tennessee Valley Authority*, 437 U.S. at 187 ("One might dispute the applicability of these examples to the Tellico Dam by saying that in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. *But neither the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make such fine utilitarian calculations.* On the contrary, the plain language of the Act . . . shows clearly that Congress viewed the value of endangered species as 'incalculable.'") (emphasis added).

This Note is not a conservative defense or a progressive attack on textualism. Helping textualist judges do their jobs is more useful than an academic battle to praise or condemn their approach. This Note therefore explores how federal judges can best apply textualism in good faith to federal environmental statutes. Textualism's classical-liberal values are generally not controversial. Instead, the two most important controversies are whether textualism succeeds in practice at advancing these values, and if not, whether they even could in theory. This Note demonstrates that textualism can promote these values for at least some laws—but only if judges live up to its principle of self-restraint. Federal environmental statutes that have specific and comprehensive enacted purposes, such as the Clean Water Act, are ideal for such an approach. Moreover, the success or failure of textualism to put its best foot forward may play a major role in whether young Americans, who especially care about environmental protection,[8] see textualism as legitimate when they eventually become future practitioners, scholars, and judges.

This Note's goal is to serve as a guide for textualist analysis of federal environmental statutes. It rests on three premises. First, it accepts that textualism is now one of—if not the—dominant approach to statutory interpretation in federal courts.[9] Second, it acknowledges good-faith criticisms of textualism that can help judges mitigate its key risks. Third, it notes two historical associations and rejects the idea that they are fundamental: textualism's association with conservativism, and conservatism's association with opposing conservation. Textualism's progressive critics and conservative supporters were equally shocked by Justice Gorsuch's recent principled textualist analysis in *Bostock*, which found Title VII prohibits discrimination of sexual orientation and gender identity.[10] Likewise, conservative values often align with environmental protection.[11] Many American conservatives have long argued that "Conservation

8. Valentino Dardanoni & Carla Guerriero, *Young People' s Willingness to Pay for Environmental Protection*, 179 ECOLOGICAL ECONOMICS 106853 (2021), https://www.sciencedirect.com/science/article/pii/S0921800920304523 (last visited Mar 16, 2025); *Do Younger Generations Care More About Global Warming?*, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION, https://climatecommunication.yale.edu/publications/do-younger-generations-care-more-about-global-warming/ (last visited Mar 16, 2025) (finding that 70% of adults aged 18-34 say they worry about global warming); Gallup Inc, *Are Americans Concerned About Global Warming?*, GALLUP.COM (2024), https://news.gallup.com/poll/355427/americans-concerned-global-warming.aspx (last visited Mar 16, 2025).

9. *See* Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes* at 8:09, YOUTUBE (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg (Justice Elena Kagan famously declaring, "we're all textualists now").

10. Bostock v. Clayton County, 590 U.S. 644, 653 (2020) This case held that when an employer fires an employee for being homosexual or transgender, they are discriminating based on traits or actions that the employer would not have questioned in members of a different sex, and so are discriminating based on sex in violation of Title VII of the Civil Rights Act of 1964 because "the limits of the drafters' imagination supply no reason to ignore the law's [textual] demands. *When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.*" *Id.* (emphasis added).

11. Matthew Feinberg & Robb Willer, *The Moral Roots of Environmental Attitudes*, 24 PSYCHOL. SCI. 56, 56-61 (2013) ("Conservatives are more likely to adopt proenvironmental positions if these

is Conservative."[12] Today, evangelical values inspire a growing chorus of young conservatives to carry on this mantle.[13] After all, it is quite literally more *conservative* to trust the traditional relationships that society developed with land and resources over many centuries of known climate conditions.[14] Likewise, it is more *liberal* to put one's faith in unregulated markets and inventions reshaping communities for an uncertain future without any concern of "progress" eroding our society's core values.[15]

This Note focuses on the Supreme Court's recent case of *Sackett v. EPA* as a comparison of how well the two distinct types of textualism follow the methodology's core values. Part I begins with an overview of textualism, including a discussion of the plain meaning rule, textualism's core principles and values, criticisms of textualism, and the two types of textualism: strict textualism and flexible textualism. It then introduces the enacted purposes canon. Part I ends by showing that flexible textualism permits using the enacted purposes canon,

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positions are discussed in moral terms that resonate with their moral commitments. . . . [R]esearchers have found evidence for five fundamental domains of human morality, which they labeled "harm/care" (concerns about the caring for and protection of other people), "fairness/reciprocity" (concerns about treating other people fairly and upholding justice), "in-group/loyalty" (concerns about group membership and loyalty), "authority/respect" (concerns about hierarchy, obedience, and duty), and "purity/sanctity" (concerns about pre-serving purity and sacredness often characterized by a disgust reaction). . . . [C]onservatives endorse in-group/loyalty, authority/ respect, and purity/sanctity more than liberals do. . . . [M]essages couched within a particularly conservative moral domain led them to adopt more proenvironmental attitudes, comparable to those of liberals. . . . [P]olitical polarization around environmental issues is not inevitable but can be reduced by crafting proenvironmental arguments that resonate with the values of American conservatives.").

12. ConservAmerica, formerly known as Republicans for Environmental Protection, has long used this slogan, citing traditional conservative philosophy and writings of Edmund Burke, Russell Kirk, and Richard Weaver. CONSERVAMERICA, https://www.conservamerica.org/ (last visited Mar. 7, 2024).

13. Feinberg and Willer, *supra* note 11, at 61 (citing Arjan Wardekker, Arthur Petersen & Jeroen P. van der Sluijs, *Religious Positions on Climate Change and Climate Policy in the United States*, *in* COMMUNICATING CLIMATE CHANGE: DISCOURSES, MEDIATIONS AND PERCEPTIONS 53 (2008), http://www.lasics.uminho.pt/ojs/index.php/climate_change) (finding that many Christian groups had become proponents of environmental protection by 2008, some of whom "perceive[d] environmental degradation as a desecration of the world God created and a contradiction of moral principles of purity and sanctity . . . . More generally, most of the world's religions emphasize humanity's role as stewards of the earth charged with keeping pure and sacred God's creation . . . "); *see, e.g.*, Meera Subramanian, *Generation Climate: Can Young Evangelicals Change the Climate Debate?*, INSIDE CLIMATE NEWS (Nov. 21, 2018), https://insideclimatenews.org/news/21112018/evangelicals-climate-change-action-creation-care-wheaton-college-millennials-yeca/.

14. *See* Michael Oakeshott, *On Being Conservative*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 168 (1962) ("To be conservative, then, is to prefer the familiar to the unknown, to prefer the tried to the untried, fact to mystery, the actual to the possible, the limited to the unbounded, the near to the distant, the sufficient to the superabundant, the convenient to the perfect, present laughter to utopian bliss. Familiar relationships and loyalties will be preferred to the allure of more profitable attachments; to acquire and to enlarge will be less important than to keep, to cultivate and to enjoy; the grief of loss will be more acute than the excitement of novelty or promise . . . . It is to be equal to one's own fortune, to live at the level of one's own means, to be content with the want of greater perfection which belongs alike to oneself and one's circumstances.").

15. *See generally* Michael Keary, *A Green Theory of Technological Change: Ecologism and the Case for Technological Scepticism*, 22 CONTEMP. POL. THEORY 70 (2023) (contrasting environmentalists' fears that environmental problems will have social-political consequences with liberalism's faith that new technologies will resolve current foreseeable environmental problems).

while strict textualism requires it. Then, Part II shifts to a brief background on the Clean Water Act, its enacted purposes, and the Supreme Court's evolving interpretation of the term "waters of the United States." Part III brings these together by applying the principles discussed in Part I to the Clean Water Act topics discussed in Part II. This section shows how Justice Alito's flexible textualism fails to fully achieve the impartiality that textualists believe in, in contrast to Justice Kavanaugh's strict textualism defers to the legislature's written goals. Thus, a close examination makes *Sackett* an ideal lesson in how to apply the two textualisms to federal environmental statutes. Not all textualism is equal: the sharp contrast between the two approaches in *Sackett* reveals that strict textualism both better embodies textualism's core values and is far more appropriate for interpreting federal environmental statutes.

I. THE TWO TEXTUALISMS AND THE ENACTED PURPOSES CANON

To understand textualism's methodology and purposes, this Part begins with the plain meaning rule. Next, it discusses some of the most widespread criticisms of textualism so that judges can better mitigate important issues that critics identify. Then, it defines "strict textualism" and "flexible textualism," and explains the different rules of thumb, called "canons of statutory interpretation," that they rely on. Finally, it shows how the enacted purposes canon gives strict textualism many of the strengths that purposivism claims when statutes have enacted purposes sections, including many federal environmental statutes.

A. The Plain Meaning Rule

In the spirit of textualism, it is best to begin with its definition:

> Textualism is a method of statutory interpretation that asserts that a statute should be interpreted according to its plain meaning and not according to the intent of the legislature, the statutory purpose, or the legislative history . . . Even if the textualist approach is commonly regarded as a conservative approach to the law, the rigor of its application can lead to progressive outcomes.[16]

To this end, textualism relies first and foremost on the *plain meaning rule*:

> [When] interpreting a statute[,] a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."[17]

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16. *Textualism*, LEGAL INFORMATION INSTITUTE (2022), https://www.law.cornell.edu/wex/textualism.

17. Conn. Nat'l. Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted). *See also* United States v. American Trucking Ass'ns., 310 U.S. 534, 543 (1940) (per Reed, J.) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."). *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

In other words, when the text has a single meaning in ordinary language with a clear application to the case's real-world content, then judges should look at only that plain meaning.

Returning to *TVA v. Hill*, Chief Justice Burger noted that few federal statutes speak in "plainer" language than the Endangered Species Act did in making no room for exceptions.[18] This was Congress's deliberate choice.[19] In its most modern form, called "new textualism," statutory interpretation starts and ends with the text, reading the whole act—or sometimes the entire U.S. code—for context.[20] During this analysis, judges often check how the legislature used the same or similar phrases in other provisions or in similar statutes.

What textualism excludes is most "external aids": anything outside the "four corners" of the text, such as legislative history, committee notes, or academic commentary. Textualists and critics alike note that because legislatures often produce laws through compromise, different legislators likely intend different purposes for the same provision.[21] Even worse, other legislators who voted for the same text might have even read different meanings into it![22] Legislators often write the final text through give-and-take compromises, settling on language that satisfies two (or more) sides that interpret the same words and phrases differently. For this reason, textualists fear that using external aids corrupts analytical rigor and risks judges cherry-picking support for what they *want* to read into a statute. Judge Harold Leventhal once said that all a judge needs to do to "support" their personal bias with legislative history "is to look over the heads of the crowd and pick out [their] friends."[23] Textualist justices further argue that even if a majority of both houses of Congress shared an intent, courts should not focus on legislative history as evidence of that intent because "we are a government of laws, not of men."[24] Courts should therefore focus on what Congress actually enacted rather than deciphering what it intended. In other words, even if almost all the legislators agreed on a single meaning, the

18. Tennessee Valley Authority v. Hill, 437 U.S. 153, 195 (1978) ("One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act . . . This language admits of no exception.").

19. *Id.* at 182-185. Chief Justice Burger doublechecked this plain meaning analysis against the legislative history, finding that Congress had actually removed draft language that would have limited the relevant section, Endangered Species Act, 16 U.S.C. § 1536 (1973), to only when it would be "practicable." *Id*. As I will discuss later, modern "new textualists" do not do this because if it were to contradict the plain meaning, the plain meaning would still be definitive. *Infra* Part I.

20. WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, LEGISLATION AND STATUTORY INTERPRETATION 197-98 (3rd ed. 2022) (citing John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997)).

21. ERWIN CHEMERINSKY, *The Epistemological Problem*, *in* WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 44, 52-53 (2022).

22. *Id.*

23. ANTONIN SCALIA, A MATTER OF INTERPRETATION 36 (1997).

24. Digital Realty Tr., Inc. v. Somers, 583 U.S. 149, 172-73 (2018) (Thomas, J., concurring in part) (internal citations omitted). This opinion criticized the majority's reliance on a single Senate report, but suggested that enacted purposes might be treated differently. *See id.* at 173 (comparing the intent that "Congress [] state[s] in committee reports" as inferior to "that which is obvious on the face of a statute") (internal citations omitted).

legislative history does not guarantee the judge's interpretation is the same as the legislators'. In contrast, textualists argue, presuming that a legislature "says . . . what it means and means . . . what it says"[25] at least promises a single, objective meaning based on impartial and predictable methods.

To be clear, the plain meaning rule requires interpreting a statute according to its ordinary and plain meaning *only when* the language is, in fact, "clear and unambiguous." This raises two questions. First, how should a textualist decide when language is "clear and unambiguous"? And second, what should textualist judges do when the language is not? While this Note cannot definitively answer the first question,[26] it is important for understanding how strict and flexible textualists differ in approaching the second question.

