STEWARDSHIP AND *SACKETT*: AN ECOTHEOLOGICAL CRITIQUE OF THE SUPREME COURT'S NARROWING OF "WATERS OF THE UNITED STATES"

CHARLIE EVANS

INTRODUCTION

In *Sackett v. Environmental Protection Agency*,[1] the Supreme Court held that the EPA's regulatory authority under the Clean Water Act[2] did not apply to the plaintiff's lands at issue.[3] Following the majority's analysis of the Clean Water Act's statutory history, subsequent case law, plain language,[4] and dictionary definitions of the Act's "operative provision[s]",[5] nearly half of U.S. wetlands formerly safeguarded under the Clean Water Act are devoid of federal protection.[6]

This Note analyzes the Supreme Court's opinion in *Sackett* through the lens of ecotheology, a form of Christian liberation theology that examines the relationship between Christianity and the environment within the specific context of current ecological crises. From an ecotheological perspective, this Note identifies and critiques the Court's fundamental posture toward the environment, its subsequent legal analysis, and the effects of its opinion on person and place alike.

Ecotheology has developed to address what role, if any, individuals and institutions ought to play with respect to the environment. Through a litany of Biblical themes and motivations, this movement has expanded as an attempt to explain the Christian Church's contribution to and complicity in

1. 598 U.S. 651 (2023).
2. 33 U.S.C. §§ 1251-1389 (1972).
3. *Sackett*, 598 U.S. at 684 ("The wetlands on the Sacketts' property are distinguishable from any possibly covered waters.").
4. As this Note demonstrates, per the concurring Justices' arguments, "plain text" is hardly plain at all—less a result of universal knowledge and more a consequence of selective policymaking. *Id.* at 715 (Kagan, J., concurring).
5. *Id.* at 676.
6. *Supreme Court Catastrophically Undermines Clean Water Protections*, EARTHJUSTICE (May 25, 2023), https://earthjustice.org/brief/2023/supreme-court-sackett-clean-water-act.

our current ecological crises.[7] Within the ecotheological[8] tradition, engagement with the realities of environmental degradation of embodied life as a whole are paramount.[9] Ecotheology reckons with those current ecological realities, critiques the Christian Church's role in them, and sketches a path toward meaningful protection and collaboration with the environment.

This ecotheological critique of this Note highlights deficiencies in the Court's analysis, its resultant holding, and its underlying attitude toward environmental issues. Namely, this Note focuses on the consequences of the majority's emphasis on plain language and statutory history as they relate to people and the planet. In other words, ecotheology highlights the cost of the Court's unduly selective historical and statutory review that results in a deceptively simple solution to a complex environmental crisis. This Note further examines how ecotheology's internal critique of disembodied Christian theology applies with the same force to judicial opinions that similarly fail to consider the gravity of their consequences. Just as theology can be too shallow when it is isolated from the concept of lived experience, so too can judicial opinions that are ignorant toward their real-world effects.

Part II of this Note outlines the history of the Clean Water Act and early case law interpreting its text and relation to other water safety statutes and regulations. Part III provides a summary and analysis of the Court's opinion in *Sackett*. Part IV gives background on the foundations of the ecotheology movement and its core tenets. Finally, Part V critiques the Court's narrowing of the Clean Water Act and argues that the Court's reasoning—that is, its excessive reliance on dictionary definitions and statutory histories and its failure to meaningfully address environmental policy concerns—is short sighted and stems from a belief system with an overly narrow

---

7. *See, e.g.*, Pope Francis, Encyclical Letter, Laudato Si: On Care for Our Common Home (May 24, 2015) (on file with the Vatican), http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html); MARK STOLL, INHERIT THE HOLY MOUNTAIN: RELIGION AND THE RISE OF AMERICAN ENVIRONMENTALISM (2015); Laurel Kearns, *Saving the Creation: Christian Environmentalism in the United States*, 57 SOC. RELIGION 55 (1996).

8. Broadly speaking, ecotheology is the result of "the integration of the new scientific perspective on the natural world with traditional theological concepts, producing a new theological paradigm. . . . [and] generat[ing] a more effective ethical response to the environmental crisis." Lawrence Troster, *What is Eco-Theology?*, 63 CROSSCURRENTS 380, 382-83 (2013). Though this Note provides a more in-depth look into ecotheology and its main touchpoints, it should be noted that this Note's classification of the theology will inevitably be over-simplified. However, a comprehensive breakdown of the theology is not the aim of this Note. Instead, this Note will generally investigate the theology to highlight how useful its underlying premises are in critiquing the philosophical underpinnings, reasoning, and result of *Sackett*.

