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***Sackett v. EPA* and the Regulatory, Property, and Human Rights-Based Strategies for Protecting American Waterways**

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SACKETT V. EPA AND THE REGULATORY, PROPERTY, AND HUMAN RIGHTS-BASED STRATEGIES FOR PROTECTING AMERICAN WATERWAYS

Erin Ryan[†]

ABSTRACT

This Essay introduces a framework of three different strategies for protecting American waterways—the conventional regulatory approach, an alternative property-based approach, and a newer human rights-based approach—and reviews how the dynamic among them will be impacted by the Supreme Court’s recent decision in *Sackett v. EPA*, which curtailed the regulatory reach of the Clean Water Act (CWA). The rights of nature movement has emerged as a human rights-based approach to environmental protection, the public trust doctrine offers a public property-based approach, and the CWA epitomizes the more traditional regulatory approach. Last Term, however, the Court unwound nearly a half century of accepted regulatory practice when it substantially limited the reach of the CWA as a tool for protecting waterways.

In *Sackett*, the majority held that CWA jurisdiction extends to only those waters with a continuous surface connection to a navigable waterway, rather than covering all wetlands, headwaters, and tributaries with a significant nexus to the navigable channel at the bottom of the watershed. The Court made this relatively hard break with fifty years of past interpretations of the “Waters of the United States” jurisdictional rule, in spite of Congress’s clearly stated purpose in enacting the CWA to protect “the chemical, physical, and biological integrity of the Nation’s waters,” and in contravention of the accepted science that had informed the agency’s interpretation of this legislative policy. By invoking a new “clear statement” doctrine during an unusually intense period of legislative paralysis, the Court has

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unselfconsciously substituted its own judgment for that of the political branches on a scientific matter in which judicial capacity approaches its nadir. The Court’s additional suggestion that wetlands regulation is really a matter for the states highlights the majority’s apparent inclination that the only federal actor eligible to weigh in on the proper means of protecting the nation’s waterways is the Supreme Court itself.

The Court’s self-aggrandizing move in *Sackett* will come at a cost for wise environmental governance under all three models reviewed here. By weakening the nation’s principal regulatory strategy for protecting them, *Sackett* will not only harm waterways directly, it will also frustrate all stakeholders in the debate about how best to balance the competing demands we place on them. It will almost certainly inspire greater recourse to the human rights- and property-based alternatives to conventional regulation under the CWA, notwithstanding the opposition these strategies face from regulated parties who critique them as legally unsound and environmental advocates who worry about their ultimate legal trajectory. *Sackett* thus threatens a critical loss in the arsenal of environmental law to protect waterways and the ecosystems, economies, and communities that depend on them—unless Congress acts quickly to support the overturned rule.

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INTRODUCTION

This Essay introduces a framework of three different strategies for protecting American waterways—the conventional regulatory approach, an alternative property-based approach, and a new human rights-based approach—and reviews how the dynamic among them will

be impacted by the Supreme Court's recent decision in *Sackett v. EPA*,¹ which curtailed the regulatory reach of the federal Clean Water Act ("the Act" or "CWA").² The rights of nature movement has emerged as a human rights-based approach to environmental protection, the public trust doctrine offers a public property-based approach, and the CWA epitomizes the more traditional regulatory approach. Last Term, however, the Court unwound nearly a half century of accepted regulatory practice when it substantially limited the reach of the CWA as a tool for protecting waterways.

In *Sackett*, the majority held that CWA jurisdiction extends to only those waters with a continuous surface connection to a navigable waterway,³ rather than covering all wetlands, headwaters, and tributaries with a significant nexus to the navigable channel at the bottom of the watershed.⁴ The Court made this relatively hard break with the past interpretations of the "Waters of the United States" (WOTUS) rule⁵ that clarifies CWA jurisdiction, in spite of Congress's clearly stated purpose in enacting the CWA to protect "the chemical, physical,

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1. 143 S. Ct. 1322 (2023).
 2. *Id.* at 1341.
 3. *Id.* at 1336, 1340–41 (concluding that "the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water "forming geographic[al] features" that are described in ordinary parlance as "streams, oceans, rivers, and lakes"") (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006)).
 4. *See id.* at 1362 (Kavanaugh, J., concurring in the judgment) ("In my view, the Court's 'continuous surface connection' test departs from the statutory text, from 45 years of consistent agency practice, and from this Court's precedents. . . . By narrowing the Act's coverage of wetlands to only adjoining wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States."); *id.* at 1359–60 (Kagan, J., concurring in the judgment); *see also* Erin Ryan, *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, 46 ENV'T L. 277, 294–97 (2016) (reviewing the history of the Waters of the United States (WOTUS) rule) [hereinafter Ryan, *Seeking Consensus*].
 5. In 2020, the Trump administration briefly adopted an interpretation of the WOTUS rule aligned with this view (and Justice Scalia's plurality opinion in *Rapanos*). *See* The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250, 22251–52 (Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 328.3, 40 C.F.R. pt. 120.2). However, the Trump rule was judicially vacated the following year, marking a very brief break with longstanding precedent. *See* *Pascua Yaqui Tribe v. U.S. EPA*, 557 F. Supp. 3d 949, 952–53, 956–57 (D. Ariz. 2021).

and biological integrity of the Nation's waters,"⁶ and in contravention of the accepted science that had informed the agency's interpretation of this legislative policy.⁷

For nearly fifty years, the two agencies that Congress assigned to implement the CWA, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACE), have interpreted their jurisdiction to match the availability of federal authority under the Commerce Clause⁸—a reasonable interpretation that reflected the scientific consensus about watershed mechanics—and one that was arguably ratified by decades of legislative acceptance. In *Sackett*, the majority warned that Congress would have to provide an even clearer statement in support of this assertion of jurisdiction to authorize it to the Court's satisfaction.⁹ By invoking a new "clear statement" doctrine during an unusually intense period of legislative paralysis (in which Congress appears unlikely to achieve clarity on any major question), the Court has unselfconsciously substituted its own judgment for that of the political branches on a scientific matter in which judicial capacity approaches its nadir.¹⁰ The additional suggestion that wetlands regulation is really a matter for the states (such that even a clear statement

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6. 33 U.S.C. § 1251(a); *Sackett*, 143 S. Ct. at 1359–60 (Kagan, J., concurring in the judgment).
 7. *See Sackett*, 143 S. Ct. at 1368–69 (Kavanaugh, J., concurring in the judgment) ("The scientific evidence overwhelmingly demonstrates that wetlands separated from covered waters by those kinds of berms or barriers, for example, still play an important role in protecting neighboring and downstream waters, including by filtering pollutants, storing water, and providing flood control.").
 8. *See id.* at 1330–31 (majority opinion).
 9. *See id.* at 1341–42; *see also id.* at 1361 (Kagan, J., concurring in the judgment) (describing the majority's reasoning as another instance of the Court's use of the same kind of "clear-statement rule" it used last year to disable EPA regulations of greenhouse gas emissions under the Clean Air Act (citing *West Virginia v. EPA*, 142 S. Ct. 2587, 2599, 2616 (2020))).
 10. *See Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 865 (1984) (recognizing the considerable weight that should be accorded to an executive agency's interpretation of a statute that it was tasked to administer and holding that a court cannot substitute its own construction of the provision for a reasonable interpretation made by an agency). Nevertheless, decisions like *Sackett* have cast doubt on the durability of this iconic administrative law precedent, as well as the Court's decision to review it in two cases this Term. *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted* 143 S. Ct. 2429 (2023) (No. 22-451) (argued Jan. 17, 2024); *Relentless, Inc. v. U.S. Dep't. of Com.*, 62 F.4th 621 (1st Cir. 2023), *cert. granted* 144 S. Ct. 235 (2023) (No. 22-1219) (argued Jan. 17, 2024).

from Congress might not suffice)¹¹ highlights the majority's apparent inclination that the only federal actor eligible to weigh in on the proper means of protecting the nation's waterways is the Supreme Court itself.

The Court's self-aggrandizing move in *Sackett* will come at a cost for wise environmental governance under all three models reviewed here. In rejecting the EPA's understanding of broader CWA jurisdiction, long accepted by the legislature that authorized it, the Court has encroached on a sphere of decision-making that properly belongs to the branches of government with actual expertise in the regulatory field.¹² (Indeed, the Court may double down on self-aggrandizement this Term, in two cases that cast further doubt on ongoing judicial deference to agency expertise.¹³) Yet under long-settled principles of administrative law, EPA and ACE reasonably asserted jurisdiction over remote wetlands and tributaries because these are the scientifically established gatekeepers of the physical, chemical, and biological integrity of downstream navigable waters, such that allowing their impairment undermines the health and vitality of the nation's waters.¹⁴

By weakening the nation's principal regulatory strategy for protecting them, *Sackett* will not only harm these waterways directly; it will also frustrate all stakeholders in the debate about how best to balance the competing demands we place on them. It will almost certainly inspire greater recourse to the human rights- and property-

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11. See *Sackett*, 143 S. Ct. at 1341 (discussed *infra* at text accompanying notes 142–143).
 12. See *Chevron*, 467 U.S. at 865–66 (“Judges are not experts in the field, and are not part of either political branch of the Government. . . . When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones”); see also E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENV’T L.J. 1, 16 (2005) (arguing that, in the environmental context, it is better for technical decisions to be made by agency policy experts rather than courts or attorneys).
 13. *Loper Bright Enters.*, No. 22-451 (argued Jan. 17, 2024); *Relentless*, No. 22-1219 (argued Jan. 17, 2024).
 14. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37054, 37057–58 (June 29, 2015) (codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116–17, 122, 230, 232, 300, 302, 401) (“Wetlands and open waters in floodplains and riparian areas are chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters.”).

based alternatives to conventional regulation under the CWA, notwithstanding the opposition these strategies face from regulated parties who critique them as legally unsound and environmental advocates who worry about their ultimate legal trajectory.