B. The Purposes and Risks of Textualism

1. Textualism's Values

Although textualism is intended to be an objective, value-neutral approach, textualism as a judicial philosophy is not value-neutral. Textualism's self-restraint and focus on a law's text have explicitly classical-liberal ideals: democratic rulemaking; public policy made by elected officials with more expertise than judges; promoting the rule of law with a fixed meaning of laws that the general public can understand; and holding elected legislators accountable by requiring them to fix their mistakes.

The first value, democracy, includes a reason Chief Justice Burger cited in *TVA v. Hill*: preserving separation of powers by honoring legislative intent.[27] He explains that under the constitutional separation of powers, the Court may not use interpretative principles to dodge Congress's policies simply because judges believe they are unreasonable.[28] Just as "'[i]t is emphatically the province and duty of the judicial department to say what the law is,' . . . it is equally—and emphatically—the exclusive province of the Congress" to set priorities and design public policy.[29] Textualists' commitment to the strict separation of powers prohibits any Supreme Court decrees that override constitutional acts of Congress,[30] even ones out of step with "common sense." In other words,

25. Conn. Nat'l. Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted).

26. The Supreme Court has noted "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language." United States v. Turkette, 452 U.S. 576, 580 (1981).

27. Tennessee Valley Authority v. Hill, 437 U.S. 153, 194-95 (1978) ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.' Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.").

28. *See id.* at 195.

29. *Id*. at 194 (quoting Marbury v. Madison, 5 U.S. 177 (1803)).

30. Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2120 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("[S]ome may conceive of judging more

textualists do not truly ignore the legislative intent. They simply determine it from *only* the statute's text in context, presuming that a legislature "says . . . what it means and means . . . what it says"[31] to prevent judges cherry-picking legislative history to disregard the text that the legislature actually enacted. Textualists believe this approach is necessary to uphold the separation of powers.[32] They fear judges who do not follow formalist approaches will invade Congress's lawmaking authority by "substituting their [preferences for] that of the legislative body."[33]

This democratic separation of powers goes hand-in-hand with textualism's value of practical policymaking: elected legislators are better placed to write laws than judges are to legislate from the bench. Chief Justice Burger's Hill opinion articulates this as well:

> Courts are ill-equipped to calculate how many dollars must be invested before the value of a dam exceeds that of the endangered species. Our responsibility . . . is merely to preserve the status quo where endangered species are threatened, thereby guaranteeing the legislative or executive branches sufficient opportunity to grapple with the alternatives.[34]

In other words, even if courts had the constitutional authority to craft nuanced public policy, judges typically lack the technical expertise and workforce to do so. Chief Justice Burger explains that legislating from the bench on complex technical issues is futile because judges have deep but narrow expertise that leaves them well-qualified to decipher legalese, but unqualified to comment on scientific and public policy matters.[35]

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as a . . . policymaking exercise in which judges should or necessarily must bring their policy and philosophical predilections to bear on the text at hand. I disagree with that vision of the federal judge in our constitutional system. The American rule of law . . . depends on neutral, impartial judges who say what the law is, not what the law should be. . . . [this is] a constitutional mandate in a separation of powers system [because] . . . When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power.").

31. Conn. Nat'l. Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted); *see also* United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."); *see generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

32. WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, LEGISLATION AND STATUTORY INTERPRETATION 197 (3rd ed. 2022) (citing James J. Brudney, *Confirmatory Legislative History,* 76 BROOK. L. REV. 901 (2011)).

33. *Id*. at 200 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)); *see, e.g.,* Kavanaugh, *supra* note 30, at 2120 ("Under the structure of our Constitution, Congress and the President—not the courts—together possess the authority and responsibility to legislate. As a result, clear statutes are to be followed.").

34. ESKRIDGE JR., BRUDNEY, AND CHAFETZ, *supra* note 32, at 169 (quoting Hill v. Tennessee Valley Auth., 549 F.2d 1064 (1977)).

35. *Id*. at 169-95 ("We have no expert knowledge on . . . endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam . . . 'Current project status cannot be translated into a workable standard of judicial review. Whether a dam is 50% or 90% completed is irrelevant in calculating the social and scientific costs attributable to the disappearance of a unique form of life. Courts are ill-equipped to calculate how many dollars must be invested before the value of a dam exceeds that of the endangered species. Our responsibility under § 1540(g)(1)(A) is merely to preserve the status quo . . . guaranteeing the legislative or executive branches sufficient opportunity to grapple with the alternatives.'").

Third, some textualists believe that interpreting laws according to their most ordinary and natural reading also provides the fairest notice to the public.[36] This is intuitive: the general public is more likely to understand laws that actually mean what people think they mean than laws that can only be understood by judges fluent in legalese and conducting comprehensive legislative history surveys. Plus, presuming laws to mean their plain meaning maintains predictability and consistency over time. As I will discuss later, this especially relevant for the Clean Water Act.[37]

Finally, textualism is intended to help voters hold legislatures accountable. The plain meaning rule does not assume that all written laws are perfect when judges interpret them. Instead, textualist judges leave to those legislators the responsibility of fixing any flaws they wrote in the law. Because Congress is responsible for writing laws, textualists believe it should also be responsible for choosing which amendments are necessary and which issues to tolerate. By focusing only on the text, judges prevent legislators from punting their responsibility to write laws that are clear and precise enough to guide private citizens and government agencies. If the statute is too ambiguous or leads to outcomes that voters dislike, the legislature cannot simply wait for judges to fix it before they are held accountable in the next election.

This back-and-forth[38] between Congress and the Court is precisely what unfolded after the *TVA v. Hill* decision. Although the Court disapproved of the policy's design, it still enforced the "unreasonable" outcome that Chief Justice Burger felt the statute's text mandated.[39] This preserved Congress's political incentive to update the Endangered Species Act, rather than punt a flaw it created to another branch of government. In fact, mere months after the Supreme Court decision, Congress amended the Endangered Species Act to create a new exemption process.[40] These amendments even specifically required the Committee to consider exemptions for the dam in *TVA v. Hill*. Creating this new exemption as a "pressure-relief valve" was a compromise between environmentalists and non-environmentalists.[41] But more importantly, deference to Congress to carefully craft compromises is itself a pressure-release valve

36. *See generally Textualism as Fair Notice*, 123 HARV. L. REV. 542 (2009).

37. Unlike many criminal laws, the Clean Water Act includes some criminal sanctions under a *mens rea* of negligence. Sackett v. EPA, 598 U.S. 651, 681 (2023) ("Facing severe criminal sanctions for even negligent violations, property owners are left to feel their way on a case-by-case basis. Where a penal statute could sweep so broadly as to render criminal a host of what might otherwise be considered ordinary activities, we have been wary about going beyond what Congress certainly intended the statute to cover.") (internal citations and quotations omitted).

38. In technical terms, we might call this a dialectic: Congress's original policy is its thesis, the Court's criticism and public opposition to the results is antithesis, and Congress's response through either amendments or clarification is the synthesis.

39. *Tennessee Valley Authority*, 437 U.S. at 166.

40. Holly Doremus, *The Story of Tennessee Valley Authority v. Hill: A Little Fish, a Pointless Dam, a Stubborn Agency, and a Narrow Escape for a Broad New Law*, *in* ENVIRONMENTAL LAW STORIES: AN IN-DEPTH LOOK AT TEN LEADING CASES ON ENVIRONMENTAL LAW 23 (Oliver A. Houck & Richard J. Lazarus eds., 2005).

41. *Id.*

superior to any ad hoc, piecemeal solutions decided by whoever the majority of justices happened to be at any given time.[42] Altogether, the story of *TVA v. Hill* shows that, as long as textualist judges are principled enough to tolerate public policy outcomes they find unreasonable, textualism can sometimes succeed in promoting its core values.[43]

2. Criticisms of Textualism

Critics of textualism generally fall into two camps. The first says that textualism is impossible even in theory; the second argues that regardless of whether it is theoretically possible, in practice, it is merely "a smokescreen by conservative judges to reach ideological[] outcomes."[44] In the first category, much of the literature focuses on the fundamental limits of language, especially language written by compromising authors. These critics ask how judges should determine where language is genuinely "clear and unambiguous." Luckily for Chief Justice Burger, the Endangered Species Act's relevant language truly was unambiguous.[45] For most laws, however, judges are not so lucky. Textualism does not presume every word to have its literal meaning in modern English, so even textualist judges must sometimes go beyond "the four corners of the page" to specific secondary sources to determine a phrase's meaning in context.[46]

These critics then ask how textualism deals with language that could have multiple interpretations. Famously, textualists such as Justice Scalia jump first to dictionaries to resolve ambiguous words and phrases.[47] But this in turn raises two questions. First, which dictionary should a judge use? If the statute borrows language from an earlier statute, did the drafters fully understand the original

42. It was likely Chief Justice Burger's actual intention as a textualist to rely on this legislative pressure-relief valve. *Id.* at 22 ("[Chief Justice] Burger may have been trying to goad Congress into action. His memo assigning himself the case had noted that he planned to 'serve notice on Congress that it should take care of its own 'chestnuts.' He went out of his way to point out in a footnote exactly how trivial this species was, noting how many darter species occurred in the Tennessee system, how often new ones were discovered, and how hard it was to tell the species apart.").

43. Compare this with purposivism, which does ask judges to consider whether relying on only the text's plain meaning is reasonable in light of the "spirit of the law." *Cf.* United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("[E]ven when the plain meaning did not produce absurd results but *merely an unreasonable one* 'plainly at variance with the policy of the legislation as a whole' [courts should] follow] that purpose, *rather than* the literal words.") (emphasis added) (citations omitted).

44. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 265-66 (2020).

45. *Tennessee Valley Authority*, 437 U.S. at 173 ("One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to insure[sic] that actions authorized, funded, or carried out by them do not jeopardize the continued existence' of an endangered species or 'result in the destruction or modification of habitat of such species . . .' This language admits of no exception.") (quoting Endangered Species Act, 16 U.S.C. § 1536 (1973)).

46. *See, e.g.*, Grove, *supra* note 44 at 291 ("[A] textualist is unlikely to read 'domestic violence' in the Ku Klux Klan Act to encompass tragic abuses within a family. Instead, textualists (of all stripes) construe semantic language with attentiveness to cultural cues, such as the history that tells us 'domestic violence' may also refer to a violent uprising.").

47. *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 732 (2006) (plurality opinion) (quoting Webster's New International Dictionary 2882 (2d ed. 1954)) (basing its ultimate finding largely on the different definitions of "water" and "waters").

language in that earlier period's context? Even if so, the drafter may have updated some phrasing while intending to keep the same meaning as the original words that no longer exist, requiring some discretion to decide if the words are "substantially" the same.[48] Second, once a judge selects a dictionary, how should they decide between different definitions for the same word that might produce different outcomes, but seem equally reasonable? Finally, dictionary definitions are of little help when dictionaries define related words by referencing each other.[49] Or statutes might simply contradict themselves or each other.[50] Critics frequently raise these questions because textualists only indirectly factor into their methodology the drafters' intent or range of intents.

Textualism is often contrasted with another approach called *purposivism*: the view that the statute's text should be secondary when its plain meaning conflicts with what the judge believes its purpose to be based on context clues, including any "patterns of policy judgments made in related legislation, the 'evil' that inspired Congress to act, [and] the legislative history."[51] In other words, purposivist judges try to understand the law's purpose based on both its text and sources, and then interpret it according to "the spirit of the law" rather than "the letter of the law."[52] Purposivist critics point out that if textualism becomes simply "dictionary-shopping and statute-parsing," it would replace purposivists' "complex normative art" with "a mere shell game" of disguising judges' policy goals.[53] To these critics, textualism is a mere excuse for judges continuing to "look . . . out over the crowd and pick . . . out [their] friends," no different from textualists' criticism of purposivism.[54] Others fear that statutory interpretation

48. *See, e.g.*, Olevik v. State, 806 S.E.2d 505, 515-16 (2017) (reasoning that "criminate" in Georgia's 1877 constitution and "incriminating" in the modern constitution have "identical" meanings).

49. For example, if *A*'s definition includes *B*, *B*'s definition includes *C*, and *C*'s definition includes *A*, this circular definition creates uncertainty.

50. *See, e.g.*, Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 649-73 (2007) (addressing the contradiction in the Endangered Species requiring Fish and Wildlife Service consultation for any federal action that may affect listed species, while the Clean Water Act provides that the U.S. Environmental Protection agency "shall" transfer NPDES authority to a state that meets specific enumerated criteria).

51. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71 (2006).

52. *See, e.g.*, United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940) ("There is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes," but simply reading its plain meaning is not always "sufficient . . . to determine the purpose of the legislation. . . . Frequently[], even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' [courts should] follow[] that purpose, *rather than* the literal words."). This case has been called "the most important purposivist precedent of the twentieth century." Manning, *supra* note 51, at 87. Intentionalist purposivists focus on the legislature's *intended purpose*, while teleological purposivists focus on the law's *"objective" purpose*. M. Aalto-Heinila, *Purposivism*, ENCYCLOPEDIA OF THE PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY (2023), https://doi.org/10.1007/9 78-94-007-6730-0_1124-1. But this is distinction is not as important for this Note as the differences between purposivism and textualism.

53. WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, LEGISLATION AND STATUTORY INTERPRETATION 202 (3rd ed. 2022).

54. *Id.* at 203.

without legislative history creates a "law without mind": interpretation that mindlessly focuses on the text without any of the motivation behind it "sever[s] the connection between democracy and the rule of law,"[55] worsening the risk of judicial rewrites.[56] These critics fundamentally disagree that judges should be "umpires" who merely "call balls and strikes, and [do] not to pitch or bat."[57]

Sadly, empirical data seems to support this criticism regarding textualism's most famous advocate in the Supreme Court's environmental jurisprudence.[58] A survey of Justice Scalia's opinions in environmental cases found that while he adhered to his textualist principles from 1990 to 2000, he increasingly abandoned textualist methodology from 2001 to 2016 for both interpretations of "legislative intent" and "economic arguments" to limit environmental regulation.[59]

C. Two Textualist Approaches to Ambiguity

1. Strict Textualism and Textual Canons

In "Which Textualism?" Tara Leigh Grove lays out the different fundamentals of "formalistic" textualism, which I will refer to as *strict textualism* and *flexible textualism*.[60] Under strict textualism, judges faithfully parse the statutory language by "focusing on semantic context and downplaying policy concerns or the practical (even monumental) consequences of the case."[61] Critically, all textualists recognize that textualism is not "literalism" because language can only be understood in context.[62] The key question is what parts of

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55. *Id.* at 202 (citation omitted).

56. *See, e.g.,* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 323-24 (2006) (Breyer, J., dissenting) ("[O]ur ultimate judicial goal is to interpret language in light of the statute's purpose. Only by seeking that purpose can we avoid the substitution of judicial for legislative will. Only by reading language in its light can we maintain the democratic link between voters, legislators, statutes, and ultimate implementation, upon which the legitimacy of our constitutional system rests. . . . By disregarding a clear statement in a legislative Report adopted without opposition in both Houses of Congress, the majority has reached a result no Member of Congress expected or overtly desired.").

57. *Cf* John G. Roberts, Jr., Opening Statement at the Confirmation Hearing for Chief Justice of the United States (Sept. 29, 2005), https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process.

58. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) (calling the presumption that the plain meaning is the "best evidence" of legislative intent a "false notion," and instead advocating lawyers and judges to do uncover legislative intent through historical research).

59. *See* Canaan Suitt, *The Promise and Perils of Textualism for Environmental Advocacy*, 46 WM. & MARY ENVTL. L. & POL'Y REV. 811, 827 (2022) (citing Rachel Kenigsberg, *Convenient Textualism: Justice Scalia's Legacy in Environmental Law*, 17 VT. J. ENVTL. L. 418 (2016)). This contrasts with the textualist argument that the rule of law requires a more predictable method of statutory interpretation. *See e.g.,* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 UNIVERSITY OF CHICAGO LAW REVIEW 1175, 1179 (1989); Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

60. Grove, *supra* note 44 at 265-66.

61. *Id.* at 267.

62. This can be incredibly frustrating. *See id.* at 280 (pointing out that "[t]extualists have variously used terms such as 'semantic context,' 'social context,' and 'full context,' without [clearly defining them or] explaining whether the terms refer to the same or different concepts").

the context should matter. What defines strict textualism is the agreement that it should be limited to textual analysis and textualist canons of interpretation. Even when the text leads to unreasonable outcomes, "naked policy appeals" should not invite judges to legislate from the bench.[63] For a fuller list of these textualist canons, see the Appendix.

Critics argue that this "wooden" approach is numb to the specific statute's goals and justifications.[64] Setting aside the enacted purposes canon for the moment, this is partially true. But strict textualism is not a cult for grammar and dictionaries. Instead, it has a well-documented goal of deference *across* cases, rather than switching moral codes with each new statute or new Supreme Court.[65] Restraint should constrain judicial discretion so that a judge does not unintentionally, or intentionally, misread a statute to "pursue his own objectives and desires."[66]

2. Flexible Textualism and Normative Canons

In contrast, flexible textualism allows interpreters to understand statutory text by considering policy context, social context, and practical outcomes, but still focuses primarily on the text without legislative history. Justice Alito explained his approach in these terms in *Bostock*: the Court needed to acknowledge "societal norms" in 1964 to understand "what the text was understood to mean when adopted" instead of "an impermissible attempt to displace the statutory language."[67] In contrast, Judge Easterbrook, a leading advocate of using textualism to restrain judicial activism, argued that this intention-focused approach may not sufficiently constrain judges because "[t]he use of original intent rather than an objective inquiry [into the text's] language . . . greatly increases the discretion, and therefore the power, of the court" because it has "endless flexibility" to decide whose intent matters.[68] Including a judge's subjective ideas about "social norms" makes the court an active

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63. Grove, *supra* note 44 at 282 (quoting Bostock v. Clayton County, 590 U.S. 644, 680-81 (2020)) ("Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress.").

64. *Id*. at 270.

65. *See id.*

66. ANTONIN SCALIA, A MATTER OF INTERPRETATION 17-18 (1997).

67. *Bostock*, 590 U.S. at 716-17 (Alito, J., dissenting); *see also* Grove, *supra* note 44 at 284-85 (further documenting Justice Alito's flexible textualist criticism of Gorsuch's textualist majority opinion in non-textualist grounds such as circuit precedents and subsequent legislative history).

68. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59, 62-63 (1988); *see also* ERWIN CHEMERINSKY, *The Rise of Originalism*, *in* WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 1, 21-22 (2022) (noting, for example, that constitutional originalists still debate whether their focal point should be the original intent of the Framers or the society at large; and that even those who argue for the latter must answer which citizens' interpretations should resolve disagreements).

participant that decides how to apply its canons, pushing the boundaries of an "umpire . . . call[ing] balls and strikes."[69]

Still, flexible textualists insist that attention to practical policy outcomes makes it the more valid textualism. In *Bostock*, Justice Alito attacked the majority's "brusque refusal to consider the consequences of its reasoning" as "irresponsible."[70] Finding some common ground with purposivists, flexible textualists believe that it does not serve justice for judges to find interpretations that undermine public policy. This belief is embodied in "normative canons" of interpretation. For textualists, the most controversial of these normative canons is the absurdity doctrine: judges should reject an interpretation that would lead to "practically absurd" outcomes, even if otherwise required by the text's plain meaning.[71] Absurd outcomes "sharply contradict society's 'common sense' of morality, fairness, or some other deeply held value."[72] By introducing personal judgment and social norms into the very definition of absurd, this doctrine gives judges the chance to override the law's plain text by interpreting "absurdity" according to their own policy goals.[73]

To be clear, the Burger Court also typically applied a "soft" plain meaning rule, using legislative history and purpose as "confirmatory" evidence for double-checking whether the plain meaning was as unambiguous as they first thought. The key difference between this and the later flexible textualism is a matter of restraint. As Justice Barrett has noted, non-textual canons become a problem for textualists when applied so "aggressive[ly]" that they enable a "court to forgo a statute's most natural interpretation in favor of a less plausible one."[74] Building on this, Grove argues that the safest approach for textualists is to use normative canons only where a statute is genuinely ambiguous, and even then, only to resolve that ambiguity and no more.[75]

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69. *Cf* John G. Roberts, Jr., Opening Statement at the Confirmation Hearing for Chief Justice of the United States (Sept. 29, 2005), https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process.

70. *Bostock*, 590 U.S. at 725 (Alito, J., dissenting).

71. Importantly, in this context, "absurd" in this context does not mean "illogical" or self-contradicting, but "ridiculously unreasonable, unsound, or incongruous; . . . extremely silly or ridiculous," but rather the everyday meaning of "absurd" as silly or insane. *Absurd definition & meaning*, MERRIAM-WEBSTER (2024), https://www.merriam-webster.com/dictionary/absurd.

72. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2405-06 (2003).

73. Grove, *supra* note 44 at 286 (2020) ("the absurdity doctrine enables a court to inject policy concerns into the interpretive inquiry—even to the point of overriding a plain text."); Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2120 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) To avoid judges simply using the absurdity canon to "fix" policies that they believe Congress mistakenly wrote, the bar of absurdity must be very high because "one person's reasonableness may be another person's absurdity. Or one person may think that an idea is bad but not absurd whereas another person may think it absurd." *Id.*

74. Amy Coney Barrett, *Substantive Canon and Faithful Agency*, 90 BOS. U. L. REV. 109, 109-10 (2023) (suggesting judges should draw the line by applying normative canons in an "aggressive" fashion only when they have clear constitutional underpinnings but acknowledging that this will not always be clear); *see also id.* at 167-77.

75. Grove, *supra* note 44 at 287 (2020). *See also*, Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARVARD LAW REVIEW 515 (2023).

Both forms of textualism rely on judicial restraint. However, navigating this narrow tightrope is perhaps the key reason flexible textualism depends so much more heavily on restraint in muddied linguistic waters than strict textualism.

D. The Enacted Purposes Canon

Strict textualism requires deference to the plain meaning whenever possible, without looking beyond the law's text to legislative history, policy considerations, or most other external aids. But as we have seen, strict textualists still face the challenge of genuine ambiguity. Fortunately, in the context of environmental statutes, strict textualism allows for and even requires judges to interpret ambiguities in the context of their "enacted purposes": the goals that the statute's text clearly and explicitly states.

Justice Lewis Powell best articulated the enacted purposes doctrine: "We cannot interpret federal statutes to negate their own *stated* purposes."[76] This is intuitive enough. Because the legislature wrote purposes into the law itself, judges should understand those purposes as important context to understand what each specific passage means.[77] This aligns with one of the most fundamental principles of textualism: when Congress votes to include purposes into the text, judges cannot override the election representatives' consensus interpretations with their own interpretations.[78]

Most helpfully for textualists, agencies and activist judges cannot simply "interpret [a passage] to negate [the statute's] own stated purposes," the legislature's enacted purposes narrow the range of plausible interpretations.[79] In addition, enacted purposes explicitly prohibit those agencies and judges from making self-serving inferences by cherry-picking other parts of the U.S. Code with goals that are in tension with the statute at hand.[80] For example, when a court reviews an agency's action, it can quickly disregard an agency interpretation broadly inconsistent with the statute's enacted purposes, limiting a President's ability to drive policies that are in tension with Congress's goal for the statute.[81]

This might sound too good to be true. After all, isn't this suspiciously like purposivists' reliance on legislative history that textualists criticize? To the contrary, purposivism is significantly different because it considers unenacted committee notes, preambles, and legislative records alongside the enacted

76. New York State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419-20 (1973). *See also,* King v. Burwell, 576 U.S. 473, 493 (2015) (citing *Dublino* and reaffirming the use of this canon to resolve textual ambiguity) (emphasis added).

77. Kevin M. Stack, *The Enacted Purposes Canon*, 105 IOWA LAW REV. 283, 287 (2019) ("[B]ecause purpose clauses are enacted into law as part of the statute and . . . provide authoritative context for reading the entire statute . . . [they should] guide judicial discussions of the statutory purpose").

78. *Id.*

79. *Dublino*, *supra* note 76.

80. Stack, *supra* note 77, at 286.

81. *Id.*

purpose provisions.[82] In contrast, textualists consider only purposes that the House of Representatives, Senate, and President all approved (or that has passed over a presidential veto) to be written into the law.[83] Under the enacted purposes canon, the only authoritative purposes are those that the legislature passes through the same democratic crucible as the rest of the text.[84] Bicameralism and presentment to the President ensures that a supermajority approved of Congress's written purposes. Political minorities had the power to block legislation, or at least to insist upon compromise. As Jarrod Shobe explains, "a statute's [textual] findings and purposes can serve as guideposts to understanding . . . the rest of the text" because they reflect congressional intent better than committee notes or cherry-picked quotations from the legislative record.[85]

Like any canon of construction, the enacted purposes canon cannot eliminate all ambiguity. Purpose statements will not always dictate using one interpretation over another.[86] However, it is still a powerful and uncontroversial tool that provides context for ambiguous words and phrases.[87] Indeed, at least one liberal and one conservative justice on the Supreme Court have explicitly said that if Congress wishes the courts to rely on any part of the legislative record in future cases, it needs only to vote to make that provision authoritative.[88]

As this Note will explore in the Clean Water Act context, the enacted purposes canon is necessary for the core democratic principle of textualism: requiring agencies and judges to defer to the legislature's will. Because flexible textualism allows a judge to override the enacted purposes with their preferred normative canons, it gives the judge leeway to insert their own policy preferences—or at least their own prioritization of the enacted purposes. In contrast, strict textualism's deference to the legislature's enacted purposes when they are clear and relevant to the issue at hand, ensures judges do not simply

82. *Id.* at 286-87 (emphasis added); *cf id.* (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 63 (2012)) (arguing that a preamble, like true enacted purposes section, "*is* a permissible indicator of meaning")) (emphasis added).

83. Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2134 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("[Putting] the key [passages of] committee or conference reports . . . into the statute itself and have the Members of Congress vote on it . . . would be both formally and functionally authoritative. [And this] would be more effective and far more acceptable to all judges than [purposivism].").

84. Stack, *supra* note 77, at 286-87.

85. Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 715 (2019).

86. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2143-44 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (noting that Congress cannot feasibly anticipate all future issues with written goals and instructions on how to interpret its text, particularly given its strict time constraints); *see generally* Kevin M. Stack, *The Enacted Purposes Canon*, 105 IOWA LAW REV. 283, 287 (2019).

87. Stack, *supra* note 77, at 302.

88. Kavanaugh, *supra* note 86 at 2122-24, 2123 ("[I]f there is some key point in the committee report, there is an easy solution to make sure it is "authoritative": vote on it when voting on the statute."); Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes* at 32:10, YOUTUBE (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg ("[Committee reports are] not what Congress passed, right? If they want to pass a committee report, they can go pass a committee report. They can incorporate a committee report into the legislation if they want to.").

replace an agency's unreasonable interpretation with their own unreasonable interpretation. Because the judiciary branch has the final say in interpretation,[89] judges' power to unilaterally or inconsistently interpret statutes would be more fatal to Congress's control and separation of powers than agencies' arbitrary and capricious interpretations.[90]

Textualists and purposivists should join in support of the enacted purposes canon, even if purposivists might prefer the broader prefatory-materials canon.[91] Those who fear that textualism results in "law without mind" should at least be satisfied when the canon is applied to statutes with sufficiently comprehensive enacted purposes, including many federal environmental statutes.[92] Furthermore, textualists and their critics should agree that this approach narrows the range of acceptable interpretations, rather than broadening it. Some critics have argued that textualism backfires because a court whose interpretation draws only from the statute's text actually has more leeway than one that is also limited by non-textual canons of construction and precedent.[93] Even if textualists and their critics never agree if this is true in general, both could agree that purposes written into the very text of the statute narrow the range of acceptable interpretations.

The enacted purposes doctrine strengthens textualism with purposivism's key promise without incorporating its key weakness because it uses textualism's rigorous methodology to ensure democratic policymaking. However, as we will see in *Sackett*, its key challenge is that judges must still resolve how to prioritize enacted purposes that are in tension with one another.[94]

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89. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

90. *Compare* Transcript of Oral Argument at 142-43, Relentless, Inc. v. Department of Commerce, 2024 WL 250638, 142-143 (2014) (No. 05-493) (Kavanaugh, J.,) (criticizing *Chevron* deference by noting "the role of the judiciary historically under the Constitution [is] to police the line between the legislature and the executive to make sure that the executive is not operating as a king, not operating outside the bounds of the authority granted to them by the legislature") *with id.* at 69-70, 99 (J. Jackson) ("I'm worried about the courts becoming uber-legislators . . . judicial policymaking is very stable but precisely because we are not accountable to the people and have lifetime appointments. . . . [W]e would have a [] separation-of-powers concern related to judicial policymaking.").

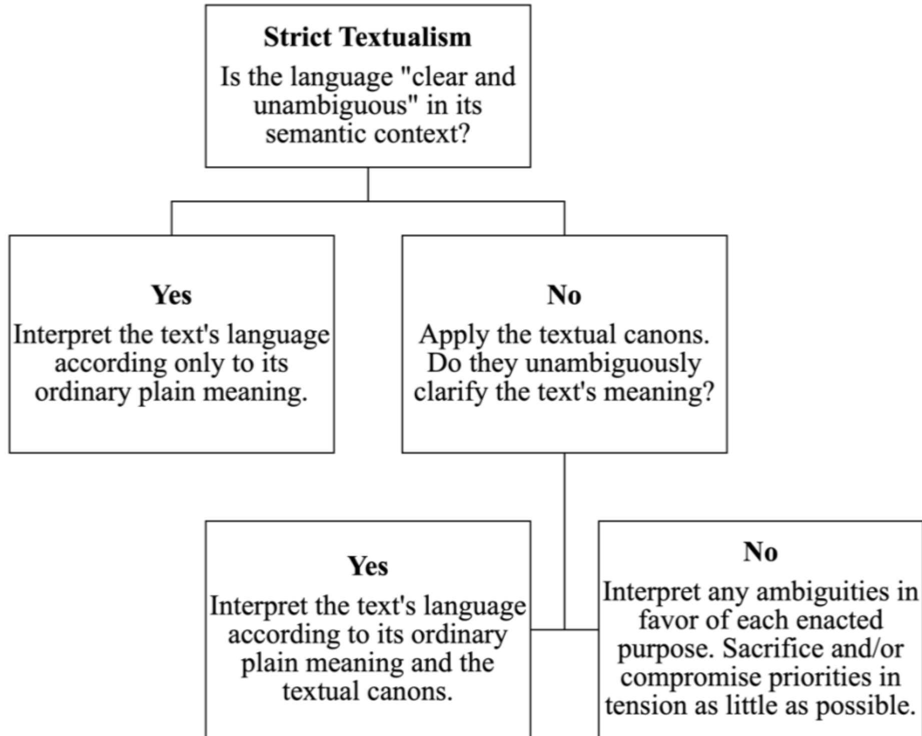
91. Stack, *supra* note 77, at 285-86, 313-16 ("[T]he canon has the pragmatic virtue of being a point of common ground between textualist and purposivist approaches to statutory interpretation. On the one hand, it satisfies textualism's core commitment to privileging the enacted text. . . . On the other hand, it reflects the core commitment of purposivism that the specific provisions of statutes be interpreted in light of their more general purposes. . . . The principle has been relied upon by jurists with very different perspectives on statutory interpretation—suggesting its prospects for emerging as a consensus plank on a closely divided Supreme Court.")

92. WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, LEGISLATION AND STATUTORY INTERPRETATION 202, 202 (3rd ed. 2022) (arguing that it "[s]hould[] make a normative difference that a statute was enacted by legislators seeking to solve a social problem in the face of disagreement, and not by a drunken mob of legislators with no apparent purpose or who had agreed to adopt any bill chosen by a throw of the dice . . . .").

93. *Id.* at 200.

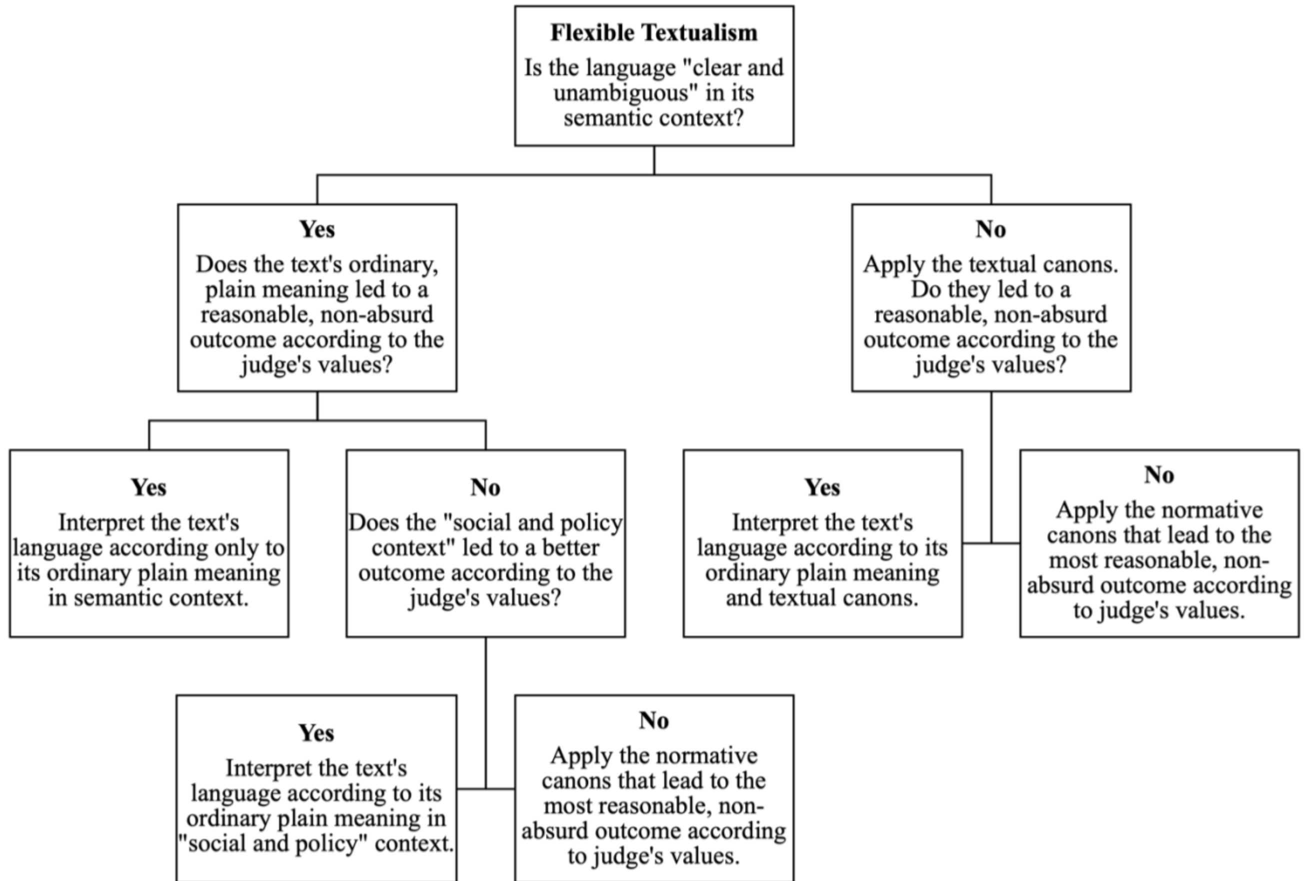
94. *See, e.g.*, Fed. R. Civ. P. 1. The Federal Rules of Civil Procedure shall "be construed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding." *Id.* Although the rules begin with some of the language most obviously guiding future interpretation, for any complex

Figure 1: Under strict textualism, a judge's sense of reasonableness never allows them to insert their own values and policy objectives.



action, speed and cost-efficiency will always be intention with a court's deliberateness and carefulness to ensure procedural justice and just outcome.

Figure 2: Under flexible textualism, a judge's sense of "reasonableness" allows their values to determine the ultimate outcome at multiple points.



II. A BRIEF HISTORY OF "WATERS OF THE UNITED STATES"

The Supreme Court's textualist justices showcased the contrast in how strict and flexible textualism handle Congress's enacted purposes in *Sackett v. Environmental Protection Agency*.[95] The only way to understand *Sackett*'s significance for textualism is to see how the Supreme Court had already used textualism to address the Clean Water Act's central ambiguity: the meaning of the phrase "waters of the United States." [96] Beginning almost forty years before *Sackett*, the Supreme Court twice clarified where the outer limits lie. In the first of the original trilogy of waters of the United States cases, *United States v. Riverside Bayview Homes*, the Court unanimously used the Clean Water Act's enacted purposes to find that "waters of the United States" must mean at least

95. *See generally* Sackett v. EPA, 598 U.S. 651 (2023).
96. 33 U.S.C. § 1362 (1977).

some wetlands.[97] In the second case, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the majority relied on good-faith textualism to identify some of the water bodies that do not fall into this category.[98] The third case, *Rapanos v. United States*, was a split decision.[99] A disagreement between the two textualist approaches left property owners and regulators unsure which wetlands count as "waters of the United States."[100] While agencies under the Obama Administration followed Justice Kennedy's middle-ground approach in *Rapanos*, Justice Alito's later opinion in *Sackett* followed and built on Justice Scalia's plurality opinion in *Rapanos*.

Throughout this trilogy, strict textualist, flexible textualist, and purposivist justices each began their analysis with the Clean Water Act's purposes as they are written into the statute's text. These enacted purposes are the best place to start our understanding of textualism for the Clean Water Act.

A. The Clean Water Act's Enacted Purposes

Sackett and the trilogy of cases that came before it focused on the meaning of "waters of the United States" in the Clean Water Act.[101] The Act defines the scope of its jurisdiction with its predecessor's[102] language: "navigable waters."[103] However, the Act then vaguely redefines this term as "waters of the United States" (often abbreviated to "WOTUS"). Although justices from all ideological leanings agree that "waters of the United States" does not mean only interstate waters that are literally navigable,[104] federal agencies faced a series of lawsuits with private landowners for almost half a century to determine its exact term's meaning and scope.

Importantly for an enacted purposes analysis, the Clean Water Act begins by declaring Congress's goals and priorities. Its first goal is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[105] Supporting this, the Act lays out seven sub-goals, such as to "end all discharge of pollutants into 'the navigable waters' by 1985; making all waters safe for fishing and swimming by 1983; and ending the discharge of toxic

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97. 474 U.S. 121, 133 (1985).

98. 531 U.S. 159, 171-72 (2001). This decision was based in part on Article I interstate commerce powers that are not relevant for this Note. *See generally id.*

99. 547 U.S. 715 (2006).