9. *See, e.g.*, CRAIG L. NESSAN, ORTHOPRAXIS OR HERESY: THE NORTH AMERICAN THEOLOGICAL RESPONSE TO LATIN AMERICAN LIBERATION THEOLOGY 13 (1989) ("The starting point of liberation theology is most definitely the human situation.").

conception of the relationship between person and place. This Note ultimately concludes that an ecotheological review of *Sackett* demonstrates why courts should interpret environmental statutes within the context of the environmental realities those statutes aim to protect and preserve. Unlike the Court's rationale in *Sackett*, this proposed form of judicial analysis recognizes the inherent challenges in dealing with environmental statutes and the ecological realities which those statutes protect and regulate.[10]

I. CLEAN WATER ACT AND PRECEDING CASE LAW

Congress enacted the Clean Water Act in 1972 to restore polluted waters and maintain water quality.[11] The Act's goals were fundamentally in response to and reflect an environmental situation of "crisis proportions."[12] And, indeed, the Clean Water Act responded to those "crisis proportions" quite well.[13] As Justice Kagan points out in her concurrence in *Sackett*, "[i]f you've lately swum in a lake, happily drunk a glass of water straight from the tap, or sat down to a good fish dinner, you can appreciate what the law has accomplished."[14]

But as significant as the legislation has proven to be, courts have wrestled with certain ambiguities of the statute since its enactment.[15]

---

10. It is also helpful to set parameters for what this Note does not seek to do at this juncture. This Note will not seek to issue judgments on any religious commitments the Justices may or may not have. This Note will not seek to advocate for any notions of religious orthodoxy. This Note will not attempt to offer any prescriptive calls of what theology ought to be.

11. 33 U.S.C. §1251(a) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

12. Sackett v. Env't. Prot. Agency, 598 U.S. 651, 711 (2023) (Kagan, J., concurring) (citing R. ADLER, J. LANDMAN & D. CAMERON, THE CLEAN WATER ACT: 20 YEARS LATER 5 (1993)); *see also* Robin M. Rotman et. al., *Realigning the Clean Water Act: Comprehensive Treatment of Nonpoint Source Pollution*, 48 ECOLOGY L.Q. 115, 123 (2021). ("[P]ublic awareness of water quality problems continued to grow, perhaps sparked by the Cuyahoga River and Lake Erie fires and the Santa Barbara oil spill, which all took place in 1969. In response to public outcry, Congress passed, by a sweeping majority, the Federal Water Pollution Control Act of 1972, which has come to be known as the Clean Water Act."). The crisis was of such proportions that "[d]rinking water was full of hazardous chemicals[; f]ish were dying in record numbers (over 40 million in 1969); and those caught were often too contaminated to eat (with mercury and DDT far above safe levels)." *Sackett*, 598 U.S. at 711 (citing R. ADLER, J. LANDMAN, & D. CAMERON, THE CLEAN WATER ACT: 20 YEARS LATER, 5-6 (1993)).

13. *See, e.g.*, *Clean Water Act*, NATIONAL WILDLIFE FEDERATION, https://www.nwf.org/Our-Work/Waters/Clean-Water-Act (last visited Sep. 30, 2024) ("Over the past half-century, the Clean Water Act has brought our waters back to life – turning rivers and lakes from dumping grounds into productive, healthy waterways again. It keeps 700 billion pounds of pollutants out of our waters annually, has slowed the rate of wetland loss, and doubled the number of waters that are safe for fishing and swimming.").

14. *Sackett*, 598 U.S. at 711 (Kagan, J., concurring); *see also* James Salzman, *Why Rivers No Longer Burn*, SLATE (Dec. 10, 2012, 5:20 AM), https://slate.com/technology/2012/12/clean-water-act-40th-anniversary-the-greatest-success-in-environmental-law-made-rivers-stop-burning.html.

15. *See, e.g.*, Cty. of Maui v. Wildlife Fund, 590 U.S. 165, 179-80 (2020) (considering the definitions of "nonpoint source" and "point source" pollution).

Indeed, though the Clean Water Act provided mechanisms to implement its purposes,[16] the application of its principles has proven difficult and often insufficient.[17] A major source of the Act's ambiguity is its failure to provide definitions for key terms. A notable example of this deficiency is the recurrence of "waters of the United States."[18] In the absence of definitional clarity, the Clean Water Act authorizes the EPA to define the term through regulations.[19] It additionally mandates that the U.S. Army Corp of Engineers ("ACE") implement the Clean Water Act's regulations for discharge of dredged or fill material into navigable waters.[20] The 1977 Clean Water Act offered some mid-course corrections to the Act, including delineating the scope of the term "waters of the United States" to include "adjacent" wetlands.[21] Additionally, the 1977 regulatory update defined "waters of the United States" as the following:

> (1) Waters which are: (i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (ii) The territorial seas; or (iii) Interstate waters; (2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section; (3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water; (4) Wetlands adjacent to the following waters: (i) Waters identified in paragraph (a)(1) of this section; or (ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters; (5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.[22]