This Essay briefly identifies the three strategies for protecting waterways before assessing the *Sackett* decision and how its rewrite of the WOTUS rule will likely alter the dynamic among them. While each of these models adds to the mix, only the regulatory model has the flexibility and specificity to respond in exactly the way that policymakers see fit, including incorporating elements of the other two strategies. For that reason, the *Sackett* decision threatens a critical loss in the arsenal of environmental law to protect waterways and the ecosystems, economies, and communities that depend on them—*unless* Congress acts quickly to support the overturned rule.

To remedy this loss (and to preempt the further CWA destabilization if the Court continues to erode prevailing principles of administrative deference), Congress must act quickly to clarify its original intention “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁵ It must statutorily clarify that the Act protects all the wetlands and tributary waters associated with navigable waterways, and it should restore the appropriate default presumptions that preceded recent Supreme Court cases clouding such precedent.¹⁶ Better still, it should add protections to couple the CWA’s tools for protecting water quality with the necessary tools to ensure sufficient water quantity—simultaneously minimizing pollution and guaranteeing minimum stream flows—thereby reducing the demand for alternative approaches to protecting waterways. Only then will the integrity of the nation’s waters be restored and maintained, as both Congress and the American people always intended.

I. THE REGULATORY, PROPERTY, AND HUMAN RIGHTS MODELS OF ENVIRONMENTAL LAW

Last year, in celebration of the fiftieth anniversary of the CWA, the *Case Western Reserve Law Review* invited a group of scholars to reflect on the significance of these five groundbreaking decades in

15. 33 U.S.C. § 1251(a).

16. See Ryan, *Seeking Consensus*, *supra* note 4, at 307–08 (“The Clean Water Rule alternates defaults not just to satisfy judicial review, but because doing so will facilitate the best regulatory outcomes. The alternating presumptions make sense in the contexts where they are deployed, because categorical jurisdiction really is preserved for those cases where the best available peer-reviewed science indicates that a fill would cause harm, and case-specific analysis is saved for those cases where the answer really is less certain.”).

environmental law.¹⁷ Most agreed that the CWA was a landmark piece of legislation that remains a pillar of modern environmental law, appropriately partnering the federal and state governments in an effort to protect treasured but vulnerable American waterways from pollution. Through a series of regulatory limits on polluting activities and discharges, the Act rehabilitated many of our most notoriously toxic waterways, and it helped establish the United States as a worldwide leader in environmental protection.¹⁸

Even so, our discussion revealed that the Act has not yet fully succeeded at its task, for varying reasons.¹⁹ Recognizing the seriousness of threats to the waterways on which we depend for life, sustenance, transport, commerce, and beauty, Congress's clearly stated goal was to restore the integrity of the nation's waters by eliminating polluting discharges by 1985.²⁰ Our failure to meet that benchmark rests in part on built-in limitations in the scope of the Act, which regulates some sources of pollution but not others (for example, limiting end-of-pipe "point source" pollution but not diffuse overland pollution from roads and yards),²¹ and some polluting industries but not others (for example, manufacturing and municipalities but not agriculture or silviculture).²² Moreover, even before the Court abruptly curtailed the jurisdictional reach of the Act this summer, recent decisions had begun to chip away at it in a way *Sackett* will only exacerbate.²³

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17. Symposium, *The Clean Water Act at 50*, 73 CASE W. RSRV. L. REV. 207 (2022).
 18. See *50 Years After the Clean Water Act—Gauging Progress*, U.S. GOV'T ACCOUNTABILITY OFF. (Oct. 17, 2022), <https://www.gao.gov/blog/50-years-after-clean-water-act-gauging-progress> [<https://perma.cc/8ZE6-993V>].
 19. See, e.g., Erin Ryan, *How the Successes and Failures of the Clean Water Act Fueled the Rise of the Public Trust Doctrine and the Rights of Nature Movement*, 73 CASE W. RSRV. L. REV. 475, 483–84 (2022) [hereinafter Ryan, *Successes and Failures*]; Jonathan H. Adler, *The Clean Water Act at 50: Is the Act Obsolete?*, 73 CASE W. RSRV. L. REV. 207, 218–19 (2022); J. B. Ruhl & James Salzman, *No Net Loss? The Past, Present, and Future of Wetlands Mitigation Banking*, 73 CASE W. RSRV. L. REV. 411, 435–38 (2022).
 20. Ryan, *Successes and Failures*, *supra* note 19, at 480.
 21. See *id.* at 480–81.
 22. *Id.*
 23. The jurisdictional reach of the CWA WOTUS rule has been previously challenged in a series of Supreme Court cases including *Riverside Bayview Homes*, *Solid Waste Agency of Northern Cook County* ("SWANCC"), and *Rapanos*, but in none of those cases did a ruling majority of the Supreme Court limit the reach of the rule to hydrologically connected waters. See *infra* Part II (discussing these cases); see also Ryan, *Seeking Consensus*, *supra* note 4, at 281–83.

In short, the Act is hardly a failure, but neither is it a complete success. And as I argued in that anniversary symposium, the great irony of the CWA is that both its successes and failures have prompted environmental advocates to seek out alternative strategies for protecting waterways.²⁴ Its spectacular successes in cleaning up our most polluted waterways have created strong expectations among the public that *all* of our waterways could and should be protected.²⁵ Nevertheless, its failure to protect many threatened waterways has also led to disillusionment with its limited set of regulatory tools. The Act's singular focus on pollution prevention has accomplished important successes, but in addition to problematic limits on which sources of pollution are regulated, its exclusive focus on preventing pollution has also led to many failures to protect treasured waterways that are struggling for reasons *other* than pollution.²⁶ An increasing number of waterways are in decline due to reductions in the quantity of water available to them after being overdrawn by water withdrawals and redirections that threaten their very existence.²⁷

These structural limitations—which empower the CWA to protect water *quality* but prevent it from addressing increasingly urgent matters of water *quantity*—have led to substantial frustration among advocates for declining waterways.²⁸ After all, the Act cannot succeed in its goal of ensuring fishable, swimmable, and drinkable waterways if there is no water left in the channel. As a result, these advocates have been exploring other legal strategies. In previous work, I compared three different approaches to accomplishing similar goals of environmental protection—understood here as the regulatory model represented by the CWA, the property-based model represented by the public trust doctrine, and the human rights-based model represented by the rights of nature movement—and observed how the built-in limitations of the CWA regulatory model had fomented the rise of these alternatives.²⁹ Without recapitulating that prior work, this Part introduces the tripartite model of regulatory, property law-based, and human rights-based strategies to the protection of waterways, in preparation for discussion of *Sackett's* likely impact.

24. Ryan, *Successes and Failures*, *supra* note 19, at 484–500.

25. *Id.* at 477.

26. *Id.* at 482–83.

27. *Id.* at 483–84.

28. *Id.* at 477.

29. *See generally id.* at 479–500 (explaining the three approaches).

A. The Regulatory Strategy

The CWA is the principal national strategy for protecting American waterways through conventional environmental regulation.³⁰ As Congress clearly stated in the preamble, the legislative objective in enacting the CWA was “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” by regulating pollutant discharges in pursuit of the specified water-quality goals.³¹

As noted above, the Act has already made substantial progress toward these goals, remediating some of the nation’s most notoriously toxic waterways—such as the Cuyahoga River in Northeast Ohio, which famously burned in 1969.³² Under authority conferred by the Act, EPA has worked together with state and local partners to improve wetlands and floodplains, restore wildlife habitat, and combat erosion along the river basin by removing harmful diversion dams and planting trees to increase water quality and availability.³³ Since the passage of the Act in 1972, it has funded some 35,000 grants worth over \$1 trillion to fight water pollution, diverting 700 billion pounds of pollution that would otherwise have been destined for America’s waterways.³⁴ As a result, the number of waterways meeting Clean Water Act goals has doubled since passage of the law.³⁵

These successes were procured through the traditional regulatory model, which establish enforceable rules to contain potentially harmful behaviors—in this case, activities that could negatively impact waterways. Regulatory models deploy executive expertise to guide

30. *Id.* at 477–79.

31. 33 U.S.C. § 1251(a).

32. *The 1969 Cuyahoga River Fire*, NAT’L PARKS SERV., <https://www.nps.gov/articles/story-of-the-fire.htm> [<https://perma.cc/RW2F-R4LS>] (May 3, 2022).

33. Leah Medley, *Cuyahoga River AOC*, EPA, <https://www.epa.gov/great-lakes-aocs/cuyahoga-river-aoc> [<https://perma.cc/JEV7-MT4U>] (Jan. 31, 2023).

34. William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?* 55 ALA. L. REV. 537, 592 (2004) (“The rate at which wetlands are lost has declined some 90% since the early 1970s, and the amount of oil spilled annually into our waters has fallen to one-tenth of the level that prevailed during the 1970s. All of this was done without causing harm to the economy or to our international competitiveness. In fact, the cost of complying with the Act has been lower than the EPA anticipated, and eleven of our largest trading partners actually spend more per capita on controlling water pollution than we do.”); Olivia Amitay, *Five Clean Water Act Success Stories*, PUB. BROAD. SERV. (Feb. 24, 2023), <https://www.pbs.org/wnet/peril-and-promise/2023/02/five-clean-water-act-success-stories/> [<https://perma.cc/4HRE-ZTR6>].

35. Amitay, *supra* note 34.

human activity in service of a legitimate public purpose authorized by legislative statute. The CWA, in particular, operates through a set of legal constraints that function together to prevent harmful discharges of pollutants from end-of-pipe (or “point sources”) of pollution.³⁶

Among its chief regulatory tools are discharge standards (including total maximum daily loads of specified pollutants that may be discharged into any given impaired waterway);³⁷ performance standards (including best practices and control technologies to mitigate polluting activities);³⁸ and the National Pollutant Discharge Elimination System, a permitting system that ensures dischargers will be informed about the relevant discharge and performance standards and that facilitates regulatory enforcement of the first two mechanisms.³⁹ There is also a federal grant program in support of state and local efforts to reduce nonpoint source pollution, which is not otherwise addressed by the previous mechanisms.⁴⁰

The regulatory approach can only constrain harmful discharges specifically addressed by these statutory instructions (primarily point source pollution by nonexempt industries)⁴¹ and only those that fall under federal jurisdiction, as designated by the WOTUS rule.⁴² The WOTUS rule—establishing precisely *which* waterways are covered by the Act—is what the Supreme Court narrowed in the *Sackett* decision, effectively reducing the raw number of waterways receiving federal regulatory protection.⁴³ The best estimates suggest that the number of stream miles regulated under the CWA fell by 58 percent after the *Sackett* decision, and even more in the arid West, where some 95 percent of stream miles are intermittent (depending on rainfall).⁴⁴

36. See generally 40 C.F.R. §§ 104–08, 110–17, 122–40, 230–33, 401–71, 501–03 (2021).

37. 33 U.S.C. §§ 1313(c)(2)(B), (d)(1)(C)–(D).