100. *See* Adrienne Froelich Sponberg, *US Struggles to Clear Up Confusion Left in the Wake of Rapanos*, 59 BIOSCIENCE 206 (2009).

101. 33 U.S.C. § 1362 (1977).

102. Rivers and Harbors Act of 1899, 33 U.S.C. §§ 407-426 (1899).

103. 33 U.S.C. § 1362 (7).

104. *See* Sackett v. EPA, 598 U.S. 651, 672 (2023) ("[W]e have acknowledged that the [Clean Water Act] extends to more than traditional navigable waters."); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 175 (2001) (Stevens, J. dissenting) (analyzing the Clean Water Act's legislative history to conclude that the definition of "waters of the United States" "requires neither actual nor potential navigability").

105. 33 U.S.C. § 1251(a).

pollutants in toxic amounts."[106] The Act's second purpose is to preserve federalism and states' primary responsibilities in water pollution management: "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ."[107]

Together, these goals give us two takeaways. First, the Clean Water Act has two goals relevant to our analysis: restoring the nation's waters' ecological health[108] and preserving states' primary responsibility in this mission.[109] At first glance, the plain meaning of these enacted purposes does not directly establish either goal as more important than the other. And as a matter of public policy, reasonable people can disagree about whether effective water pollution control or vertical federalism should be more important in this context. But the answer to this debate is not immediately obvious within the four corners and plain meaning.

Second, the text gives different instructions for these two priorities. Twice, it calls states' responsibilities and rights in water pollution management "primary"—not "exclusive."[110] Therefore, while the text does not spell out a clear ranking of these priorities, the second priority is at least plainly limited to states' primacy rather than exclusivity.[111]

Finally, it is important to note that Congress passed the Clean Water Act, like many environmental laws of the 1970s, with broad bipartisan support because environmental protection was less politically divisive at the time. In fact, the Clean Water Act of 1972 had so much support from both parties that Congress even overruled a presidential veto.[112] Such unanimous support, along with detailed and specific goals written in the statute's text, makes the Clean Water Act an excellent example for studying the enacted purposes doctrine.[113]

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106. *Id.*

107. 33 U.S.C. § 1251(b).

108. 33 U.S.C. § 1251(a).

109. 33 U.S.C. § 1251(b).

110. In contrast, the seventh and final purpose clearly shows that the Clean Water Act does not limit or reduce the state's control over water *quantity* management, as opposed to the water quality that the Act focuses on. *See* 33 U.S.C. § 1251(g) ("It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.").

111. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132-33 (1985) (holding that Congress "*demanded* broad federal authority to control pollution" to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters") (emphasis added) (citations omitted).

112. E. W. Kenworthy, *Clean-Water Bill Is Law Despite President's Veto*, N.Y. TIMES, Oct. 19, 1972 at 26.

113. To be clear, such a survey of legislative history is not part of a modern textualist analysis. I instead mention this history in the same manner as Chief Justice Burger to double-check how the Clean Water Act's history confirms its text's enacted purposes.

B. United States v. Riverside Bayview Homes

The first case in the original "waters of the United States" trilogy is the most important for understanding the textualism *Sackett* breaks away from. When a home developer wanted to fill wetlands on the shores of a lake recognized as "waters of the United States," the U.S. Army Corps of Engineers sued the developer.[114] The Army Corps asserted that adjoining wetlands were also part of "waters of the United States," so the developer needed to apply for a permit under the Clean Water Act to fill them.[115] Specifically, the Army Corps believed that "waters of the United States" included all freshwater wetlands that navigable waters flood frequently enough for the wetlands to support aquatic vegetation.[116] The Sixth Circuit held that such "adjacent wetlands" could not qualify as "waters of the United States,"[117] because Congress did not intend for "navigable waters" to include every wetland that navigable waters flood.[118]

The Supreme Court unanimously rejected the lower court's narrow interpretation. It held that two years after the Army Corps interpreted "waters of the United States" to include adjacent wetlands, Congress explicitly adopted that meaning by amending the Clean Water Act to prohibit states issuing permits for dumping dredged or fill material into "waters of the United States," "including wetlands adjacent."[119] Thus, in that 1977 Act, Congress recognized adjacent wetlands as "waters of the United States." The Court upheld the Army Corp's interpretation under *Chevron* deference (federal courts' practice at the time to defer to an agency's interpretation of ambiguous statutes unless its interpretation was "unreasonable"[120] given the text, legislative history, and "purposes"[121]).

In the most textualist passage of its analysis, the Court criticized any categorical divide between land as dry and waters as wet as "simplistic . . . [because] the transition from water to solid ground is not necessarily or even typically an abrupt one."[122] Linguistic clarity alone does not equal real-world conceptual clarity. The Court never used today's term "enacted purposes canon," but it followed the same methodology to a tee: ambiguity in "waters of the United States" cannot be interpreted in a way directly contrary to the goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's

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114. *Riverside Bayview*, 474 U.S. at 123-124.

115. *Id.*

116. 33 C.F.R. § 209.120(d)(2)(h) (1976). *See also* 33 C.F.R. § 323.2(c) (1978) ("[Wetlands are those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.").

117. United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 396 (6th Cir. 1984), *rev'd* 474 U.S. 121 (1985).

118. *Riverside Bayview*, 474 U.S. at 125.

119. Sackett v. EPA, 598 U.S. 651, 675 (2023).

120. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984).

121. *Riverside Bayview*, 474 U.S. at 131.

122. *Id.* at 132.

waters."[123] Given this goal's breadth, the Court concluded that "Congress chose to define the waters covered by the Clean Water Act broadly . . . to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[124] Because protecting adjacent wetlands is necessary to restore and maintain neighboring navigable waterways, the Court held that the only interpretation consistent with this goal's plain meaning is that "waters of the United States" includes adjacent wetlands. Although the Supreme Court issued this ruling under *Chevron* deference, the Court's strong and unanimous language indicated that the Army Corps' interpretation was more than reasonable—it was the product of explicitly delegated discretion.

This case has four critical takeaways. First, the Supreme Court unanimously agreed that wetlands adjacent to traditionally navigable waters fall within "waters of the United States." Second, how the Court arrived at this holding demonstrates that textual analysis of a clear enacted purposes section can help resolve the Clean Water Act's ambiguities. Third, textualists must keep in mind that an author's conceptually clear language (i.e., "waters" versus "land") may not provide enough practical clarity for real-world applications (i.e., is a specific wetland a "water body," or simply land that is wet?). Finally, the unanimity of this opinion demonstrates that textualism with an enacted purposes analysis can be uncontroversial between textualists and purposivists.

C. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers

The second case in the trilogy used a good-faith textualist interpretation of "waters of the United States" to show the outer limits of the phrase. *Solid Waste Agency of Northern Cook County* (often abbreviated to "*SWANCC*") focused on several ponds at an abandoned sand and gravel pit, none of which crossed state lines or were adjacent to traditionally navigable waterways or their tributaries.[125] The Army Corps asserted its jurisdiction after determining that migratory birds used the ponds.[126] Because this habitat would help promote the biological and ecological integrity of the protected water bodies that these birds also migrated to, the Army Corps asserted they were "navigable."[127] In other words, it believed the Clean Water Act's scope included even isolated, intrastate waters not adjacent to traditionally considered navigable waters.[128]

The Supreme Court ruled against the Corps. It upheld *Riverside Bayview*, noting that "the term 'navigable' is of 'limited import[ance]'" because the text

123. *See id.* at 132-33 (noting that because the Clean Water Act's first enacted purpose was "a comprehensive legislative attempt" to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" with "a broad, systemic view of the goal of maintaining and improving water quality," Congress "demanded broad federal authority to control pollution") (citations omitted).

124. *Id.* at 133.

125. *Solid Waste Agency*, 531 U.S. at 162-66.

126. *Id.*

127. *Id.*

128. *Id.*

clearly expresses Congress's intent to regulate at least some waters that are not "'navigable' under the classical understanding of that term."[129] However, the Court limited the expansion of "waters of the United States" because "navigable" could not be read out of the text altogether. Rather, the word "navigable" showed that Congress had in mind waters that were or could be made navigable.[130] Thus, *Solid Waste Agency* follows in *Riverside Bayview*'s textualist footsteps of using the enacted purposes canon to find what "waters of the United States" means in specific circumstances.

D. Rapanos v. United States

The final case in the original trilogy was a split decision that left the meaning of "waters of the United States" unresolved until *Sackett*. In *Rapanos*, private landowners planned to develop wetlands that were not directly adjacent to navigable waters (unlike *Riverside Bayview*), but rather adjacent to man-made ditches draining into the tributaries of navigable waters.[131] The U.S. Army Corps of Engineers asserted jurisdiction under the Clean Water Act, requiring permits for the proposed landscaping.[132] Like in *Riverside Bayview*, the Army Corps asserted that the Clean Water Act gave them authority to regulate these even wetlands that were not directly connected to navigable waters because pollution in them could affect navigable waters downstream.[133] Although five Justices ruled in favor of remanding the lower court's ruling against the landowners, they were unable to agree on a single legal theory for a majority decision.[134]

In his concurrence, Justice Kennedy returned to the unanimous *Riverside Bayview* holding and *Solid Waste Agency* majority. Adjacent wetlands fall within "navigable waters" because they are "integral parts of the aquatic environment" that share a "significant nexus with navigable waters."[135] Based on this, nonadjacent wetlands fall under the navigable waters definition when they share a "significant nexus" to the "chemical, physical, and biological integrity" of traditionally covered waters.[136] This "significant nexus" language came from the Court's earlier deductions of the text plain meaning in light of the enacted purposes section.[137] Like the unanimous Court in *Riverside Bayview*, Justice Kennedy did not mention the enacted purposes doctrine by name, but he clearly followed it: he continued to interpret the ambiguous boundary between land and water to serve the textual "'objective' of the Clean Water Act . . . 'to restore and

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129. *Id.* at 167.
130. *Id.* at 171-72.
131. Rapanos v. United States, 547 U.S. 715, 719-20 (2006) (plurality opinion).
132. *See id.* at 720-21.
133. *Id.* at 739-41.
134. *See generally id.*
135. *Id.* at 779 (Kennedy, J., concurring) (citing *Solid Waste Agency*, 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [Clean Water Act] in *Riverside Bayview Homes*.")).
136. *Id*. at 779-80 (Kennedy, J., concurring).
137. *Solid Waste Agency*, 531 U.S. at 167.

maintain the chemical, physical, and biological integrity'" of the nation's waters.[138] This opinion illustrates yet again how judges can use the enacted purposes canon to resolve ambiguities in favor of Congress's enacted goals.

Although Justice Kennedy's concurrence was not the plurality decision, it is the Supreme Court's most nuanced textualist analysis to provide a workable rule for the scope of "waters of the United States." In addition, Justice Scalia's plurality decision lives on in Justice Alito's majority opinion in *Sackett*. For that reason, I discuss them together in the following section.

III. COMPARING *SACKETT*'S TWO TEXTUALISMS UNDER TEXTUALISM'S VALUES

This Part examines two applications of textualism in the recent Supreme Court case of *Sackett v. Environmental Protection Agency*. Here, a majority of the justices narrowed the scope of "waters of the United States" so sharply that it suddenly no longer included more than half of the wetlands long believed to be protected under *Riverside Bayview* and *Solid Waste Agency*.[139] It begins by examining how the legacy of the split decision in *Rapanos* shaped the regulation in *Sackett*. Finally, it explores the significant differences between Justice Alito's and Justice Kavanaugh's distinct textualist approaches. Their differences reveal the weaknesses of flexible textualism and the strengths of strict textualism.

A. Rapanos *and Pre-*Sackett *Regulations*

After the Court's split decision in *Rapanos* provided no clear interpretation of "water of the United States," the EPA and the Army Corps adopted Kennedy's significant nexus test as the most workable interpretation and a political compromise between the plurality and dissent.[140] Their "waters of the United States" rule defined "adjacent" to include not just wetlands directly "bordering" and "contiguous" to traditionally navigable waters, but also those "neighboring."[141] Army Corps guidance instructed officials to assert jurisdiction over wetlands "adjacent" to non-navigable tributaries when those wetlands had "a significant nexus to a traditional navigable water."[142] A "significant nexus" existed when "wetlands, either alone or in combination with similarly situated

138. *Rapanos*, 547 U.S. at 759 (Kennedy concurring) (quoting 33 U.S.C. § 1251(a)). Although the use of "objective" sounds like teleological purposivism, Justice Kennedy quotes only the enacted purposes. *See id.*

139. James Doubek, *The EPA Removes Federal Protections for Most of the Country's Wetlands*, NPR (Aug. 29, 2023), https://www.npr.org/2023/08/29/1196654382/epa-wetlands-waterways-supreme-court (last visited Mar 25, 2024).

140. *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, EVERYCRSREPORT.COM (Apt. 27, 2016), https://www.everycrsreport.com/reports/RL33263.html (last visited Mar 25, 2024) (citing Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,' Final Rule," 80 Fed. Reg. 37054-56, June 29, 2015).