---

16. *See* 33 U.S.C. § 1252.
17. *See, e.g.*, John A. Chilson, *Keeping Clean Waters Clean: Making the Clean Water Act's Antidegradation Policy Work*, 32 U. MICH. J.L. REFORM 545 (1999) (highlighting the Act's vague definitions, states' failures to adhere to its policies, and the EPA's passiveness in enforcing those policies).
18. 33 U.S.C. § 1.
19. 33 U.S.C. § 1251(d).
20. 33 U.S.C. § 1344(a),(d).
21. Sackett v. Env't. Prot. Agency, 598 U.S. 651, 723 (2023) (Kavanaugh, J., concurring).
22. 40 C.F.R. 120.2(a).

This definition, incorporated in the 1986/1988 regulations, has been so pervasive and established that it is often referred to as the "Pre-2015 Regulatory Definition of 'Waters of the United States.'"[23] Even so, its prevalence has by no means resulted in firm or consistent application. The following cases—*United States v. Riverside Bayview Homes, Inc.*,[24] *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*,[25] and *Rapanos v. United States*[26]—both illustrate the Supreme Court's struggles with articulating and applying the definition of "waters of the United States" and lay the groundwork for its most recent articulation in *Sackett*.

A. United States v. Riverside Bayview Homes, Inc.

In *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court considered whether wetlands were within the regulatory scope of the Clean Water Act and thus fell under the purview of the Army Corps of Engineers ("ACE").[27] In 1975, ACE promulgated regulations under the Act, revising the definition of "navigable waters" to include "not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce."[28] The respondent, owner of eighty acres of "low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan[,] began filling its property as part of preparations for a housing development."[29] Believing that the property was an "adjacent wetland" under the 1975 regulation defining "waters of the United States," ACE sought to enjoin respondent from filling the property without its permission.[30]

Thus, the issue before the Court was twofold: first, whether the respondent's property was a "wetland" within the meaning of the Clean Water Act and second, whether ACE's regulation over "navigable waters" gave it authority "to regulate discharges of fill material into such a wetland."[31] Ultimately, the Court found no issue with ACE's "wetlands"

23. *Pre-2015 Regulatory Regime*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/wotus/pre-2015-regulatory-regime (last visited Sept. 30, 2024).
24. 474 U.S. 121 (1985).
25. 531 U.S. 159 (2001).
26. 547 U.S. 715 (2006).
27. 474 U.S. at 123.
28. *Id.* at 123 (citing 40 Fed. Reg. 31320 (July 25, 1975)).
29. *Id.* at 124.
30. *Id.*
31. *Id.* at 126.

definition "that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation."[32] Accordingly, it quickly concluded that the property satisfied ACE's definition.[33] In considering the latter question, the Court confined its analysis to the reasonableness of the definition, applying the presumption of deference where "[a]n agency's construction of a statute . . . is reasonable and not in conflict with the expressed intent of Congress."[34]

Though acknowledging the facial difficulty of including certain "lands" within a "waters" definition, the Court found that the real difficulty lay in defining the gray area between purely dry land and solely aquatic bodies of water: "Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious."[35] Given such ambiguity, the Court held that the Act's "legislative history and underlying policies of its statutory grants of authority" supported ACE's definition.[36] Indeed, "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined."[37] In so doing, the Court recognized that linguistic precision should yield to the technical expertise of the EPA and ACE:

> In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.[38]

---

32. *Id.* at 129-30.
33. *Id.* at 130.
34. *Id.* at 131.
35. *Id.* at 132 (first citing Chemical Mfrs. Ass'n v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 125 (1985); and then citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984)).
36. *Id.* at 132-33.
37. *Id.* at 133.
38. *Id.* at 134.

Thus, finding "no reason to interpret the regulation more narrowly than its terms would indicate[,]"[39] the Court sided with ACE and enjoined respondents from filling their property without a permit.[40]

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

In *Solid Waste Agency*, Solid Waste Agency of Northern Cook County ("SWANCC"), a suburban Chicago association, purchased an abandoned parcel as a "disposal site for baled nonhazardous solid waste."[41] Because their proposed filling affected certain permanent and seasonal ponds on the parcel, SWANCC contacted federal authorities, including ACE, for guidance on whether they might require a federal land permit under 33 U.S.C. § 1344(a).[42]

Additionally, the proposed filling implicated the Migratory Bird Rule[43] in ACE's assertion of jurisdiction over the site, as the gravel pit provided habitat for migratory birds.[44] ACE found over 120 bird species that "depend[ed] upon aquatic environments for a significant portion of their life requirements" and concluded that the site could be properly classified as "waters of the United States."[45] Subsequently, even though SWANCC promised to "mitigate the likely displacement of the migratory birds and to preserve a great blue heron rookery located on the site,"[46] ACE denied SWANCC the 33 U.S.C. § 1344(a) permit.[47]