38. *Id.* §§ 1311(b)(2), 1314(b).

39. *Id.* § 1342(a).

40. 33 U.S.C. § 1329(h); see also *319 Grant Program for States and Territories*, EPA, <https://www.epa.gov/nps/319-grant-program-states-and-territories> [<https://perma.cc/KWH7-FT6F>] (July 17, 2023).

41. See *supra* note 24 and accompanying text (discussing the limitations of the CWA).

42. Ryan, *Seeking Consensus*, *supra* note 4, at 280–81, 285, 288.

43. *Sackett v. EPA*, 143 S. Ct. 1322, 1344 (2023).

44. *Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S.*, EPA, <https://www.epa.gov/cwa-404/geographic-information-systems-analysis-surface-drinking-water-provided-intermittent> [<https://perma.cc/2SKS-VDBS>] (July 10, 2023) (“Across the nation, 357,403 total miles of streams provide water for surface water intakes supplying public drinking water systems; of this, 207,476 miles, or 58%, are intermittent, ephemeral, or headwater

Even before *Sackett* narrowed the reach of CWA protection, achieving the statutory goals of restoring the nation's waters for drinking, fishing, and swimming was hampered by the limited regulatory tools available under the statute.⁴⁵ As discussed in my previous article, the CWA's regulatory strategy fails to account for important challenges to the health of U.S. waterways posed by intersecting environmental and property interests, especially those legally recognized as water rights.⁴⁶ As population, industrial development, and climatic factors combine to stress available water resources, water withdrawals by individuals, firms, and municipalities increasingly pose an existential threat to many waterways that cannot be managed merely through the remediation of pollution.⁴⁷ In some cases, the regulatory strategy is also vulnerable to private takings claims under the Fifth Amendment, by owners who argue that regulatory limits on water use wrongly impose on their property rights to use or develop adjacent lands.⁴⁸

Moreover, confining the CWA's regulatory reach to the limits of federal authority under the Commerce Clause is problematic for accomplishing the goals of environmental protection. The *Sackett* decision highlights the fact that many nonnavigable tributaries of navigable waterways may no longer receive CWA protection for exceeding that authority, even when their fates are inextricably intertwined with the fates of downstream waterways.⁴⁹ Even before *Sackett* and its predecessor line of litigation, some scholars objected to the fact that environmental regulations like the CWA rely on the Constitution's Commerce Clause as their primary source of federal authority, when many values at stake in environmental protection—

streams.”); *Streams Under CWA Section 404*, EPA, <https://www.epa.gov/cwa-404/streams-under-cwa-section-404> [<https://perma.cc/C27R-XAZF>] (Feb. 17, 2023).

45. See Ryan, *Seeking Consensus*, *supra* note 4, at 285–86.

46. Ryan, *Successes and Failures*, *supra* note 19, at 483–84.

47. *Id.*

48. See, e.g., *Lemon Bay Cove, LLC v. United States*, 160 Fed. Cl. 593, 597, 617 (2022) (finding no taking where the property owner was denied a permit to fill 2.08 acres of submerged lands and mangroves under § 404 of the CWA); see also *Mehaffy v. United States*, 499 F. App'x 18, 21–23 (Fed. Cir. 2012) (in an unpublished opinion, finding no regulatory taking where the homeowner was denied a permit to fill a wetland under § 404 of the Clean Water Act).

49. See *supra* note 14 and accompanying text (discussing why the failure to protect tributaries will result in harm to downstream navigable waterways).

such as biocentric, aesthetic, cultural, and even spiritual values—are, at best, only tangentially tied to interstate commerce.⁵⁰

B. The Property Strategy

For this reason, environmentalists have increasingly turned to alternative strategies for achieving environmental protection, including the property-based public trust doctrine. One of the oldest doctrines of Roman, English, and American common law, the public trust doctrine holds that certain natural resources, including navigable waterways, are common property, held in trust by the government for the benefit of the people—and that the people can enforce the state’s obligations as trustee in court.⁵¹

While the doctrine has long protected rights of public access, including values associated with fishing, swimming, boating, and commerce, environmental advocates have increasingly used the doctrine to protect the ecological and environmental values associated with waterways, including habitat, recreation, and scenic beauty.⁵² Environmentally oriented public trust principles have also been adopted in

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50. See, e.g., Kristen H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 183–84 (2006) (“Although a commercial connection may not be hard to find, many activities that harm the environment, and hence are candidates for federal regulation, are not purely commercial in nature. Because it refused to extend the reach of the Clean Water Act to the filling of isolated wetlands on statutory grounds, the Supreme Court did not address the question of whether such an activity is commercial in nature. Nevertheless, while the activity can be characterized as commercial, with a substantial impact upon interstate commerce from a variety of perspectives, the characterization is forced and, frankly, beside the point. The requirement for such line drawing forces the Court into making superficial distinctions of little relevance to the issue of whether federal regulation is truly appropriate.”); see also ERIN RYAN, *THE PUBLIC TRUST DOCTRINE, MONO LAKE, AND A QUIET REVOLUTION IN ENVIRONMENTAL LAW* [hereinafter RYAN, *A QUIET REVOLUTION*] (forthcoming 2024) (manuscript at Introduction 4–7) (on file with the Case Western Reserve Law Review).
51. Erin Ryan, *A Short History of the Public Trust Doctrine and Its Intersection with Private Water Law*, 38 VA. ENV’T L.J. 135, 140–49 (2020) [hereinafter Ryan, *A Short History*].
52. *Id.* at 166; Erin Ryan, Holly Curry & Hayes Rule, *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 CARDOZO L. REV. 2447, 2541–42, 2547, 2550, 2563 (2021) [hereinafter Ryan et al., *Comprehensive Analysis*]; Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Court*, 45 ENV’T L. 561, 567–68 (2015) [hereinafter Ryan, *Historic Saga*].

various state statutes and constitutions,⁵³ and even in the laws and constitutions of other nations.⁵⁴ The public trust doctrine has also been increasingly deployed to defend environmental regulations against private takings claims by impacted owners, framing the doctrine as a background principle of state property law.⁵⁵

In contrast to the regulatory model emphasizing control over behavior, the property-based model protects natural resources directly, with the same quality of legal force that we apply in protecting private property—but in reverse. Whereas conventional constitutional protections for private property protect it against public expropriation,⁵⁶ public trust protections for trust resources protect them for the public benefit against private appropriation. And when these protections are understood as constraints on sovereign authority to do otherwise, they have been interpreted as having quasi-constitutional force.⁵⁷

In many cases, public trust principles have operated to protect waterways with even greater force than the regulatory model, especially when threats to a vulnerable waterway have gone beyond the prevention of point sources of pollution, as used by all branches of government. For example, the California Supreme Court judicially allowed environmental advocates to use the common law doctrine in their successful effort to save Mono Lake, the eastern watershed of the Yosemite high country, from gradually disappearing due to water exports to Los Angeles.⁵⁸ The Pennsylvania legislature initiated a constitutional amendment adopting public trust principles that enabled citizens to protect their local water resources from contamination and overuse by fracking operations.⁵⁹ And the Governor of Michigan relied

53. Ryan et al., *Comprehensive Analysis*, *supra* note 52, at 2462; RYAN, A QUIET REVOLUTION, *supra* note 50, manuscript ch. 8, at 6–9, 11, 13–16, 18–21, 29.

54. Ryan et al., *Comprehensive Analysis*, *supra* note 52, at 2483–93, 2495–96; RYAN, A QUIET REVOLUTION, *supra* note 50, manuscript ch. 10, at 3–11, 14–15.

55. Ryan, *A Short History*, *supra* note 51, at 171–73; RYAN, A QUIET REVOLUTION, *supra* note 50, manuscript ch. 8, at 27–31.

56. U.S. CONST. amend. V; *see also* Erin Ryan, *Privatization, Public Commons, and the Takingsification of Environmental Law*, 171 U. PA. L. REV. 617, 640–41 (2023).

57. Ryan, *A Short History*, *supra* note 51, at 176–77; *cf* RYAN, A QUIET REVOLUTION, *supra* note 50, manuscript ch. 8, at 33–39 (discussing similar arguments in application to federal law).

58. Nat'l Audobon Soc'y v. Superior Ct., 658 P.2d 709, 732 (Cal. 1983); *see also* Ryan, *Historic Saga*, *supra* note 52, at 603, 608–09; RYAN, A QUIET REVOLUTION, *supra* note 50, at 1–2, 6–7, 11–13, 24.

59. Robinson Twp. v. Commonwealth, 83 A.3d 901, 981–82 (Pa. 2013); Ryan, *A Short History*, *supra* note 51, at 168–69.

on the doctrine for executive authority to revoke a seventy-year-old easement for submerged oil pipelines threatening the health and vitality of Lake Michigan.⁶⁰

While many statutory and constitutionalized versions of the doctrine expand its protections well beyond waterways,⁶¹ environmental advocates have also attempted to expand the common law doctrine to other public natural resources that are similarly susceptible to private monopolization or appropriation, including groundwater, biodiversity, and even the atmosphere.⁶² In a nationwide effort with even more successful counterparts internationally, a series of litigants have

60. The governor revoked the easement permitting submerged oil pipelines to run between Lake Huron and Lake Michigan to prevent a potentially catastrophic oil spill from frequent anchor strikes by passing commercial shipping traffic. *See* John Flesher, *Michigan Governor Seeks to Revoke Enbridge Easement*, STAR TRIB. (Nov. 13, 2020, 7:51 PM), <https://www.startribune.com/michigan-governor-seeks-to-revoke-enbridge-easement/573072012> [<https://perma.cc/T64V-QP38>]. The Office of the Governor announced that “[t]he state is revoking the 1953 easement for violation of the public trust doctrine” and that “[t]his body of law recognizes the State of Michigan as the ‘trustee’ of the public’s rights in the Great Lakes and lays upon the state legal obligations to protect those rights from any impairment.” Press Release, State of Mich. Off. of the Governor, Governor Whitmer Takes Action to Shut Down the Line 5 Dual Pipelines Through the Straits of Mackinac After a Reasonable Transition Period to Protect the State’s Energy Needs (Nov. 13, 2020), <https://www.michigan.gov/whitmer/news/press-releases/2020/11/13/governor-whitmer-takes-action-to-shut-down-the-line-5-dual-pipelines-through-the-straits-of-mackina> [<https://perma.cc/V95P-VPRZ>].