141. Sackett v. EPA, 598 U.S. 651, 664 (2023) (citing 40 C.F.R. §§ 230.3(b), (s)(3), (s)(7) (2008)).

142. *Id.* at 662.

lands in the region, significantly affect the chemical, physical, and biological integrity" of those waters.[143]

For the Sacketts, this definition included wetlands on their property across a thirty-foot-wide road from an unnamed tributary to a non-navigable creek, which then fed into a navigable lake. The facts of the case proved less important to the legal reasoning than in prior Supreme Court cases because the Court unanimously ruled in favor of the plaintiffs, and disagreeing only about the legal definition of "waters of the United States."[144] What matters is that the EPA argued the Sacketts' wetlands were "waters of the United States" because, together with a large nearby fen, all these wetlands as a whole "significantly affect[ed]" the lake's ecology.[145]

The EPA justified this rule both textually and atextually. Its textual argument was that the plain meaning of "waters" includes wetlands because the "presence of water is universally regarded as the most basic feature of wetlands."[146] The EPA also asserted precedent: since its earliest post-*Riverside Bayview* rules, "adjacent" had not been interpreted to mean *only* "directly adjoining."[147] The EPA argued that in context, Scalia's "reasonably continuous surface connection" test in *Rapanos* had no grounding in the Clean Water Act's history since *Riverside Bayview*.[148] Finally, the EPA made a policy argument that the "reasonably continuous surface connection" test would "seriously compromise the Act's comprehensive scheme" to restore and maintain their integrity by denying protection to wetlands with a significant potential to impact traditionally navigable waters.[149] By definition, the scope of EPA's protection of navigable waters would be narrower and weaker if arbitrary outcomes were based on the presence or absence of a small surface connection.[150]

B. *Justice Alito's Flexible Textualism*

The central holding of Justice Alito's majority opinion in *Sackett* directly draws on Justice Scalia's plurality opinion in *Rapanos*. Both Justices argue that "waters" means only water bodies such as "streams, oceans, rivers, and lakes" plus adjacent wetlands that are so connected above ground that they are "indistinguishable."[151] Justice Alito nominally defers to *Riverside Bayview*'s unanimous opinion because the Court's prior interpretations are still an important consideration for textualists, even if they are given somewhat less weight than in

143. *Id.*
144. *See generally id.*
145. *Id.* at 663
146. *Id.* at 674 (quotations omitted).
147. Brief for Respondents at 17, *Sackett*, 598 U.S. 651 (2023) (No. 21-454).
148. *Id.*
149. *Id.*
150. *Id.* (discussing how under the majority rule, the Clean Water Act's coverage will "come and go as floods or storms created or breached natural barriers like berms and dunes").
151. *Sackett*, 598 U.S. at 671, 678 (citing 33 U.S.C. § 1362(7)).

other approaches.[152] But his opinion rejects its legacy and the significant nexus test drawn from its conceptual core.[153]

1. Undermining Goals in the Clean Water Act's Text

The central thrust of Justice Alito's opinion was rejecting the EPA's "significant nexus" interpretation as incompatible with the plain meaning of "waters." He notes that the Clean Water Act's usage of "navigable waters" is confusing.[154] Its predecessor had used the term with a well-established meaning,[155] but the Clean Water Act redefined it as "the waters of the United States"[156]—"decidedly not a well-known term . . . ."[157] Mistakenly believing "waters" to be a plural noun, Justice Alito finds that the ordinary meaning of "waters"—rather than "water"—is a water body.[158] Notably, "waters" is not the plural of "water" because "water" is an uncountable "mass noun."[159] Still, combining his misreading with a desire to not totally read "navigable" out of the statute,[160] he concludes that wetlands that are "waters of the United States" must

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152. *See generally* Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157 (2018) ("The Supreme Court's textualist justices are far more willing to overturn precedent in statutory interpretation cases than justices who prefer other approaches. Two reasons for this are likely fundamental to the textualist approach: judge-made legal tests are less important than the statute's text, and textualism is based on the presumption that there is only one 'correct' interpretation of the text's plain meaning. Together, these imply that an incorrect interpretation should be overturned. However, it also argues some justices who happen to be textualist are overruling prior precedents simply because they disagree with the earlier statutory interpretation. This would not merely be weakening *stare decisis*, but directly abandoning it.").

153. *See Sackett*, 598 U.S. at 671-77 (reasoning that the Court's new "reading follows from . . . [how t]his Court has understood [Clean Water Act]'s use of 'waters' in [*Riverside Bayview*]," and that "the thrust of observations in decisions going all the way back to *Riverside Bayview*" was that only "certain 'adjacent' wetlands are part of 'waters of the United States'").

154. *Id.* at 671.

155. Rivers and Harbors Act of 1899, 33 U.S.C. §§ 407-426 (1899).

156. 33 U.S.C. § 1362 (7).

157. *Sackett*, 598 U.S. at 671.

158. *Id.* at 674.

159. *What's The Plural of "Water"?*, MERRIAM-WEBSTER, https://www.merriam-webster.com/grammar/water-and-other-noncount-nouns (last visited Jan 19, 2025) ("These words don't take the traditional plural -s or -es ending—except sometimes . . . only [] on special occasions. Their very oddness conveys an immediate understanding that something different is being expressed—often something more figurative or poetic: 'The *waters* of March . . .'.") (emphasis added). For example, one might refer to "two bunches of *bananas*" but not "two lakes of *water*." Similarly, one would say "less *water*" rather than "fewer *waters*."

160. *Sackett*, 598 U.S. at 672-77.

be connected to a navigable body of water.[161] Although "water" is the "the most basic feature of wetlands," its mere presence is not enough.[162]

Because Justice Alito concluded that "navigable waters" was ambiguous,[163] a strict textualist reading would examine how the Court had already unanimously clarified this ambiguity, the enacted purposes section, and indeed the statute's name "Clean *Water* Act."[164] Instead, the majority opinion most clearly crosses into flexible textualism with a formula that Justice Kavanaugh referred to as "unorthodox statutory interpretation."[165] I include the following passage largely unedited to highlight the oddity of Justice Alito admitting it is a "convoluted formulation," while still arguing it is clear enough for ordinary people to reach the same conclusion:

> [S]tate permitting programs may regulate discharges into (1) any waters of the United States, (2) except for traditional navigable waters, (3) "including wetlands adjacent thereto." . . . When this convoluted formulation is parsed, it tells us that at least some wetlands must qualify as "waters of the United States" . . . which we may call category A. The provision provides that States may permit discharges into these waters, but it then qualifies that States cannot permit discharges into a subcategory of A: traditional navigable waters (category B). Finally, it states that a third category (category C), consisting of wetlands "adjacent" to traditional navigable waters, is "include[ed]" within B. Thus, States may permit discharges into A minus B, which includes C. If C (adjacent wetlands) were not part of A ("the waters of the United States") and therefore subject to regulation under the [Clean Water Act], there would be no point in excluding them from that category. Thus, [this provision] presumes that certain wetlands constitute "waters of the United States . . . . [But] because the adjacent wetlands . . . are "includ[ed]" within "the waters of the United States," these wetlands must qualify as "waters of the United States" in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes "waters" under the [Clean Water Act].[166]

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161. *Id.* at 671-72 (quoting *Rapanos*, 547 U.S. at 740 (plurality opinion) ("This reading follows from the [Clean Water Act]'s deliberate use of the plural term 'waters.' . . . That term typically refers to bodies of water like those listed above. *See, e.g.*, Webster's Second 2882; Black's Law Dictionary 1426 (5th ed. 1979) ('especially in the plural, [water] may designate a body of water, such as a river, a lake, or an ocean, or an aggregate of such bodies of water, as in the phrases 'foreign waters,' 'waters of the United States, and the like'); Random House Dictionary of the English Language 2146 (2d ed. 1987) (Random House Dictionary) (defining 'waters' as 'a. flowing water, or water moving in waves: The river's mighty waters. b. the sea or seas bordering a particular country or continent or located in a particular part of the world'. This meaning is hard to reconcile with classifying 'lands,' wet or otherwise, as 'waters.'")).

162. *See id.* at 674 (reasoning that this interpretation "proves too much" because "puddles . . . are also defined by the ordinary presence of water even though few would describe them as 'waters'").

163. *Id.* at 671.

164. 33 U.S.C. § 1251 et seq. (emphasis added).

165. *Sackett*, 598 U.S. at 723 (Kavanaugh, J., concurring).

166. *Id.* at 675-76 (citing 33 U.S.C. § 1344(g)(1)) ("[A]ny State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward

When the Court's decision was announced, this formula was just as novel as it was confusing for property owners, courts, agencies, and state governments.[167]

What makes this textualism "flexible" is that Justice Alito found that the term "navigable waters" is clear enough to substantially weaken the Clean Water Act's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[168] while elsewhere finding it "complicate[d]" and "frustrating . . . to make sense of."[169] In fact, this linguistic interpretation is difficult for many lawyers to follow—let alone ordinary property owners who are not fluent in legalese.[170] In the following section, I discuss more fully why this counts as "flexible" textualism. In the end, it is because this analysis did precisely what Justice Barrett has warned textualists against: it ignored "the most natural interpretation" of clear language "in favor of a less plausible [interpretation]" based on the most controversial ambiguities in the statute.[171]

2. Vertical Federalism in the Clean Water Act

Justice Alito's second justification was a non-textual canon: the federalism clear statement rule, which judges often use when statutes implicate states' powers. Under this canon, a court should presume that Congress only uses "exceedingly clear language" to alter the balance of federal and state government powers to regulate land use and private property.[172] Justice Alito noted that for most of the United States' history, only state and local governments regulated water pollution (alongside the common law of torts). By contrast, federal water regulation historically focused on keeping "traditional[ly] navigable" interstate waters unobstructed and usable for navigation and commerce.[173] Put together: a statute's language must include a clear statement for courts to find that the scope of "the waters of the United States" limits states' exclusive role in regulating water pollution.[174]

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to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the [EPA] Administrator a [proposal].").

167. Bobby Magill, *Supreme Court's Wetlands Ruling Sows State Permitting Confusion*, BLOOMBERG LAW (July 13, 2023), https://news.bloomberglaw.com/environment-and-energy/wetlands-confusion-reigns-as-dust-settles-after-sackett-ruling (last visited Mar 30, 2024).

168. 33 U.S.C. § 1251(a).

169. *Sackett*, 598 U.S. at 671 (citing 33 U.S.C. § 1362(7)) ("[T]he Act applies to 'navigable waters,' which had a well-established meaning at the time of the [Clean Water Act]'s enactment. But the [Act] complicates matters by proceeding to define 'navigable waters' as 'the waters of the United States,' which was decidedly not a well-known term of art. This frustrating drafting choice has led to decades of litigation, but we must try to make sense of the terms Congress chose to adopt.") (internal citations omitted).

170. Magill, *Supreme Court's Wetlands Ruling*, *supra* note 167.

171. Amy Coney Barrett, *Substantive Canon and Faithful Agency*, 90 BOS. U. L. REV. 109, 109-10 (2023).

172. *Sackett*, 598 U.S. at 679.

173. *Id.* at 679-80 (citing 33 U.S.C. § 407).

174. *See id.* at 681.

Justice Alito observes that the Clean Water Act expressly "protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[175] Reasoning that states' role could not remain "primary" if the EPA had jurisdiction over everything "defined by the presence of water" and that the EPA noted its significant nexus-based rule could include "almost all waters and wetlands,"[176] Justice Alito found that the federalism clear statement rule does not allow any interpretation of "waters of the United States" that would give federal agencies authority over lands that are wet.[177]

The more fundamental concern for textualists is that Justice Alito found that the Clean Water Act's language is clear enough for the policy goals that he was sympathetic to, but too vague for those that he was not. Because flexible textualism includes so many normative canons,[178] Justice Alito could apply the federalism clear statement rule's high standard to find the statutory language was too ambiguous for the long-standing broad interpretation of "waters of the United States," while elsewhere using the plain meaning rule to find that it is clear enough to deduce his "unorthodox statutory interpretation."[179] This again raises the question: how should a judge decide when language is or is not "clear and unambiguous?" Although an answer to this question is outside the scope of this note, I will return to Justice Kavanaugh's explanation of why any textualist should be troubled by Justice Alito's odd finding.

3. Flexible Textualism's Problem of Notice

Although Justice Alito's third line of reasoning was based on a normative canon, the canon is an uncontroversial one that aligns with textualism's core value of notice. He invoked the rule of lenity, which instructs courts to interpret any ambiguity in a statute with criminal penalties in the defendant's favor. There are two underlying rationales: to punish only individuals who had fair notice to avoid breaking the law and to shift the burden of determining what criminal statutes mean from private citizens and the judiciary to the legislators who draft those statutes.

Justice Alito rightly feared landowners facing too much difficulty determining the scope of "waters of the United States" before developing their private property, and then facing the Clean Water Act's criminal penalties under strict liability.[180] When landowners were unsure if they needed Clean Water Act

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175. 33 U.S.C. § 1251(b).