---

39. *Id.* at 139.
40. *Id.*
41. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 163 (2001).
42. *Id.*
43. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
44. *Solid Waste Agency*, 531 U.S. at 164-65.
45. *Solid Waste Agency*, 531 U.S. at 164.
46. *Id.* at 165.
47. *Id.*

Although 33 U.S.C. § 1344(a) directly pertains to discharge into "navigable waters at specified disposal sites[,]"[48] the terms of the provision ultimately rest on the meaning of "navigable waters" and thus the meaning of "waters of the United States."[49] Thus, the Court questioned "whether the provisions of § 404(a) may be fairly extended to these waters . . . ." [50] in order to determine ACE's statutory jurisdiction[51] over the site.

The Court began its analysis by distinguishing *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* with its previous opinion in *Riverside Bayview Homes*. Whereas the previous case rested on the fact that there was an adjoining connection between the contested wetlands and "navigable waters," the present case considered ponds non-adjacent to navigable waters.[52] The Court in *Solid Waste Agency* found this distinction meaningful, thus declining to extend the *Riverside Bayview Homes* ruling and opting instead for limiting the definition of "navigable waters."[53]

To support limiting the definition of "navigable waters," the Court considered several elements of the Clean Water Act's legislative history. First, the Court found that ACE's 1974 intent in enacting the statute seemed inapposite to the ponds at issue here: "It is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor."[54] Second, the Court was not persuaded by SWANCC's arguments based on Congress's failed 1977 bill which would have expanded the definition of "navigable waters" to include "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce."[55] The Court was similarly unconvinced by SWANCC's related argument that failed efforts to overturn ACE's 1977 regulations "indicate[d] that Congress recognized and accepted a broad definition of 'navigable waters' that includes nonnavigable, isolated, intrastate waters."[56] Declining to attach such meaning to Congressional inaction, the Court asserted that

48. 33 U.S.C. § 1344(a).

49. *See* 33 U.S.C. § 1362(7) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.").

50. *Solid Waste Agency*, 531 U.S. at 162. § 404(a) refers to the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 404(a), 86 State. 816, 884 (1972) (codified as amended at 33 U.S.C. § 1344(a)).

51. 33 U.S.C. § 1344(a),(d).

52. *Id.* at 168.

53. *Id.* at 167 ("We conclude that the 'Migratory Bird Rule' is not fairly supported by the CWA.").

54. *Id.* (citing 33 C.F.R § 209.260(e)(1)).

55. *Id.* at 169 (citing 123 Cong. Rec. 10420, 10434 (1977)).

56. *Id.*

"failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'"[57]

Though admitting that "navigable waters" likely included "at least some waters that would not be deemed 'navigable' under the classical understanding of that term,"[58] the Court declined to hold that "isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds."[59] A contrary finding, the Court maintained, would read "navigable" out of the statute.[60] Accordingly, the Court held that ACE's regulation over the contested site exceeded its granted authority under the Clean Water Act.[61]

C. Rapanos v. United States

Lastly, in *Rapanos v. United States*,[62] the Court considered whether "navigable waters" extended to wetlands that neither contained, nor were adjacent to, waters that were "navigable in fact."[63] This opinion consolidated two similar cases. In one of the cases, the petitioner backfilled wetlands on a parcel he owned that included "54 acres of land with sometimes-saturated soil conditions."[64] Regulators notified the petitioner that his actions violated the Clean Water Act because his saturated land contained "waters of the United States" given that there were navigable waters eleven to twenty miles away.[65] The other case similarly discussed whether "a wetland may be considered 'adjacent to' remote 'waters of the United States,' because of a mere hydrologic connection to them."[66] Thus, the Court granted certiorari and issued a plurality decision in determining

57. *Id.* at 169-70 (citing Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994)).

58. *Id.* at 171 (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 133 (1985)).

59. *Id.* at 171-72.

60. *Id.*

61. *Id.* at 174.

62. 547 U.S. 715 (2006) (plurality opinion).

63. *Id.* at 759 (Kennedy, J., concurring). Again, as a defined term, the Clean Water Act merely provides that "navigable waters" means "the waters of the United States, including territorial seas." 33 U.S.C. § 1362(7). Defining the term in such a way is a major source of the statute's ambiguity, especially as courts try to understand the definition in light of "traditional" or "common sense" interpretations of "navigable."

64. *Rapanos*, 547 U.S. at 719-20.

65. *Id.* at 720-21 (citation omitted).