61. *See, e.g.*, HAW. CONST. art IX, § 8 (“The State shall have the power to promote and maintain a healthful environment, including the prevention of any excessive demands upon the environment and the State’s resources.”); MONT. CONST. art. IX, § 1 (“The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”).

62. Erin Ryan, *From Mono Lake to the Atmospheric Trust: Navigating the Public and Private Interests in Public Trust Resource Commons*, 10 GEO. WASH. J. ENERGY & ENV’T L. 39, 58, 60–63, 65 (2019) [hereinafter Ryan, *Mono Lake*].

attempted to apply the same public trust principles to the atmospheric commons in an effort to fight climate change.⁶³

However, the property-based strategy faces criticism from advocates for private property rights, who allege that the doctrine is too malleable, and that without an effective limiting principle, it has pushed the balance too far toward protecting public values at the expense of private interests.⁶⁴ The doctrine also faces criticism from environmentalists who oppose the use of property-based legal concepts (emphasizing the dominion of ownership) to manage environmental challenges they feel are better served by the obligations of stewardship

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63. See, e.g., *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 3750334, at *9 (D. Or. June 1, 2023) (“[P]laintiffs seek declaratory relief that ‘the United States’ national energy system that creates the harmful conditions described herein has violated and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs’ constitutional rights to substantive due process and equal protection of the law.”); *Rb. Den Haag [The Hague District Court]* June 24, 2015, ECLI:NL:RBDHA:2015:7196 (*Stichting Urgenda/De staat der Nederlanden*) [*Urgenda Foundation/The State of the Netherlands*], at sec. 4.1, translation at <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196> [<https://perma.cc/E75W-KQ5S>] (unofficial English translation) (“This case is essentially about the question whether the State has a legal obligation towards Urgenda to place further limits on greenhouse gas emissions—particularly CO2 emissions—in addition to those arising from the plans of the Dutch government, acting on behalf of the State.”); *Held v. State*, No. CDV-2020-307, slip op. at 92–93, 101–02 (Mont. 1st Dist. Ct. Aug. 14, 2023), <https://westernlaw.org/wp-content/uploads/2023/08/2023.08.14-Held-v.-Montana-victory-order.pdf> [<https://perma.cc/575J-AGN8>]; see also Ryan, *Mono Lake*, *supra* note 62, at 39, 60–64; see generally RYAN, *A QUIET REVOLUTION*, *supra* note 50, manuscript ch. 9.
64. Ryan, *Historic Saga*, *supra* note 52, at 618–19; see James L. Huffman, *A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENV’T L. 527, 533, 556 (1989) (identifying the doctrine as a creature of property law that has been distorted by the courts beyond its proper boundaries); Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction and Defense*, 15 SE. ENV’T L.J. 47, 49, 68, 70 (2006) (suggesting reconstruction of the public trust doctrine in response to libertarian and property rights critiques); Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 242–43, 274–76 (1992) (criticizing the public trust doctrine’s effects on private property rights); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 714–18, 720, 749, 766 (1986) (recognizing the inevitable conflict between the public trust and private property rights and considering what type of property can, under competing notions of public trust, be considered inherently public). But see Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 418–21, 426, 428–30 (1987) (analyzing the public trust doctrine from a similarly libertarian, property-rights perspective, but supporting it as a natural limitation on government power, comparable to restrictions on eminent domain).

that ground the regulatory approach.⁶⁵ Some members of the environmental community also oppose the anthropocentric focus of both the regulatory and property-based approaches, which center on protecting the human enjoyment of natural resources and ensuring these resources maximize human welfare.⁶⁶

Indeed, the public trust doctrine is powerful because in at least some circumstances, it has protected waterways against even the force of private property-based claims for water withdrawals.⁶⁷ Nevertheless, skeptical environmentalists worry that the doctrine is too weak for their task because they fear an implicit balancing test at the heart of the public trust inquiry. If the state must protect trust resources for the public benefit, must it consider all the different facets of public need? What if the public decides to “pav[e] paradise and put up a parking lot”?⁶⁸ It is this very concern that has driven other environmentalists toward the rights of nature approach, which protects objects in nature for their own intrinsic value, and not just how they benefit human beings.

C. The Human Rights Strategy

This leads to the third strategy that environmental advocates are increasingly deploying to protect vulnerable waterways—the human rights-based approach represented by the rights of nature movement.⁶⁹ Reflecting their frustration with both the limitations and philosophical premises of the alternatives, environmental advocates around the world have sought to assign legal rights to nature directly, without privileging the specific interests of human members of the ecosystem.⁷⁰ In contrast to both the CWA and public trust models, the rights of nature model follows from a biocentric or ecocentric environmental ethic, conferring

65. See, e.g., Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633, 692, 710, 715–16 (1986). The public trust approach has also been assailed by legal-process critics who oppose the way it empowers the judiciary at the expense of the legislature, see William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 387–88, 432 (1997), a critique with ironic parallels to the *Sackett* decision. See also RYAN, A QUIET REVOLUTION, *supra* note 50, manuscript ch. 7, at 5–6, 8–11 (discussing these critiques).

66. Ryan et. al., *Comprehensive Analysis*, *supra* note 52, at 2500–01, 2541–48.

67. Nat'l Audubon Soc'y v. Superior Ct., 658 P.2d 709, 712, 732 (Cal. 1983).

68. JONI MITCHELL, *Big Yellow Taxi*, on LADIES OF THE CANYON (Reprise Recs. 1970).

69. Ryan et al., *Comprehensive Analysis*, *supra* note 52, at 2499–2501.

70. *Id.* at 2500–01.

legal rights on nature itself or specific objects in nature—most often waterways.⁷¹

Following a human rights model, these initiatives often frame the rights they grant natural objects in terms of “legal personhood,” conferring the same rights to sovereign protection and judicial access as a human being would have.⁷² This model removes the complicating factors that can obstruct environmental protection in the other models, such as whether the waterway should be considered public or private property, or how individual behavior or economic activity can or should be regulated with regard to that waterway. In the rights of nature approach, the waterway itself is the bearer of environmental rights, often framed as rights to exist, flourish, or evolve, or even outright legal personhood.⁷³

In the last fifteen years, rights of nature initiatives have emerged in countries on every inhabited continent of the globe, including the United States, overwhelmingly to protect waterways.⁷⁴ For example, the nations of New Zealand, Australia, India, and municipalities in England, Pennsylvania, Florida, and many North American tribes have all enacted rights of nature laws to protect waterways.⁷⁵

The fact that waterways are the most common rights holders designated for protection highlights both their centrality to the ecosystems they support and also their fragility under existing regulatory and property-based frameworks of protection.⁷⁶ For example, three municipalities in Pennsylvania adopted rights of nature ordinances to protect local waterways threatened by sewage sludge and fracking operations.⁷⁷ Five municipalities in Florida proposed rights of nature

71. *Id.* at 2548–49.

72. *Id.* at 2512–13.

73. *Id.* For example, New Zealand’s Whanganui River is granted “the rights, powers, duties, and liabilities of a legal person.” Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, subs 14(1) (N.Z.). Similarly, the Punjab and Haryana High Court recognizes all animals in Haryana as “legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person.” *Karnail Singh v. State of Haryana*, 2019 SCC Online P&H 1, 104 (India), https://www.livewlaw.in/pdf_upload/pdf_upload-361239.pdf [<https://perma.cc/X56L-K7UX>].

74. Ryan et. al., *Comprehensive Analysis*, *supra* note 52, at 2514–21, 2559–60.

75. *Id.* at 2507–10, 2512–13, 2536–38 (describing examples); Isabella Kaminski, *River Ouse May Become First in England to Gain Legal Rights*, THE GUARDIAN (Mar. 1, 2023, 10:15), <https://www.theguardian.com/environment/2023/mar/01/sussex-river-ouse-first-in-england-legal-rights-aoe> [<https://perma.cc/LDS4-CHWC>].

76. Ryan et al., *Comprehensive Analysis*, *supra* note 52, 2559–60.

77. *Id.* at 2522–24.

ballot initiatives to protect local waterways from pollution, algal blooms, and excessive water withdrawals for such reasons as commercial water bottling.⁷⁸ In 2019, the Yurok Tribe of Northern California established legal rights in the Klamath River “to exist, flourish, and naturally evolve.”⁷⁹ The same year, following serial failures of the regulatory model to prevent serious pollution and illegal riverbank development, the Supreme Court of Bangladesh determined that all rivers in the country were owed the same legal rights as human beings.⁸⁰

Notably, waterways in Pennsylvania, Florida, and California are also subject to regulatory protections under the CWA, as well as public property protections under their respective state public trust doctrines. Yet neither strategy had adequately served the waterways for which local advocates eventually sought protection under this human rights-based alternative.

That said, the rights of nature model also faces significant legal hurdles. While initiatives have won strong support abroad and among North American tribes,⁸¹ they have fared comparatively poorly in nontribal jurisdictions within the United States. Despite the flurry of local efforts to protect domestic waterways through rights of nature initiatives, many have been judicially overturned or legislatively preempted. For example, voters in Toledo, Ohio amended the City Charter to recognize legal rights for Lake Erie through the Lake Erie Bill of Rights, but the ballot initiative was later overturned in court on grounds that the initiative was unconstitutionally vague and exceeded the powers of a municipal government.⁸² Meanwhile, after rights of nature initiatives began spreading through local ballot initiatives in Florida, the state legislature acted promptly to preempt rights of nature initiatives anywhere in the state.⁸³

Objections to the rights of nature follow unresolved legal questions. Most initiatives lack a consistent account of who should speak for rights bearers in nature that cannot speak for themselves, or how to handle

78. *Id.* at 2531.