176. *Sackett*, 598 U.S. at 669, 674.

177. *Id.* at 674.

178. *See Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VANDERBILT LAW REVIEW 395, 395, 401-406 (1950) (noting that there are opposing canons on almost every point, suggesting that there is "no single right and accurate way of reading one case"); *see also* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARVARD LAW REVIEW 515 (2023) (arguing that the normative canons simply cannot be reconciled with textualism).

179. *Id.* at 723.

180. *Id.* at 669-70.

permits under the significant nexus-based regulations, the EPA recommended they ask the Army Corps to conduct a "jurisdictional determination" based on several technical factors.[181] However, the Army Corps said it had no legal obligation to provide jurisdictional determinations.[182] Many property owners needed to hire expensive expert consultants to analyze their property and present non-binding findings that might persuade the Army Corps.[183]

The first textualist problem with this line of argument is that, as previously discussed, there are other times where Justice Alito found that the scope of "navigable waters" is clear. Of course, a phrase can be ambiguous in some contexts but clear in others.[184] But the jurisdictional boundary between the unprotected wetlands and protected "navigable waters" is the same question whether or not criminal sanctions trigger the rule of lenity.[185]

Moreover, Justice Alito fell into a classic textualist pitfall: confusing linguistic clarity for practical clarity.[186] While "reasonably continuous surface connection" is more intuitive language than "significant nexus," it provides little guidance on *how* continuous is continuous *enough*.[187] Before *Sackett*, developers needed consultants to determine if a wetland fell under the Clean Water Act's jurisdiction.[188] Most citizens, and indeed most lawyers, would be unable to identify a significant nexus between wetlands and a non-adjacent navigable water body. But these consultations at least offered ordinary landowners an informed determination of their obligations before any legal proceedings or criminal charges. Now, without any objective criteria, private citizens must make their best guess of how "continuous" surface connections must be to be "continuous enough" for a judge's subjective judgment. Even once common law evolves to fill this gap, landowners may be confused by circuit splits when one judge rules differently from judges directly upstream, downstream, or across the river from them, but in another circuit or district.

The second and most concerning problem is that after finding the rule too ambiguous to provide notice, Justice Alito concluded that the judiciary—not

181. *Id.* at 667.

182. *Id.*

183. *Id.*

184. *See, e.g.,* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984) (noting that the term "stationary source [of air pollution]" clearly refers to buildings, structures, power plants, and installations rather than motor vehicles, but does not make clear whether it is referring to the individual emitting device or the polluting overall facility).

185. *Sackett*, 598 U.S. at 663, 668.

186. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985) ("Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious.").

187. The majority's notes only "low tides," "dry spells," and artificial barriers would not count. *Sackett*, 598 U.S. at 678. However, this dictum does not provide any guidance on how long a "dry spell" is, providing little real-world guidance to property owners where dry periods and rainy seasons can be highly variable. *See id.*

188. *See id.* at 661.

Congress—should rewrite the rule. Judges rewriting laws and legislating from the bench is the very thing that textualism's goal of notice seeks to prevent. After all, if liability for criminal penalties changes whenever the balance of power in the Court shifts, how can any citizen ever truly be on notice?[189]

Unfortunately, like his search for a bright line between "land" and "waters," Justice Alito's new reasonably continuous surface connection test illustrates the fundamental difference between linguistic clarity and practical clarity. By replacing a test that gives practical notice with the mirage of linguistic clarity,[190] the majority's attempt to promote notice simply backfired.

C. Justice Kavanaugh's Strict Textualism

Justice Kavanaugh concurred with the majority's decision to overrule Justice Kennedy's significant nexus test, although oddly, without explaining why.[191] But Justice Kavanaugh's separate opinion did note several places where Justice Alito's flexible textualism departed from a strict textualist analysis, making the new "reasonably continuous surface connection" test unsound on both textualist and conservative grounds.[192] And crucially, although Justice Kavanaugh never refers to the enacted purposes canon by name, his recent explanation of its principle[193] is evident throughout the opinion.

1. The Plain Meaning of "Adjacent"

Justice Kavanaugh's first and most crucial point was that the plain meaning rule did not support Justice Alito's finding that "adjacent" means "adjoining." The majority decision gave only a weak explanation: "[t]he term 'adjacent' may mean either 'contiguous' or 'near.' . . . Wetlands that are separate from

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189. *See* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S.Ct. 789, 790 (2020) (opinion of Gorsuch, J.) (noting that ordinary citizens cannot realistically keep up when interpretations of criminal law change almost as often as presidential administrations).

190. See, e.g., *Sackett*, 598 U.S. at 727 (Kavanaugh, J., concurring) ("[H]ow difficult does it have to be to discern the boundary between a water and a wetland for the wetland to be covered by the Clean Water Act? How does that test apply to the many kinds of wetlands that typically do not have a surface water connection to a covered water year-round—for example, wetlands and waters that are connected for much of the year but not in the summer when they dry up to some extent? How 'temporary' do 'interruptions in surface connection' have to be for wetlands to still be covered? How does the test operate in areas where storms, floods, and erosion frequently shift or breach natural river berms? Can a continuous surface connection be established by a ditch, swale, pipe, or culvert? The Court covers wetlands separated from a water by an artificial barrier constructed illegally, but why not also include barriers authorized by the Army Corps at a time when it would not have known that the barrier would cut off federal authority? The list goes on.") (citations omitted).

191. *See id.* at 716-28 (Kavanaugh, J., concurring).

192. *Id.*

193. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2123, 2134, 2143-44 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("[I]f there is some key point in the committee report, there is an easy solution to make sure it is "authoritative": vote on it when voting on the statute. . . . [Putting] the key [passages of] committee or conference reports . . . into the statute itself and have the Members of Congress vote on it . . . would be both formally and functionally authoritative.").

traditional navigable waters cannot be considered part of those waters, even if they are located nearby."[194] But Justice Kavanaugh emphasized that "adjacent" and "adjoining" have different plain 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.[195]

In other words, "adjacency" is broader than "adjoining" because it does not require that two objects directly touch. Thus, the majority's conclusion that wetlands are included in "waters of the United States" only when they directly touch traditional navigable waters is too narrow.

Justice Kavanaugh presumed that Congress said what it meant and meant what it said, so it did not mean "adjoining" wetlands when it wrote "adjacent" wetlands.[196] He criticized the majority's "unorthodox statutory interpretation . . . formula," reasoning that it "just seems to be a fancier way of arguing (against all indications of ordinary meaning) that 'adjacent' means 'adjoining.'"[197] He further noted that Justice Alito's redefinition of "adjacent" to mean the same thing as "adjoining" excluded "wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like," regardless of how close and connected they are to navigable waters.[198] Unfortunately, the majority's "one-size-fits-all approach" overlooked the reality of our nation's many "non-navigable waters" critical for restoring navigable waters. These range from pocosins (isolated bogs) and Delmarva bays (seasonal, ellipsis-shaped freshwater wetlands with sandy rims) in the Chesapeake Bay area, and intermittent and ephemeral waters in dry Western lands that play an outsized role in nearby navigable waters when they seasonally run.[199]

Moreover, "connected-on-the-surface-continuously-enough" provides less notice than a layperson's understanding of "adjacent." No advanced training in legalese is necessary to understand that "a marsh is adjacent to a river even if separated by a levee, just as your neighbor's house is adjacent to your house even if separated by a fence or an alley."[200] Private landowners and industry leaders

194. *Sackett*, 598 U.S. at 676 (Kavanaugh, J., concurring) (internal citations omitted) (citing RANDOM HOUSE DICTIONARY 25; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 26 (1976); OXFORD AMERICAN DICTIONARY & THESAURUS 16 (2d ed. 2009) (listing "adjoining" and "neighboring" as synonyms of "adjacent")).

195. *Id.* at 716 (Kavanaugh, J., concurring).

196. *Id.* at 718-19 (Kavanaugh, J., concurring).

197. *Id.* at 723 (Kavanaugh, J., concurring).

198. *Id.* at 717-18 (Kavanaugh, J., concurring).

199. E.A. Crunden & Pamela King, *Post-Sackett, Chaos Erupts for Wetlands Oversight*, E&E NEWS BY POLITICO (Jun. 2, 2024), https://www.eenews.net/articles/post-sackett-chaos-erupts-for-wetlands-oversight/ (last visited Mar 17, 2024).

200. *Sackett*, 598 U.S. at 719 (Kavanaugh, J., concurring).

were not asking for the majority's clear linguistic distinction, but a practical distinction to figure out which real-world wetlands are federally protected.[201]

The core of Justice Kavanaugh's plain meaning criticism is that the majority's bizarre formula "impose[d] a restriction nowhere to be found in the text," and "the Court has no good answer for why Congress used the term 'adjacent' instead of 'adjoining.'"[202]

2. Using Historical Consensus to Uncover Ordinary Meanings

Justice Kavanaugh provided another textualist argument that is perhaps the best test for how people actually use a term or phrase. He reasoned that if an agency's consistent, longtime interpretation reflects a statute's ordinary meaning (rather than atextual reasons such as precedent or purposivism), it can be a useful reference for uncovering the plain meaning.

Justice Kavanaugh noted that the new "reasonably continuous surface connection" test goes against a longstanding agency interpretation that was consistent across various administrations of both parties.[203] Despite their different ideologies and approaches to environmental policy, each administration agreed that "adjacency" included wetlands separated by barriers as well as those that directly touch covered waters. Like Chief Justice Burger double-checking his plain meaning analysis in *TVA v. Hill*, Justice Kavanaugh saw that the long-time and consistent agreement between the executive and judicial branches confirmed his plain meaning understanding of "adjacent."[204] Two years after the

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201. Bobby Magill, *Water Permitting Uncertainty Remains as Industry Blasts EPA Rule*, BLOOMBERG LAW (Aug. 29, 2023), https://news.bloomberglaw.com/environment-and-energy/water-permitting-uncertainty-remains-as-industry-blasts-epa-rule (last visited Mar 17, 2024) (noting industry leaders' frustration that EPA's updated "waters of the United States" regulation following *Sackett* does not provide a clear definition of "relatively permanent" waters, aggravating the uncertainty that only Congress, not the courts, could have resolved).

202. *Sackett*, 598 U.S. at 718-19 (Kavanaugh, J., concurring). Justice Kavanaugh notes several places where the Clean Water Act's text expressly uses the term "adjacent" or "adjoining": "Compare 33 U.S.C. § 1344(g) with §§ 1321(b)-(c) ('adjoining shorelines' and 'adjoining shorelines to the navigable waters'); § 1346(c) ('land adjoining the coastal recreation waters'); *see also* § 1254(n)(4) ('estuary' includes certain bodies of water 'having unimpaired natural connection with open sea'); § 2802(5) ('coastal waters' includes wetlands 'having unimpaired connection with the open sea up to the head of tidal influence'). The difference in those two terms is critical to this case. Two objects are 'adjoining' if they 'are so joined or united to each other that no third object intervenes.' *Adjoining*, BLACK'S LAW DICTIONARY (rev. 4th ed. 1968); *see also id.* ('Adjoining" means 'touching or contiguous, as distinguished from lying near to or adjacent.'); *Adjoining*, BLACK'S LAW DICTIONARY (5th ed. 1979) (same); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 26-27 (1961) (similar)". *Id.*

203. *Id.* at 1363-64 (Kavanaugh, J., concurring) (reasoning that "[t]he ordinary meaning of the term 'adjacent' has not changed since Congress amended the Clean Water Act in 1977 to expressly cover 'wetlands adjacent' to waters of the United States. 91 Stat. 1601; 33 U.S.C. § 1344(g) . . . . the definitions of 'adjacent' are notably explicit that two things need not touch each other in order to be adjacent").

204. *Id.* at 1365-66 (Kavanaugh, J., concurring) "[The] longstanding and consistent agency interpretation reflects and reinforces the ordinary meaning of the statute. The eight administrations since 1977 have maintained dramatically different views of how to regulate the environment, including under the Clean Water Act. Some of those administrations promulgated very broad interpretations of adjacent wetlands. Others adopted far narrower interpretations. Yet all of those eight different administrations have recognized as a matter of law that the Clean Water Act's coverage of adjacent wetlands means more than

Army Corps interpreted "waters of the United States" to include adjacent wetlands, Congress even recognized this definition of adjacent wetlands as "waters of the United States."[205] Textualism's fundamental commandment that courts presume the "legislature says . . . what it means and means . . . what it says" compels strict and flexible textualists to conclude that Congress's understanding of the scope of "waters of the United States" includes adjacent wetlands that were not directly adjoining.