66. As used here, "hydrologic" refers to "a science dealing with the properties, distribution, and circulation of water on and below the earth's surface and in the atmosphere." *Hydrology*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2019).

whether such lands constituted "waters of the United States" under the Clean Water Act.[67]

Justice Scalia's plurality opinion advocated narrowing the term, allowing regulators authority over only "relatively *permanent* bodies of water."[68] Justice Scalia reasoned that "[t]he *only natural* definition of the term 'waters,' our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court's canons of construction" supported this definitional modification.[69] In this plurality's estimation, "[t]he use of the definite article ('the')"[70] and the dictionary definition of "waters" "connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."[71] Such an understanding, the opinion argues, not only conforms to general "commonsense,"[72] but adheres to the Clean Water Act's "use of the traditional phrase."[73] Thus, the plurality arrives at the "only plausible conclusion [that] the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as streams[,] . . . oceans, rivers, [and] lakes.'"[74] Thus came the "continuous surface connection" test to determine the scope of the term. This test protects wetlands insofar as they (1) share a continuous surface connection to bodies of water that are properly considered "waters of the United States[,]" (2) have "no clear demarcation between 'waters' and wetlands, [and (3)] are 'adjacent to' such waters and covered by the Act."[75]

However, Justice Kennedy in a separate concurring opinion argued for upholding the "significant nexus" test originally articulated in *Riverside Bayview Homes*.[76] Justice Kennedy based this interpretation on a "reasonable inference of ecologic interconnection"[77] between wetlands and navigable waters. Justice Kennedy's concurrence highlights two primary concerns with the Scalia opinion and its continuous surface test. First, the requirement of permanence or continuous flow for Clean Water Act protection "makes little practical sense in a statute concerned with

67. *Rapanos*, 547 U.S. at 730.
68. *Id.* at 734.
69. *Id.* at 731-32 (emphasis added).
70. *Id.* at 732.
71. *Id.* at 732-33.
72. *Id.* at 734.
73. *Id.* (citing Daniel Ball, 77 U.S. 557 (1870)).
74. *Id.* at 739.
75. *Id.* at 742.
76. *Id.* at 759.
77. *Id.* at 780 (Kennedy, J., concurring).

downstream water quality."[78] A trickling stream, for example, would satisfy the plurality's proposed test whereas a stream that vacillates between torrents and seasons of dormancy would be excluded.[79] Similarly, Justice Kennedy considered the requirement that wetlands be indistinguishable from the navigable waters which they abut unpersuasive: Though adjacent and ecologically related, "a bog or swamp is different from a river."[80] Because such an easy association is misguided, the question becomes "what circumstances permit a bog, swamp, or other non-navigable wetland to constitute a 'navigable water' under the Act—as § 1344(g)(1), if nothing else, indicates is sometimes possible."[81]

Though failing to secure a majority on several legal issues, the Scalia plurality and Justice Kennedy agreed to remand the case to the Sixth Circuit for a new decision based on a different analysis.[82]

II. *SACKETT* V. EPA

As described, the Court's precedent on the "outer reaches"[83] of the Clean Water Act laid the foundation for its decision in *Sackett v. EPA*. In *Sackett*, the Court considered contested lots in Bonner County, Idaho, that were to be backfilled with water despite being near protected wetlands.[84] The Court faced two main obstacles at the outset: the still ambiguously defined "waters of the United States" and the case law interpreting this phrase.[85] From an ecotheological perspective, the *Sackett* Court chose a path that was overly simple, lacked a contextual basis, and resulted in harm to individuals and the environment.

After purchasing a small lot near Priest Lake, Idaho, the petitioners began backfilling their property.[86] The EPA later notified them that their lot contained protected wetlands and demanded that petitioners "immediately

78. *Id.* at 769.
79. *Id.*
80. *Id.* at 772.
81. *Id.*
82. *Id.* at 757 (plurality opinion). Ultimately, the petitioner paid the EPA $1 million in a settlement—$150,000 in civil penalties and an estimated $750,000 to mitigate the acres he had impermissibly filled. Press Release, U .S. Env't Prot. Agency, John Rapanos Agrees to Pay for Clean Water Act Violations (Dec. 29, 2008), https://www.epa.gov/archive/epapages/newsroom_archive/newsreleases/b029ab82bf92cd5f8525752e0072fc60.html.
83. Sackett v. Env't. Prot. Agency, 598 U.S. 651, 657 (2023).
84. *Id.* at 662.
85. *Id.* at 661.
86. *Id.* at 662.