79. *Id.* at 2538 (quoting *Testimony Regarding Natural Solutions to Cutting Pollution and Building Resilience: Hearing Before the H. Select Comm. on the Climate Crisis*, 116th Cong. 8 (2019) (statement of Frankie Myers, Vice Chairman, Yurok Tribe)).

80. *Id.* at 2520–21.

81. *Id.* at 2514–21, 2536–38.

82. *Drewes Farms P’ship v. City of Toledo*, 441 F. Supp. 3d 551, 558 (N.D. Ohio 2020); see also Ryan et al., *Comprehensive Analysis*, *supra* note 52, at 2525–27 (discussing the Lake Erie Bill of Rights).

83. Clean Waterways Act, ch. 2020-150, 2020 Fla. Laws 1602 (codified at FLA. STAT. § 403.412(9)(a) (2023)); see also Ryan et al., *Comprehensive Analysis*, *supra* note 52, at 2529, 2532–34 (discussing the preemption of rights of nature initiatives in Florida).

conflicts when different human speakers with contradictory views speak for those rights bearers.⁸⁴ In *Sierra Club v. Morton*,⁸⁵ a case that ironically helped foment the modern rights of nature movement in response,⁸⁶ the Supreme Court ruled that nonhuman beings could not maintain standing in federal court absent direct adverse impacts to a human litigant, a rule that remains securely in place to this day.⁸⁷ Rights of nature initiatives will also encounter legal difficulties when they conflict with other legally protected rights and the existing anthropocentric legal infrastructure that privileges human interests and presumes human agents.

Establishing rights in waterways, at least within conventional Western legal systems, threatens to create inevitable conflicts with other rights, such as property rights and water allocation rights, and perhaps even human rights to engage in certain uses that may conflict with rights bearers in nature. Some environmentalists reject the rights of nature approach specifically because it fits so poorly with the rest of our well-developed body of regulatory environmental law, which these critics believe can better preserve environmental values without upending the philosophical basis that underlies most of the American legal system.⁸⁸ In some cases, advocates move freely between the human rights- and property-based approaches that are based on mutually exclusive ethical premises, raising questions as to whether their use of these approaches is principled or opportunistic.⁸⁹ Either way, advocates'

84. Ryan et al., *Comprehensive Analysis*, *supra* note 52, at 2454.

85. 405 U.S. 727 (1972).

86. While the claim was unsuccessful, it launched a wave of scholarship contending that the Court had wrongly decided the rights of nature issue, including Christopher Stone's famous treatment in *Should Trees Have Standing?*, which argued for direct recognition of legal rights in natural objects and in nature as a whole. Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 455–56 (1972).

87. *Sierra*, 405 U.S. at 739–41.

88. See generally Noah M. Sachs, *A Wrong Turn with the Rights of Nature Movement*, GEO. ENV'T L. REV. (forthcoming) (manuscript at 18–24, 27–46), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4402290 [<https://perma.cc/W2WP-A68B>] (arguing that the vagueness of nature's rights, paired with the rights of nature movement's reliance on ad hoc litigation, will both underprotect nature and result in undesirable outcomes for humans).

89. See Ryan et al., *Comprehensive Analysis*, *supra* note 52, at 2555–58 (framing the coexistence of anthropocentric and ecocentric worldviews as either a duality or a false dichotomy). Although the public trust doctrine has had more time to develop than the emerging rights of nature movement, they appear to be evolving along a set of related legal axes (in terms of what they protect, how they operate, and who decides), suggesting that despite the important differences in their underlying

recourse to these methods indicate shortcomings in the existing regulatory infrastructure for protecting waterways.

For all of these reasons, the alternative approaches have proven riskier bets in litigation than the regulatory approach, which is easier to adjudicate and on solid statutory footing. Yet now that *Sackett* has reduced the effectiveness of the regulatory strategy by curtailing its regulatory reach, these alternative strategies may compete more favorably.

II. *SACKETT v. EPA*

This Part reviews the path to the Court's decision in *Sackett* and its latest attempt to determine the proper reach of federal jurisdiction under the CWA. It reviews the WOTUS rule and its application to wetlands in earlier Supreme Court inquiries before turning to the *Sackett* decision itself, and then the likely impacts of that decision on the competing strategies for environmental protection reviewed above.

A. *Wetlands and the Waters of the United States (WOTUS) Rule*

Sackett v. EPA is the latest in a series of cases reviewing a disputed definitional term in the CWA, the WOTUS rule, which Congress used in the text of the statute to delineate which water bodies are subject to CWA jurisdiction. For decades, EPA interpreted the term in its regulations to extend to all navigable waterways and connected wetlands within the territorial boundaries of the United States,⁹⁰ and until recently, the Supreme Court had generally deferred to the agency's interpretation⁹¹ under its own precedents deferring to the regulatory expertise of the agency tasked with interpreting a congressional statute.⁹² However, the WOTUS definition has been the subject of intensifying scrutiny as regulated parties have increasingly pushed back against the expansive reach of the statute, especially with regard to remote headwaters and wetlands.

principles, advocates may be relying on them to solve related environmental problems. *See id.* at 2555–62.

90. *See* Ryan, *Seeking Consensus*, *supra* note 4, at 288–89 (explaining this legal history in detail).
91. *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985) (upholding CWA jurisdiction over wetlands adjacent to navigable waterways against a jurisdictional challenge). *But see* *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 171–72, 174 (2001) (rejecting CWA jurisdiction over hydrologically isolated wetlands). *See also* Ryan, *Seeking Consensus*, *supra* note 4, at 292 (citing *Solid Waste Agency*, 531 U.S. at 174).
92. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 864–65 (1984).

Wetlands, scientifically defined as saturated soils, technically include standing lakes and rivers, but also intermittent streams, prairie potholes, small ponds, and swamps.⁹³ Scientists have characterized wetlands as among the most useful and productive ecosystems in the world.⁹⁴ They filter pollutants and sediments from downstream waterways, prevent floodwaters from entering communities and carbon from entering the atmosphere, and are comparable to coral reefs in their ability to provide habitat and fish nursery.⁹⁵ Because the science indicates that wetlands are integral to the overall physical, chemical, and biological health of connected waterways, agency regulations interpreting the WOTUS rule have always included as many as could be justified under various sources of pertinent federal authority, including the Constitution's Commerce Clause, the Treaty Clause,⁹⁶ and potentially even the Property Clause.⁹⁷

However, the application of CWA protections to wetlands that are not directly navigable have been challenged by developers and others whose business prospects require their destruction, in a series of cases that have chipped away at the agency's originally expansive interpretation of WOTUS. The first time the issue arose, in *United States v. Riverside Bayview Homes, Inc.*,⁹⁸ the Supreme Court upheld the agency's interpretation, affirming that wetlands adjacent to navigable waterways are protected even if the wetlands themselves are not navigable.⁹⁹ In the next iteration, *Solid Waste Agency of Northern*

93. 33 C.F.R. § 323.2(a)(5) (1978).

94. *Functions and Values of Wetlands*, U.S. ENV'T PROT. AGENCY (March 2002), https://www.epa.gov/sites/default/files/2021-01/documents/functions_values_of_wetlands.pdf [<https://perma.cc/N4DZ-LP8N>]; Sara Ernst & Kevin D. Kroeger, WOODS HOLE COASTAL & MARINE SCI. CTR., *Learn How Wetlands Can Naturally Help with Climate Change Impacts*, U.S. GEOLOGICAL SURV. (May 12, 2023), <https://www.usgs.gov/centers/whcmssc/news/learn-how-wetlands-can-naturally-help-climate-change-impacts> [<https://perma.cc/4MU9-Y52X>].

95. *Id.*

96. See Ryan, *Seeking Consensus*, *supra* note 4, at 290–91 (discussing these sources of federal authority, including reliance on the Treaty Clause as a basis for the migratory bird rule, which once conferred federal authority over wetlands that are hydrologically isolated from navigable waterways but ecologically connected as bird migration corridors).

97. The Property Clause, establishing federal authority to manage the nation's territory and other property, authorizes federal management of public lands that, presumably, include navigable waterways and their tributaries. U.S. CONST. art IV, § 3, cl 2.

98. 474 U.S. 121 (1985).

99. *Id.* at 134–35, 139.

Cook County v. United States Army Corps of Engineers,¹⁰⁰ the Court maintained the generally expansive WOTUS rule except to clarify that hydrologically isolated wetlands—with no hydrologic connection to navigable waterways above or below ground—were not jurisdictional.¹⁰¹ The judicial consensus began to shift with the Court’s fractured decision in the case that established the path for the new *Sackett* rule, *Rapanos v. United States*.¹⁰²

B. Rapanos: The Court’s Previous Wrestling Match with WOTUS

In *Rapanos v. United States*, two different owners challenged CWA jurisdiction over remote wetlands they wished to fill on their property, one of which was connected to a navigable waterway through miles of nonnavigable channels and one of which was artificially separated from the navigable waterways by a man-made berm.¹⁰³ After hearing the case, the Court failed to come to a majority consensus on how to interpret WOTUS in application to these facts. Instead, in 2006, the Court issued a series of fractured opinions that, while theoretically leaving most of the existing WOTUS rule intact, nevertheless resulted in a sharp curtailment of CWA jurisdiction at the practical level.¹⁰⁴

In a plurality opinion that commanded only four votes, Justice Antonin Scalia wrote that the “waters of the United States” could only include those with a permanent, standing connection to navigable waterways.¹⁰⁵ This would have catastrophically limited the extent of CWA jurisdiction up the hydrological chain, but with only four votes in support, it did not become the operative rule. Justice Anthony Kennedy concurred with these four justices that the CWA should not apply to these particular plaintiffs, securing the plurality vote that allowed them to win their suit as individuals.¹⁰⁶ However, he disagreed with Justice Scalia’s extraordinary reduction of CWA jurisdiction, which he did not believe accorded the congressional goals for the statute and the scientific support for broader regulatory reach.¹⁰⁷

In his concurrence, Justice Kennedy attempted to find a compromise that could protect plaintiffs from potentially overinclusive regulation while still honoring Congress’s stated intention that the

100. 531 U.S. 159 (2001).