Moreover, it is difficult to imagine how upending a regulatory definition that was unchanged for almost fifty years improved notice for criminal penalties. Justice Alito's new *Sackett* standard still requires officials to determine on a case-by-case basis which wetlands and waterways are federally protected. As previously noted, what private landowners and industry leaders need is real-world, practical certainty that only Congress can provide.[206] In this way, Justice Alito's flexible textualism's approach backfired. His approach provides greater latitude for judges to redefine the "plain meaning" of words as common as "adjacent," undermining fair notice for complex, technical environmental statutes with criminal penalties. Such unpredictability in how the Supreme Court interprets criminal laws causes textualism to lose legitimacy in the eyes of both the public and future generations of lawyers and judges.[207]

3. Justice Alito's Test versus the Enacted Purposes

Finally, Justice Kavanaugh implicitly referenced the goals in the Clean Water Act's text to find that Congress had a clear, deliberate purpose for the provision relevant to *Sackett.*[208] He argued that the majority's interpretation is not consistent with the Clean Water Act's purposes because interpreting "adjacent" as "adjoining" would have significant real-world implications, so this new, narrower interpretation would leave many wetlands suddenly unregulated. But many wetlands that are not directly adjoining to "navigable waters" still hold polluted water that moves between the two through sporadic or underground connections. Because these wetlands are so essential to protecting neighboring

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adjoining wetlands and also includes wetlands separated from covered waters by man-made dikes or barriers, natural river berms, beach dunes, or the like. That consistency in interpretation is strong confirmation of the ordinary meaning of adjacent wetlands.").

205. *Id.* at 1363 (Kavanaugh, J., concurring).

206. Magill, *Water Permitting*, *supra* note 201 (noting industry leaders' frustration that EPA's updated "waters of the United States" regulation following *Sackett* does not clearly define "relatively permanent" waters, creating uncertainty that "only Congress can now offer clarity [to resolve]").

207. *See* Eric Martínez & Kevin Tobia, *What Do Law Professors Believe About Law and the Legal Academy?*, 112 GEORGETOWN L. J. 111, 176 (2023) (noting that only 60 percent of law professors instructing future practitioners and judges approve of textualism, notably lower than the percent who endorse purposivism and pragmatism); Ilya Somi, *What Law Professors Think About Legal Issues—and Why It Matters*, REASON: FREE MINDS AND FREE MARKETS (Aug. 10, 2022), https://reason.com/volokh/2022/08/10/what-law-professors-think-about-legal-issues-and-why-it-matters/ (last visited Mar 30, 2024) (arguing that this difference is important because law professors influence the views of law students, who go on to be the next generation of lawyers, politicians, and judges, and because "[c]ourts often adopt ideas that were first developed by academics").

208. *See Sackett*, 598 U.S. at 719 (Kavanaugh, J., concurring).

and downstream waters, they "may affect downstream water quality and flood control in many of the same ways" that directly-adjoining wetlands impact the "chemical, physical, and biological integrity of the Nation's waters."[209]

Although Justice Kavanaugh never invoked the terms of "formalistic textualism" or "enacted purposes doctrine," he was not subtle in criticizing flexible textualism's implications for the Clean Water Act's textual goals. He concluded that the majority's "atextual test—rewriting 'adjacent' to mean 'adjoining'—will produce real-world consequences for the waters of the United States and will generate regulatory uncertainty. I would stick to the text."[210] Combining a basic plain meaning analysis with the concerns for textualism's core values made his strict textualism a superior textualist analysis.

4. Strict Textualism and the Enacted Purposes Doctrine

Justice Kavanaugh did not address one crucial flaw in Justice Alito's flexible textualism: prioritizing states' *exclusive* role in regulating water pollution and private property rights over effective pollution reduction without a sufficient textual reason. This mirrored the very vulnerability to judge's personal policy preferences that textualists see in purposivism. Justice Alito pointed out that the Clean Water Act's enacted purposes provision includes an explicit goal to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[211] He reasoned that the states' role could not be "primary" if the EPA had jurisdiction over everything "defined by the presence of water" and that the EPA admitted that Justice Kennedy's significant nexus test might include "almost all waters and wetlands."[212]

Here, Justice Alito's error was not a difference between strict and flexible textualism—it was simply a mistake in applying the plain meaning rule. Much like he misinterpreted adjacent to mean adjoining,[213] he misinterpreted states' *primary* role in regulation to mean their *exclusive* role in regulation. "Primary" suggests that states' role in regulation should be "of first rank, importance, or value,"[214] but it does not require "exclusivity": "commanding, controlling, or prevailing over all others."[215] After all, Justice Alito actually noted that "the [Clean Water Act] specifies . . . that States may permit discharges into ['waters of the United States'], but it then qualified that States cannot permit discharges

209. 33 U.S.C. § 1251(a); *Sackett*, 598 U.S. at 726-27 (Kavanaugh, J., concurring) (noting some specific benefits such as filtering pollutants, storing water, and enhancing flood control).

210. *Sackett*, 598 U.S. at 727 (Kavanaugh, J. concurring).

211. 33 U.S.C. § 1251(b).

212. *Sackett*, 598 U.S. at 669.

213. *See id.* at 676 (citing RANDOM HOUSE DICTIONARY 25; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 26 (1976); OXFORD AMERICAN DICTIONARY & THESAURUS 16 (2d ed. 2009)).

214. *Primary definition & meaning*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/primary (last visited Nov. 10, 2023).

215. *Dominant definition & meaning*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/primary (last visited Nov. 10, 2023).

into . . . traditional navigable waters."[216] In contrast, nothing in the first goal's text allowed public health and environmental protection to be weakened to prioritize states' exclusive role in regulation.[217] For other statutes, the enacted purposes canon might not be enough to uncover how the text balances goals when they have tension.[218] But for the Clean Water Act's federalism goal, a good-faith reading of the words within the four corners of the page is enough to see that it permits states to sometimes give federal regulators the lead. Here, textualists do not even need the enacted purposes, let alone an appeal to judges' preferences, to determine which goal Congress allowed flexibility and deprioritization.[219]

This vulnerability to judges' individual policy goals is precisely why all textualists, whether strict or flexible, must always exercise restraint. Textualism began as a theory of adjudication that would reign in judicial discretion.[220] Its first, last, and only line of defense against error is a challenge for each judge to constantly look within themselves to rigorously question any possibility that their personal opinions, preferences, or biases are seeping in under the surface and polluting their plain meaning analysis.

CONCLUSION

Justice Kavanaugh's strict textualist approach might not name the enacted purposes canon, but he still employed it to demonstrate more honest good faith deference to the legislature than purposivism or flexible textualism. These lessons from *Sackett* are crucial because many other of the 1970s federal environmental statutes include comprehensive, explicit, and specific enacted purposes provisions. This includes the Endangered Species Act, as Chief Justice Burger found in *TVA v. Hill*, but also extends to other increasingly politically salient statutes such as the Clean Air Act.

As environmental litigation in appellate courts continues to become more high-profile, the public's trust in the judiciary as apolitical continues to erode.[221] Judges must protect the courts' reputation by resolving conflicts in the most democratic and least controversial manner.[222] Relying on only rhetorical appeals

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216. *Sackett*, 598 U.S. 675 (citations omitted).

217. 33 U.S.C. § 1251(a).

218. *Id.*

219. 33 U.S.C. § 1251(b).

220. Grove, *supra* note 44 at 295.

221. Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx (last visited Mar 24, 2024); Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CENTER (July 21, 2023), https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/ (last visited Mar 24, 2024).

222. Brett M. Kavanaugh, *Fixing Statutory Interpretation* 129 HARV. L. REV. 2118, 2118-19 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("[J]udges sometimes decide (or appear to decide) high-profile and important statutory cases not by using settled, agreed-upon rules of the road, but instead by selectively picking from among a wealth of canons of construction. Those decisions leave

to textualism is not enough to protect public trust in the Supreme Court because no justice is consistently a "flexible" or "strict" textualist. In practice, each textualist judge sometimes applies one approach, and in other cases applies the other.[223]

The bad news is that the success or failure of textualism depends entirely on a judge's consistent self-restraint. This makes its critics skeptical of new judges who promise to exercise good-faith textualism. But the good news is that strict textualism's genuine, good-faith deference to the legislature can alleviate the public's growing distrust.[224] Experts who study public approval of the Supreme Court tend to agree that its long-term legitimacy is determined by outcomes that do not surprise the public with drastic changes to longstanding law.[225] Because strict adherence to the plain meaning would avoid strings of decisions that are consistently more conservative or progressive than the public expects, rejecting flexible textualism can help repair the Supreme Court's bruised reputation. At the same time, environmental cases are gaining visibility among young people,[226] who are especially concerned with our nation's ecological future[227] regardless of party affiliation.[228] Because this generation will be important in deciding textualism's future, strict textualism's restraint and democratic deference might be as good an opportunity to repair textualism's reputation as the Supreme Court's.

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the bar and the public understandably skeptical that courts are really acting as neutral, impartial umpires in certain statutory interpretation cases.").

223. Grove, *supra* note 220, at 271.

224. *Id.* at 270-71.

225. *See id.* at 299-300.

226. Stephanie Hanes, *Suing the World to Save It. Children Pioneer a Right to a Secure Future.*, CHRISTIAN SCI. MONITOR (Nov. 20, 2023), https://www.csmonitor.com/Environment/2023/1120/Suing-the-world-to-save-it.-Children-pioneer-a-right-to-a-secure-future (last visited Mar 24, 2024); *see, e.g.*, Held v. Montana, 2023 WL 1997864 (D. Mont. 2023) (a high-profile lawsuit on behalf of sixteen Montana children, aged two to eighteen, successfully arguing that the state's support of the fossil fuel industry had deprived them of their state constitutional rights by worsening the effects of climate change on their lives).

227. Hickman Caroline et al., *Climate Anxiety in Children and Young People and Their Beliefs about Government Responses to Climate Change: A Global Survey*, 5 LANCET E863 (2021) (finding that 59 percent of youth and young adults said they were very or extremely worried about climate change, stemming from feelings of fear for their own lives under future climate conditions, fear for the lives of their children and loved ones, and betrayal by older generations).

228. Cary Funk, *Key Findings: How Americans' Attitudes about Climate Change Differ by Generation, Party and Other Factors*, PEW RSCH. CTR. (May 26, 2021), https://www.pewresearch.org/short-reads/2021/05/26/key-findings-how-americans-attitudes-about-climate-change-differ-by-generation-party-and-other-factors/ (last visited Mar 31, 2024) (finding that compared to their older counterparts, to young adult "Republicans and Republican-leaning independents" are much less likely to support continued fossil fuel use, including: 30 percent less likely to favor hydraulic fracturing, three times more likely to support phasing out fossil fuel use entirely, 20 percent more likely to support phasing out gasoline-powered vehicles). *Cf id.* (finding more consistent generational polling among Republicans on other climate issues, with 88 percent of supporting largescale tree planting for drawing down carbon emissions by planting large numbers of trees, 73 percent favoring a corporate tax credit for carbon-capture technology, and about half favoring a tax on corporate carbon emissions (50 percent) and stricter fuel-efficiency standards for cars and trucks (49 percent)).

APPENDIX OF TEXTUALIST CANONS OF STATUTORY INTERPRETATION

Strict Textualism's Textual Canons[229]

Rule	Definition
Associated-words Canon ("*noscitur a sociis*")	Each word's meaning is determined by the context of surrounding words. Each item in a list should be interpreted as similar to the others.
"Of the Same Kind" Canon ("*ejusdem generis*")	When a list of specific items ends in a general term (e.g., ". . . and other foods"), that general term should be interpreted to include only things similar to the specific items.
Negative-Implication Canon ("*expressio unius est exclusion alterius*")	When a statute explicitly specifies one thing (e.g., an exception to a general rule), it implies the exclusion of other things (e.g., other exceptions) absent clear evidence of legislative intent.
Whole Text Rule	Each part of a statute should be interpreted in the context of the entire statute, such that all provisions make sense as a cohesive whole.
Related-Statutes Canon ("*In pari materia*")	Related statutes should be interpreted in the context of each other, such that they all make sense as part of a cohesive whole.
Canon Against Surplusage	Every word and provision should be given effect, avoiding interpretations that make any words or phrases redundant or meaningless.
General-Specific Canon	When a general rule and a specific provision conflict, the specific provision should be considered an exception to the general rule.
Presumption of Consistent Usage	A statute should be presumed to use words and terms with the same meaning throughout.

229. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xii-xvi (2012).

Flexible Textualism's Normative Canons[230]

Constitutional-Doubt Canon	If a statute can be interpreted multiple ways, and one way conflicts with the U.S. Constitution, it should not be interpreted in that way.
Federalism Clear Statement Rule	A statute should not be interpreted to change the balance of powers between the states and federal government, unless the text makes Congress's intent to do so "unmistakably clear."
Rule of Lenity	Any ambiguity in criminal statutes should be interpreted in the way most favorable to the defendant.
Absurdity Doctrine	Courts should avoid interpretations that "sharply contradict" society's "common sense," including for policy outcomes.[231]

230. *Id.*

231. *See* Grove, *supra* note 44 at 286 (noting that the "absurdity doctrine enables a court to inject policy concerns into the interpretive inquiry—even to the point of overriding a plain text . . . [but] even Justice Scalia endorsed a narrowly defined absurd results exception") (citing Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989) (Scalia, J., concurring)).

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