'undertake activities to restore the site.'"[87] The EPA arrived at this conclusion on the basis of the significant nexus test, which it articulated in an agency memorandum[88] following the *Rapanos*[89] opinion. The guidance clarified that under this test, a significant nexus exists where "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of [those] waters."[90] Relatedly, the EPA defined "adjacent" wetlands to include those "bordering, contiguous [to], or neighboring"[91] waters which could affect interstate commerce. Since the lot was adjacent to a similarly positioned wetland complex and an unnamed tributary which fed into Priest Lake,[92] the EPA held that the petitioners' backfilling impermissibly affected the "waters of the United States."[93]

In grappling with the EPA's classification of the petitioners' property, the Court surveyed case law surrounding the ambiguity of "waters of the United States" and "adjacent,"[94] and it considered the expenses individual property owners bear on account of that ambiguity: "This puts many property owners in a precarious position because it is 'often difficult to determine whether a particular piece of property contains waters of the United States.'"[95] In addition, property owners who opt to go through the EPA's recommended path for seeking clearer guidance often face a lengthy, complicated, and expensive process—one that is likely to result in an adverse judicial determination.[96] The same is true, in the Court's estimation, of the process for obtaining a permit at all.[97]

With this cost in mind, the Court ultimately relied on plain language and statutory history to conclude that the Clean Water Act extends to wetlands that are "as a practical matter indistinguishable from waters of the United States."[98] Following *Sackett*, to establish jurisdiction over wetlands, then, the EPA or ACE must first establish that the body of water to which the

87. *Id.* at 662.

88. EPA & CORPS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U. S. SUPREME COURT'S DECISION IN *RAPANOS* V. *UNITED STATES* & *CARABELL V. UNITED STATES* 8–11 (2007) (2007 Guidance).

89. 547 U.S. 715, 759 (2006) (Kennedy, J., concurring).

90. *Id.* at 662. (internal citation omitted).

91. 40 C.F.R. § 230.3(b).

92. Significantly within the meaning of the Clean Water Act, the EPA deemed Priest Lake a traditionally navigable water in accord with 33 U.S.C. § 1362(7). *Sackett*, 598 U.S. at 663. Without such classification, the connected wetland would not have presented an issue of Clean Water Act jurisdiction.

93. *Id.*

94. *Id.* 665-69.

95. *Id.* at 669 (citing U.S. Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 594 (2016)).

96. *Id.* at 670.

97. *Id.* at 670-71.

98. *Id.* at 678 (citing Rapanos v. United States, 547 U.S. 715, 755 (2006) (plurality opinion).

wetland is adjacent fits within the "waters of the United States" classification, "*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters."[99] Secondly, the identified wetland must have "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[100]

The Court's plain language prong considered the Clean Water Act's "deliberate use of the plural term 'waters'" as especially illuminative.[101] The Court found that three separate dictionary entries[102] supported its opinion that the Clean Water Act's use of "waters" extended solely to '"those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[103] Additionally, the Clean Water Act's use of "waters of the United States" to define "navigable waters" further supported the Court's reading that "the definition principally refers to bodies of navigable water like rivers, lakes, and oceans."[104]

Moreover, the Court found additional support for its definitional line drawing in the historical statutory use of "waters" elsewhere in the Clean Water Act and other laws.[105] The Court's reading of statutory history led to the same conclusion produced by its plain language analysis: the Clean Water Act's predecessor statute,[106] other ostensibly similar statutes,[107] and early cases[108] highlight the propriety of limiting "waters of the United States" to "bodies of open water."[109]

---

99. *Id.*

100. *Id.* at 678-79 (citing Rapanos v. United States, 547 U.S. 715, 742 (2006) (plurality opinion).

101. *Id.* at 671.

102. Those dictionary definitions come from the following sources: Webster's New International Dictionary, published in 1954; Black's Law Dictionary, published in 1979; and Random House Dictionary of the English Language, published in 1987. Despite these myriad definitions, "[f]rom 1986 until 2015, under Presidents Reagan, George H. W. Bush, Clinton, George W. Bush, and Obama, the regulations continued to cover wetlands 'separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.'" *Sackett*, 598 U.S. at 721 (Kavanaugh, J., concurring) (internal citations omitted).

103. *Id.* at 671 (majority opinion) (citing Rapanos v. United States, 547 U.S. 715, 739 (2006 (plurality opinion))).

104. *Id.* at 672 (internal citation omitted).

105. *Id.* at 672-73. This "definitional line drawing," which this Note will later explore more fully, refers to the selectiveness, if not seeming arbitrariness, with which the Court decides the types of waters protected under the Clean Water Act.

106. *Id.* at 673 (citing 33 U.S.C. §§ 1160(a), 1173(e)).

107. *Id.* (citing Rivers and Harbors Act of 1899, 30 Stat. 1151 (codified as amended at 33 U.S.C. § 403)).

108. *Id.* (citing Gibbons v. Ogden, 22 U.S. 1 (1824)). To posit what is primarily a case about conflict between state and federal powers and the scope of the Commerce Clause as early authority on the meaning of "waters of the United States" seems dubious at best.

109. *Id.* at 672.