101. *Id.* at 171–72, 174, 176–77.

102. 547 U.S. 715 (2006).

103. *Id.* at 729–30.

104. *Id.* at 718 (4-1-4 decision: Scalia, J., plurality opinion; Kennedy, J., concurring in the judgement; and Stevens, J., dissenting).

105. *Id.* at 719, 732–33 (Scalia, J., plurality opinion).

106. *Id.* at 778–79, 783 (Kennedy, J., concurring in the judgement).

107. *Id.* at 768–76.

CWA ensure the physical, chemical, and biological health of the nation's waters. He offered a competing decision rule to Justice Scalia's that would continue to authorize CWA jurisdiction whenever EPA can show that a waterway bears the significant nexus to navigable waterways that the WOTUS rule had long presumed.¹⁰⁸ Bridging Congress's clear intentions for effective CWA protection of the physical, chemical, and biological health of the nation's waters to the scientific consensus about the ecologically significant relationships between the waterways, tributaries, and wetlands within a watershed, Kennedy would have allowed proof of not only a significant surface nexus, but also a subsurface or ecological nexus.¹⁰⁹

Meanwhile, the four dissenting Justices, led by Justice John Paul Stevens, shared Justice Kennedy's essential reasoning, but would have preserved the presumption in the existing rule that gave the agency the benefit of the doubt on its jurisdictional reach.¹¹⁰ The dissenters' interpretation would have deferred to EPA's existing regulations, which presumed a significant nexus throughout the tributary chain on grounds that the vast majority of territorial waters would meet the nexus test—but which enabled landowners to rebut the presumption in application to their particular circumstances.¹¹¹

Justice Kennedy and the dissenters all agreed that CWA protections should flow through any important hydrological connection.¹¹² At bottom, their disagreement was over who should carry the burden of proving or disproving nexus—the agency (to show it) or the permit seeker (to rebut it).¹¹³ Because the four dissenting Justices agreed with Justice Kennedy's core reasoning, however, his concurrence commanded the agreement of the majority, and this more expansive WOTUS interpretation became the legally delimiting rule.¹¹⁴

Yet as all trial lawyers know, the burden of proof can be destiny in close cases, especially when producing the evidence is expensive or requires a lot of effort. In effectively shifting the burden of proof to EPA to prove significant nexus (rather than setting it on the landowner to disprove it, as the existing regulations had done), the immediate impact of *Rapanos* was to make it too expensive for EPA to pursue

108. *Id.* at 759.

109. *See id.* at 767–68, 770, 776–78, 782.

110. *Id.* at 788 (Stevens, J., dissenting).

111. *Id.* at 811–12 (Breyer, J., dissenting); *id.* at 807–10 (Stevens, J., dissenting); *see also* Ryan, *Seeking Consensus*, *supra* note 4, at 283 (discussing the ability of landowners to rebut).

112. *Rapanos*, 547 U.S. at 779–80 (Kennedy, J., concurring in the judgement).

113. *See id.*

114. *Id.* at 810 (Stevens, J., dissenting).

potential enforcement actions it would have previously been able to presume jurisdiction over. Without additional staffing and resources to prove the nexus in every instance, the impact was to sharply curtail EPA's ability to assert even justifiable CWA jurisdiction. CWA enforcement dropped off precipitously after *Rapanos*, with as many as 300 reported CWA infringements overlooked by the EPA in just the year following the decision.¹¹⁵

The years that followed have proved extremely confusing for environmental governance. Most courts followed the Kennedy rule, but some followed Justice Scalia's plurality rule, prompting every subsequent presidential administration to attempt to clarify the WOTUS rule with new regulations. The Obama administration enacted the Clean Water Rule in 2015,¹¹⁶ arguably a compromise between the two competing opinions in *Rapanos*,¹¹⁷ but it was immediately challenged in court and then overturned by the Trump administration's revised 2020 WOTUS rule, the Navigable Waters Protection Rule.¹¹⁸ After the number of wetlands protected by the WOTUS rule was effectively halved,¹¹⁹ the Trump rule was also quickly challenged in court and then

115. Memorandum from the Comm. on Oversight & Gov't Reform and Comm. on Transp. & Infrastructure to Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight & Gov't Reform and James L. Oberstar, Chairman, H. Comm. on Transp. & Infrastructure 3 (Dec. 16, 2008) <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/migrated/20081216113810.pdf> [<https://perma.cc/ND67-RVVP>]; see also Charles Duhigg, *Clean Water Laws Are Neglected, at a Cost in Suffering*, N.Y. TIMES (Sept. 12, 2009), <https://www.nytimes.com/2009/09/13/us/13water.html> [<https://perma.cc/N94M-QGAW>] (reporting on the results of an extensive review of water pollution records showing that "in recent years, violations of the Clean Water Act have risen steadily across the nation"); *Toxic Waters: A Series About the Worsening Pollution in American Waters, and Regulators' Response*, N.Y. TIMES, <https://www.nytimes.com/interactive/projects/toxic-waters/index.html> [<https://perma.cc/374H-JDPP>] (providing a collection of reports on the subject); Ryan, *Seeking Consensus*, *supra* note 4, at 298 (discussing reports like these, indicating that the number of dropped enforcement actions was in the hundreds if not thousands).

116. 40 C.F.R. § 110.1(1) (2015) (defining "waters of the United States").

117. Ryan, *Seeking Consensus*, *supra* note 4, at 302.

118. Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4205 (proposed Feb. 14, 2019).

119. Ariel Wittenberg & Kevin Bogardus, *EPA Falsely Claims 'No Data' on Waters in WOTUS Rule*, POLITICO GREENWIRE (Dec. 11, 2018, 1:17 PM), <https://subscriber.politicopro.com/article/eenews/1060109323> (last visited Feb. 4, 2024) (noting that "a 2017 slideshow prepared by EPA and Army Corps of Engineers staff shows that at least 18 percent of streams and 51 percent of wetlands nationwide would not be protected under the new definition of 'waters of the United States,' or WOTUS, announced today").

effectively retired when the incoming Biden administration refused to defend it.¹²⁰ The Biden administration then produced its own version of the WOTUS rule,¹²¹ mostly codifying the Kennedy concurrence compromise, before it too was upended by the *Sackett* litigation.¹²²

C. *Sackett v. EPA*

The facts in *Sackett* were relatively simple. In preparation for construction, the plaintiffs had loaded gravel onto a lot of land a few hundred feet from Priest Lake, a resort destination in northern Idaho.¹²³ After a neighbor complained, EPA halted the construction on grounds that the lot included wetlands that drained into navigable waters, meeting the significant hydrologic nexus test that Justice Kennedy had articulated in *Rapanos*.¹²⁴ EPA ordered the plaintiffs to remove the gravel and cease further development without first securing a permit as required under CWA section 404 before filling federally protected wetlands.¹²⁵

The Sacketts sued in 2008, arguing that their lot could not be considered a regulated “water of the United States,” because there was dry land standing between it and the adjacent navigable waterways that were clearly jurisdictional.¹²⁶ After fourteen years of litigation, in which both the trial and appellate courts sided with EPA’s interpretation in light of past Supreme Court precedent on this point, the Supreme Court overturned the lower decisions to find in favor of the Sacketts.¹²⁷ All nine Justices agreed that the Sacketts’ property should not be subject to CWA jurisdiction, but they divided sharply over their reasons why.

Writing for the majority, Justice Samuel Alito took the opportunity of new court personnel to formally adopt Justice Scalia’s WOTUS

120. *EPA, Army Announce Intent to Revise Definition of WOTUS*, EPA (June 9, 2021), <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus> [<https://perma.cc/EV4J-NMPD>].

121. Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3004 (proposed Jan. 18, 2022) (effective Mar. 20, 2022).

122. After *Sackett*, EPA and ACE issued a new final rule that conforms to the definition of WOTUS in the *Sackett* decision. Revised Definition of “Waters of the United States”; Conforming, 88 Fed. Reg. 61964 (effective Sept. 8, 2023).

123. *Sackett v. EPA*, 143 S. Ct. 1322, 1331 (2023).

124. *Rapanos v. United States*, 547 U.S. 715, 759–63 (2006).

125. *Sackett*, 143 S. Ct. at 1331–32, 1331 n.6.

126. *Sackett v. U.S. EPA*, No. 08-cv-185-N-EJL, 2008 WL 3286801, at *1 (D. Idaho Aug. 7, 2008).

127. *Sackett*, 143 S. Ct. at 1334.

interpretation in *Rapanos* as the new rule going forward.¹²⁸ Justice Alito concluded that to assert CWA jurisdiction over a wetland, the agency must establish:

[F]irst, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States,’ (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.¹²⁹

The Court stated plainly that “the CWA extends to only those wetlands that are ‘as a practical matter indistinguishable from waters of the United States,’” rejecting everything else up the tributary chain.¹³⁰

The decision acknowledged that “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells,”¹³¹ but the exception remains much more limited than preceding regulations. Under the new reading, a wetland must be fully connected to a navigable waterway; it cannot merely be “neighboring.”¹³² While acknowledging that the significant nexus test set forth by Justice Kennedy represented the Court’s previous consensus in *Rapanos*, Justice Alito critiqued the test as “particularly implausible.”¹³³ Despite the scientific consensus that these newly vulnerable wetlands form an integral part of the waterways that Congress had designated for physical, chemical, and biological

128. *Id.* Between the Court’s fractured 2006 opinion in *Rapanos* and its 2023 decision in *Sackett*, all five of the Justices that had agreed with Justice Kennedy’s *Rapanos* rationale had left the court (Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer). *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/GYJ7-735F>]. Two of the five were replaced with new Justices sympathetic to Justice Scalia’s competing *Rapanos* rationale (Justices Kavanaugh and Barrett), shifting the balance of ideology on this point. *Id.* Justice Scalia also left the court but was replaced with Justice Gorsuch, who shared his interpretation in *Sackett*. *Id.*

129. *Sackett*, 143 S. Ct. at 1341 (alterations in original) (quoting *Rapanos*, 547 U.S. at 742).

130. *Id.* (quoting *Rapanos*, 547 U.S. at 755).

131. *Id.* at 1341.

132. *Id.*

133. *Id.* at 1342.

protection, Justice Alito observed that “the CWA does not define the EPA’s jurisdiction based on ecological importance.”¹³⁴

Even one of Justice Alito’s interpretive allies, Justice Brett Kavanaugh, objected to this reasoning, writing separately to criticize the majority’s “rewriting of ‘adjacent’ to mean ‘adjoining’” and to express concern that the decision will likely “leave long-regulated and long-accepted-to-be-regulable wetlands suddenly beyond the scope of the agencies’ regulatory authority.”¹³⁵

In so doing, the majority dismissed not only the scientific consensus on how to protect waterways and decades of agency expertise attempting to implement congressional directives, they rejected the Kennedy standard of the last iteration, the best collective attempt to forge consensus on the WOTUS question among all branches of government, including the judiciary, the executive agencies, and arguably even tacit legislative participation by acquiescence. The decision effectively halved the waterways receiving protection under the CWA.¹³⁶ But Justice Alito and his four colleagues decided that they alone knew better than every other player in the orchestra of negotiated environmental governance that had preceded them.

III. HOW *SACKETT* WILL SHIFT THE BALANCE AMONG MODELS

By undermining the regulatory approach so dramatically, the Court’s self-aggrandizing decision in *Sackett* threatens to upend the balance not only among the three branches of government, but among the three approaches to environmental protection reviewed above. As the regulatory model is weakened, environmental advocates will pursue the property-based and human rights models with even more rigor, resulting in environmental governance that may end up disappointing all stakeholders. This Part reviews, with healthy skepticism, the separation-of-powers concerns purportedly underlying the majority’s reasoning in the case, as well as the ramifications for good environmental governance of the likely shifts in strategy that will follow among environmental advocates.

134. *Id.* at 1343.

135. *Id.* at 1367–68 (Kavanaugh, J., concurring in the judgment).

136. Erika Ryan, Patrick Jarenwattananon & Ari Shapiro, *More Than Half of Wetlands No Longer Have EPA Protections After Supreme Court Ruling*, NPR (Aug. 30, 2023, 5:33 PM), <https://www.npr.org/2023/08/30/1196875240/more-than-half-of-wetlands-no-longer-have-epa-protections-after-supreme-court-ru> [<https://perma.cc/4Z5U-RUZX>] (discussing the impacts of *Sackett* on CWA enforcement).

A. Disingenuous Separation of Powers Concerns

In *Sackett*, the Court deployed its new jurisprudential tool of choice: a clear statement rule demanding that Congress speak more clearly when it regulates on important questions involving the reach of federal authority.¹³⁷ While past judicial practice has long acknowledged that Congress enacts clear directives that leave purposeful space for agency rulemaking on the particulars,¹³⁸ the new judicial order apparently requires Congress to go back and give express blessing to subsequent rulemaking on the sorts of particulars it typically assigns to agencies with greater technical expertise in the relevant field.¹³⁹ Departing from decades of settled expectations, the initial grant of authority can no longer serve as the necessary authorization.

Similar to the Court's 2022 embrace of the "major questions doctrine" in *West Virginia v. EPA*,¹⁴⁰ a companion environmental law case in which the Court also declined deference to EPA's interpretation of a statute it administers, the Court's holding in *Sackett* purports to correctly realign the separation of powers between the legislative and executive branch, returning policymaking power to the legislature from executive encroachment by administrative agencies.¹⁴¹ Yet in reality, the decision simply realigns policymaking power toward the sitting majority of the Supreme Court—a decision made fully cognizant of the

137. *Id.* at 1341–43 (majority opinion) (requiring a clear statement from Congress in determining the scope of the Waters of the United States).

138. *See Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 865 (1984); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134–35, 139 (1985).

139. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) ("[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims.") (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

140. *Id.* (declining to defer to EPA's interpretation of the Clean Air Act in the regulation of greenhouse gases that contribute to climate change and requiring clearer congressional authorization for such regulation because it raised a major question of policy on which Congress should weigh in).

141. *E.g., Sackett*, 143 S. Ct. at 1340 ("[I]t would be odd indeed if Congress had tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs. We have often remarked that Congress does not 'hide elephants in mouseholes' by 'alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.' We cannot agree with such an implausible interpretation here.") (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)).

likely reality that a politically paralyzed legislature will not be able to act to countermand it.

Without fear of legislative second-guessing, the *Sackett* majority confidently substituted its own judgment on a scientific matter for that of the thousands of actual scientists and other experts who helped craft the regulations governing our waterways for nearly fifty years. It also supplanted the judgments of the previous Supreme Courts that upheld the very standards it dramatically undid in *Sackett*. In requiring a clearer statement from Congress before allowing settled principles of nexus to remain in effect, the Court essentially usurped the decision for itself, because no reasonable person expects today's Congress to be able to reach a filibuster-proof majority on this point (or any major question involving the reach of federal authority).

Rationalizing that it did so because such decisions properly belong to Congress¹⁴² is, at best, disingenuous under present circumstances. It is a shift of power not from the executive branch back to the legislature, but from the legislature and the executive (to whom the legislature has entrusted these choices) to the least democratic branch of all—and that with the markedly paltriest technical and staff expertise—the Supreme Court. Moreover, even as the majority opines that such decisions belong to Congress rather than the agencies, it simultaneously suggests that the decision *doesn't* properly belong to Congress, because the “regulation of land and water use lies at the core of traditional state authority [and that an] overly broad interpretation of the CWA's reach would impinge on this authority.”¹⁴³ The implication of these two intersecting parts of the analysis—(1) that Congress must speak clearly on this matter and (2) that this matter is really a decision for the states—is that the only federal actor eligible to weigh in on the proper means of protecting the nation's waterways is the Supreme Court itself.

The potential result for the health of the nation's waterways is alarming. Agency enforcement of existing CWA regulations was already challenging after *Rapanos*, when the Kennedy interpretation of significant nexus required case-by-case fact-finding to establish jurisdiction over each individual tributary.¹⁴⁴ The rationale may have been pragmatically challenging to administer, but at least it was intellectually satisfying—in that it was faithful to the congressional and scientific rationales underlying both the CWA and WOTUS rule. After

142. See *id.* at 1341; cf. *West Virginia*, 142 S. Ct. at 2609 (explaining that “the major questions doctrine ‘label’ took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted”).

143. *Id.* at 1341.

144. *Rapanos v. United States*, 547 U.S. 715, 782 (2006) (Kennedy, J., concurring in the judgement).

Sackett, however, there is no longer any need to decide case by case. Huge swaths of upstream waterways, especially in the American West, are now no longer subject to CWA authority if they lack a continuous surface connection, no matter how provably significant the nexus is otherwise. This means that, if concerned residents want to protect the waterways that sustain their communities ecologically, recreationally, and functionally, they will have to turn to other, alternative theories of environmental protection beyond the regulatory model—strategies like the public trust and rights of nature approaches.

B. Ramifications for Environmental Governance

The resulting decision shows the limits of a Court without expertise in deciding an issue that utterly requires it. All stakeholders should be upset by the dynamics the *Sackett* decision will unleash in environmental law, even if for different reasons. Environmental advocates are already decrying the decision for limiting the ability of the nation's most important statutory protector of waterways to reach the most important and vulnerable elements of the system.¹⁴⁵ And as the regulatory solution becomes less powerful, more advocates for failing waterways will turn to the property- and human rights-based solutions, which will lead to unhappiness among many relevant stakeholders—starting with the regulated community that the *Sackett* majority purports to protect.

Members of the regulated community may not have loved the CWA, but at least it was a predictable regulatory strategy that operated through familiar channels of lawmaking and implementation. They may not have loved the agencies that oversaw it, but at least their lawyers understood the playing field and the likely points of contact with conventional executive, legislative, and judicial actors. There was process, there was precedent, and there were relatively settled expectations. Markets dislike uncertainty, it is said, but at least the regulatory model is familiar. But if the demise of the regulatory model prompts the rise of the alternatives, the playing field may become far more unsettled, and for a good long time.

Regulated entities are likely to oppose the expansion of the public trust doctrine for a variety of reasons—because it favors public property rights over private rights, because it lacks a limiting principle, or (ironically) because it erodes the separation of powers principle by empowering judicial review of legislative activity.¹⁴⁶ In addition to these standard objections, they may especially resent the loss of dominion

145. Hannah Grover, *Environmental Advocacy Groups Decry SCOTUS Clean Water Act Ruling*, N.M. POL. REP. (May 26, 2023), <https://nmpoliticalreport.com/news/environmental-advocacy-groups-decry-scotus-clean-water-act-ruling/> [<https://perma.cc/R8UK-63LC>].

146. Ryan, *The Historic Saga*, *supra* note 52, at 617–22; RYAN, A QUIET REVOLUTION, *supra* note 50, manuscript ch. 7, at 2–14.

that accords the legal recognition of someone else's property interest (the public's) intersecting with theirs. From this vantage point, the regulatory approach may be less troublesome because at least under that model, they don't stand to lose any actual property rights, just regulation of how they use it.