While the Court found support for its reading in the plain language of the Clean Water Act, a later Clean Water Act amendment[110] forced the Court to account for the fact that "at least some wetlands must qualify as 'waters of the United States.'"[111] What wetlands, then, does the Clean Water Act cover? The Court offered the following judicial algebra:

> The provision begins with a broad category, "the waters of the United States," which we may call category A. The provision provides that States may permit discharges into these waters, but it then qualifies that States cannot permit discharges into a subcategory of A: traditional navigable waters (category B). Finally, it states that a third category (category C), consisting of wetlands "adjacent" to traditional navigable waters, is "includ[ed]" within B. Thus, States may permit discharges into A minus B, which includes C. If C (adjacent wetlands) were not part of A ("the waters of the United States") and therefore subject to regulation under the CWA, there would be no point in excluding them from that category.[112]

With this formulation established,[113] the Court concluded that adjacent wetlands must therefore be "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."[114] Again, the Court found various dictionary definitions of "adjacent" conforming to this reading.[115] The brevity of the phrase similarly bolstered the Court's interpretation: Should Congress have intended such sweeping power, it surely would have done so in clearer terms.[116]

---

110. 33 U.S.C. § 1344(g)(1) (allowing governors of any state to "administer [their] own individual and general permit program[s] for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto . . . .").

111. *Sackett*, 598 U.S. at 675.

112. *Id.* at 675-76.

113. I'm admittedly skeptical that any sort of formulation has been established at all, but, for the sake of the argument and summary of the opinion, I will continue as if the "math" tracks.

114. *Sackett*, 598 U.S. at 676.

115. *Id.*

116. *See* Virginia v. Env't. Prot. Agency, 597 U.S. 697, 724 (2022) (preventing the EPA from wielding a "newfound power" from an "ancillary provision" in the Clean Air Act); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."); *Sackett*, 598 U.S. at 680 ("Particularly given the CWA's express policy to 'preserve' the States' 'primary' authority over land and water use, § 1251(b), this Court has required a clear statement from Congress when determining the scope of 'the waters of the United States.'").

As such, the Court held that the EPA's "significant nexus" test was inconsistent with the CWA's structure and text and would threaten states' regulatory authority, even though the Clean Water Act explicitly leaves room for state action.[117] In addition, the Court highlighted the lack of any express language in the Clean Water Act upon which this test could be based.[118] Moreover, the Court found that the significant nexus test injected uncertainty where, as evidenced by the Court's definitional and historical analysis, there was none. The Court feared that the significant nexus test would allow the "waters of United States" to become impermissibly and impracticably broad as "the boundary between a 'significant' and an insignificant nexus is far from clear."[119] Not only that, but the test's "similarly situated" component[120] would create further uncertainty for lower courts. This was because it was "based on a variety of open-ended factors that evolve as scientific understandings change."[121] The Court similarly found the EPA's ecological policy arguments for an "adjacent" definition unpersuasive because the Clean Water Act does not grant the EPA authority on account of ecological importance.[122] The Court seemed, however, to give such ecological concerns some credence in its reminder that "[s]tates can and will continue to exercise their primary authority to combat water pollution by regulating land and water use."[123]

---

117. *See* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.").

118. *Sackett*, 598 U.S. at 682 ("[A]s we have explained, the text of §§ 1362(7) and 1344(g)(1) shows that 'adjacent' cannot include wetlands that are not part of covered 'waters.'").

119. *Id.* at 681.

120. I.e., that a significant nexus exists where "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Rapanos v. United States, 547 U.S. 715, 780 (2006) (Kennedy, J., concurring).

121. *Sackett*, 598 U.S. at 681. One might well wonder alternatively at the ambiguity of water laws which wholly discount "open-ended factors" like "scientific understandings."

122. *Id.* at 683.

123. *Id.*

Accordingly, the Court reversed the Ninth Circuit's application of the significant nexus test and remanded the case consistent with its holding: The Clean Water Act only protects wetlands with a "continuous surface connection to bodies that are 'waters of the United States' in their own right, so that they are 'indistinguishable' from those waters."[124]

III. ECOTHEOLOGY: FOUNDATIONS AND RESONANCES

The case law path above is an important step in making sense of the *Sackett* opinion and establishing a meaningful critique of the opinion. Indeed, there are several ways one might come to see the opinion's shortcomings.[125] As the following will argue, ecotheology's internal critiques of the Christian church's role in current ecological crises apply viably and incisively within the jurisprudential sphere as well. Theology and judicial opinions alike can prove dangerous when either divorced from or unconcerned with the realities which they address and in which they occur.

Before sketching basic ecotheological tenets and suppositions, it is important to address why the Court should consider an ecotheological perspective at all. Given the Constitution's separation between church and state,[126] what bearing, if any, does an ecotheological approach have on the Supreme Court? What relevance does it have for the reader? Ecotheology's relevance to this case exists in highlighting the philosophical underpinnings of the *Sackett* opinion, critiquing the opinion's subsequent analysis and consequences, and ultimately furnishing unique judicial invitations.