Some environmentalists may also oppose a greater embrace of public trust advocacy in environmental law, especially if they perceive it as an ill-fitting attempt to force property-based principles into stewardship-shaped obligations.¹⁴⁷ Those who oppose the rights of nature doctrine will be equally unhappy—because they reject the underlying principle of rights for nonhumans, because they are market participants whose economic activity faces a further environmental irritant, or because they are environmentalists who are sympathetic to the idea but who believe the doctrine is underdeveloped, undertheorized, internally inconsistent, or impossible to harmonize with the rest of Western legal infrastructure.¹⁴⁸ If the rights of nature movement were to gain more traction in the United States, that would pose even greater consternation for the regulated community, because what was once considered property could then end up with cognizable rights of its own.¹⁴⁹

Moreover, even those who do support the public trust doctrine and rights of nature approaches will be unhappy, because neither of these approaches can alone accomplish what the three strategies together might do for protecting vulnerable waterways. In enacting the CWA to protect the nation's waters, Congress recognized that only a national strategy can succeed where individual states and localities cannot,¹⁵⁰ given the relentlessly interjurisdictional nature of the great navigable waterway commons. Waterways are a tapestry of interconnected corridors driven by natural cycles and gravity, in which water that evaporates in one place falls down in another and then runs over the course of many lands to begin again, often crossing state and even international lines—above ground, below ground, and even atmospherically. The hydrologic cycle is so remorselessly dismissive of political boundaries and so irretrievably connected across navigable and nonnavigable components that only a national regulatory strategy for their protection is truly viable. And perhaps even an international

147. Ryan, *The Historic Saga*, *supra* note 52, at 620–21; RYAN, A QUIET REVOLUTION, *supra* note 50, manuscript ch. 7, at 10–14.

148. *See generally* Sachs, *supra* note 88.

149. *Supra* notes 71–73 and accompanying text.

150. 33 U.S.C. § 1251(a). Although section 1251(b) preserves a cooperative federalism role for the states, that doesn't diminish the fact that Congress felt the need to enact a federal statute in the first place. In other words, if the states could have handled it alone, there would be no need for the CWA.

strategy when the watershed is large enough, as the Pacific Garbage Patch warns.¹⁵¹

By contrast, the property- and human rights-based approaches are, at best, partial solutions to a complex problem, at least under present-day circumstances. They are most effective as adjuncts to a regulatory solution that can modify behavior that negatively impacts waterways without being directly about waterways. Acknowledging public property in waterways and the interests and obligations thereby implied is important, but insufficient, compared with requiring the adaption of best available technologies to control pollution, as required by regulation such as the CWA. Acknowledging the right of a waterway to exist may be important for other reasons, but it is ineffective without a concomitant permit system to ensure that regulated parties are made aware of the potential for harm, the rules for protection, and the enforceable series of obligations that will ensure implementation of those protections, such as the CWA does.¹⁵²

Of course, we could always endeavor to create a regulatory adjunct to these property- and human rights-based models to provide these benefits—but if we did that, we would essentially be recreating the CWA itself (ideally with a few tweaks recommended in this journal's 50th CWA Anniversary Symposium).¹⁵³ Yet rather than recreating a regulatory program of that scope from whole cloth, would it not be better to just work with the program we already have, which has already been tested and refined over half a century of implementation, and with which all stakeholders are already familiar?

There are many legitimate places to land in a debate over which of the three strategies reviewed here will best protect our heritage of waterways, and under which circumstance each performs best. There are good reasons to look to the human rights-based approach represented by the rights of nature movement, especially among environmentalists frustrated by the legal privilege that human interests enjoy over all others in an ecosystem, and distrustful of the way that large-scale water users can influence the legislative process to their benefit. There are good reasons to turn toward the property-based approach of the public trust doctrine, given that the conflict over waterways is already driven by strongly protected property interests in land development and water allocation rights. Recognizing public property rights in waterways may be the only way to defend against

151. *Garbage Patches*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <https://marinedebris.noaa.gov/info/patch.html> [<https://perma.cc/8B72-U583>] (Feb. 3, 2024, 11:34 PM).

152. *See e.g.*, 33 U.S.C. § 1344.

153. For example, an improved CWA would account for the protection of water quantity and not just quality, and better engage sources of nonpoint source pollution that are currently unregulated. Ryan, *Successes and Failures*, *supra* note 19, at 475–79, 482–89, 491, 495–502.

competing property-based claims that would deplete them. Yet whatever the strengths of these alternative approaches, almost all environmental advocates would concede the critical reasons to preserve the regulatory strategy exemplified by the CWA alongside them.

The regulatory strategy is our time-honored method for managing interjurisdictional coordination on large-scale public commons, nowhere clearer than the management of the nation's waterways. Protecting these hydrological fractals upon, below, and over the land—crossing jurisdictional boundaries as easily as the weather—requires the kind of coordinated multijurisdictional strategy that only a complex program of cooperative federalism like the CWA can accomplish. The rights of nature movement offers a romantic ideological alternative to the course utility calculus of the regulatory model, but under mainstream American law, it lacks any means to alter the specific human behaviors leading to the threats it seeks to resolve. The public trust doctrine offers important tools to confront the force of property law principles that are already deeply involved in environmental law,¹⁵⁴ but its environmental role is developing unevenly across the states, and it can leave waterways vulnerable if public preferences for conservation yield to shorter-term utilitarian goals.

At the moment, only the regulatory approach can seamlessly operate at the nationwide scale that is needed, with a properly focused ethic of stewardship, and in harmony with conventional legal means to regulate harmful human behavior. Congress, the states, and the Supreme Court must work together to ensure that we do not allow short-term economic interests and unrelated political agendas to undermine the long-term vitality of the waterways on which we all depend for life and livelihood.

CONCLUSION

The Supreme Court's decision in *Sackett* portends bad results for water quality specifically, and for environmental law in general. Not only does it undermine the efficacy of one of the most successful environmental laws in history (and one we will sorely miss when it ceases to function well), the casual way it sets aside decades of scientific and agency expertise bodes poorly for environmental law more generally—which is, by nature, a shared enterprise of law and science, and of local and national governance.¹⁵⁵ Moreover, in hobbling the

154. See generally Erin Ryan, *Public Commons, Privatization, and the Takingsification of Environmental Law*, 171 U. PENN. L. REV. 617 (2023) (discussing how property law biases have influenced the development and implementation of environmental and natural resources law).

155. See ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* 151–56 (2011) (discussing how water pollution is an interjurisdictional problem that requires regulatory response from national, state, and local actors);

premier regulatory model for accomplishing the most fundamental promise of American environmental law—that waters will be safe for drinking, fishing, and swimming—the decision will unintentionally fuel the rise of alternative strategies for environmental protection that cannot function effectively on their own, and will likely displease their antagonists even more than the regulatory approaches they displace.

In limiting the reach of the CWA, *Sackett* will prompt more environmental appeals to the property-based public trust doctrine, which is increasingly deployed for the purposes of environmental protection by asserting public commons property in navigable waterways and other trust resources that are held by the state in trust for the public.¹⁵⁶ It is likely to fuel even greater support for the human rights model taken by the rights of nature movement, which recognizes legal rights and even legal personhood in natural objects, and which has been especially focused on protecting waterways.¹⁵⁷ Given that frustration with the pre-*Sackett* limitations of the CWA had already inspired appeals to these alternative strategies,¹⁵⁸ the loss of further regulatory protections under the CWA will foment an even stronger turn toward public trust and rights of nature initiatives.

Recourse to these alternative strategies is understandable but potentially troubling given the open questions they raise for environmental advocacy, especially without the buttressing support of regulatory approaches like the CWA. The rights of nature model is rhetorically powerful and grounded in indigenous law, but questions remain about who speaks for natural rights holders, what to do when their human champions disagree, and how to manage conflicts between rights of nature and other protected rights, such as property rights.¹⁵⁹ Meanwhile, the public trust doctrine has successfully countered some property-based threats to waterways, including the overallocation of water rights and takings-based challenges to environmental regulations

see also Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 574–77 (2007).

156. See Ryan, *A Short History*, *supra* note 51; Ryan et al., *Comprehensive Analysis*, *supra* note 52, at 2476–83; see generally RYAN, *A QUIET REVOLUTION*, *supra* note 50, intro., at 1–3, 7–10.

157. See Ryan et al., *Comprehensive Analysis*, *supra* note 52, at 2506–13. See also RYAN, *A QUIET REVOLUTION*, *supra* note 50, manuscript ch. 10, at 2–3, 19–39.

158. See, e.g., Ryan et al., *Comprehensive Analysis*, *supra* note 52, at 2532–36 (describing efforts in Florida to assert rights of nature to fill in the gaps left by the CWA).

159. *Id.* at 2506–13.

preventing wetland development,¹⁶⁰ but it is better equipped to protect instream values and public access than resolve the pollution problems addressed by the CWA. Moreover, environmental uses of these approaches are developing unevenly across the country at the state and local levels, leaving different zones of the same multijurisdictional water resources vulnerable without a unifying federal counterpart.¹⁶¹

The brazen implication of the majority's reasoning that this executive assertion of CWA jurisdiction fails because the legislature did not confirm it clearly—while *also* implying that wetland regulation is really beyond Congress's reach—is that only the members of the Supreme Court are entitled to weigh in on behalf of the federal interest in protecting the nation's waterways. Rather than weakening the CWA, as the Supreme Court has done in *Sackett*, the nation should be working to strengthen it. And since *Sackett* is merely a decision of statutory interpretation, inviting Congress to clarify its meaning under the "clear statement rule," this is something that Congress has the power to do at any time—just by speaking a little more clearly.

Yet given the political dynamics currently paralyzing Congress, that is a task likely easier said than done. Whether consciously or unconsciously, this immodest Court stands to benefit from legislative paralysis in the interbranch contest for power that it has heightened by abandoning its former deference to administrative interpretation. Given the Court's extraordinary decision in *Sackett*, we can only hope that a bipartisan coalition to protect the nation's waterways will emerge. It's our last best hope to prevent further weakening of the CWA, an iconic American legal accomplishment, and one that is critical to the endurance of the nation's waterways on which we all depend.

160. See, e.g., Ryan, *A Short History*, *supra* note 51, at 192–96 (describing the use of the public trust doctrine to prevent diversions from Mono Lake in California); Ryan et al., *Comprehensive Analysis*, *supra* note 52, at 2480–83 (discussing the use of the public trust doctrine to shield governments against takings claims, under the theory that they are obligated to protect environmental trust resources).

161. See Ryan et al., *Comprehensive Analysis*, *supra* note 52, at 2461–75, 2521–38. See RYAN, *A QUIET REVOLUTION*, *supra* note 50, manuscript ch. 8.