Just as ecotheology disapproves of Biblical interpretation that fails to account for our environment, so too does it critique judicial opinions whose preoccupation with definitions, statutory history, and plain meaning comes at the expense of acknowledging the consequences of those opinions on both people and place. Judicial analysis, in other words, has embodied effects. Indeed, ecotheology's insight is not merely to highlight the opinion's analytical deficiencies but to trace those shortcomings to a

---

124. *Id.* at 684.

125. For a scientific critique, see for example *Evidence for the Multiple Benefits of Wetland Conservation in North America: Carbon, Biodiversity, and Beyond*, POINT BLUE CONSERVATION SCI. (2022),which highlights the flow of water and wetlands' roles in it from a hydrological perspective); Jeff Turentine, *What the Supreme Court's Sackett v. EPA Ruling Means for Wetlands and Other Waterways*, NRDC (June 5, 2023), https://www.nrdc.org/stories/what-you-need-know-about-sackett-v-epa. Indeed, one might also look to the criticism Justice Kavanaugh's concurrence furnishes. The basis for his concurring rather than dissenting was his agreement with the outcome of the case (i.e., the Sacketts' land didn't qualify for EPA protection under the Clean Water Act), rather than the reasoning which led to the majority opinion—namely, the significant narrowing of the Clean Water Act's authority over wetlands. *Sackett*, 598 U.S. at 715-16 (Kavanaugh, J., concurring).

126. U.S. CONST. amend. I.

philosophical starting point: a lowly conception of the environment and a competitive relationship with it. With this in mind, ecotheology advocates for a judicial analysis that acknowledges its own shortcomings when dealing with environmental statutes, recognizes those statutes' ecological realities, and understands the faultiness of statutory history and definitional work largely divorced from the environmental goals at the heart of those statutes.

Starting in the 1970s, a wealth of writing emerged in what has come to be known as "ecological theology."[127] The movement largely began as a rejoinder to Professor Lynn White ascribing principal responsibility for ongoing environmental crises to the Christian worldview.[128] Having started as a response, ecotheology is a highly contextual theology. Contrary to Professor White's assertions, the ecotheological perspective posits that "Christianity, if interpreted adequately, is not the cause of the environmental crisis but can offer ecological wisdom that may be crucial for responsible earthkeeping."[129]

While other liberation theologies generally focus on the human condition,[130] ecotheology shifts its gaze to "the condition of the created order."[131] Accordingly, the lynchpin for interpreting Scripture ecotheologically is a "perspective of justice for the earth."[132] Thus, ecotheology offers an expansive vision of redemption and liberation, one that includes people and planet alike.

---

127. Ernst M. Conradie, *Towards an Ecological Biblical Hermeneutics: A Review Essay on the Earth Bible Project*, 85 SCRIPTURA 123, 124 (2004).

128. *See, e.g.*, Lynn White, *The Historical Roots of Our Ecologic Crisis*, 155 SCI. 1203, 1205 (1967) ("Christianity, in absolute contrast to ancient paganism and Asia's religions (except, perhaps, Zoroastrianism), not only established a dualism of man and nature but also insisted that it is God's will that man exploit nature for his proper ends."). The article has produced heated debate and criticism since its publication. Professor White seems to anticipate certain critiques within the article itself: "When one speaks in such sweeping terms, a note of caution is in order. Christianity is a complex faith, and its consequences differ in differing contexts." *Id.* at 1205-06. For critiques of this essay, see, e.g., Paul A. Djupe & Patrick Kieran Hunt, *Beyond the Lynn White Thesis: Congregational Effects on Environmental Concern*, 48 J. SCI. STUDY RELIGION 670, 672 (2009), which questions whether religious doctrine plays an independent role in its effect on environmental attitudes or whether doctrine is, in part, a byproduct of social and institutional communication that also affects political positions, and see generally Ronald G. Shaiko, *Religion, Politics, and Environmental Concern: A Powerful Mix of Passions*, 68 SOC. SCI. Q. 244, 259 (1987), which suggests a more comprehensive view by way of statistical study to address the differences of values and beliefs of Judeo-Christian denominations.

129. Conradie, *supra* note 127, at 125.

130. For example, one of the more popular and recent iterations of this larger strand of theology is black liberation theology, which seeks "to interpret the Christian Gospel in such a way that it empowers black people to fight for justice, for themselves, without having to hate themselves about being Christian." James D. Kirylo & James H. Cone, *Black Theology of Liberation, and Liberation Theology: A Conversation with James H. Cone*, 385 COUNTERPOINTS 195, 198 (2011).

131. Andrew J. Spencer, *Beyond Christian Environmentalism: Ecotheology as an Over-Contextualized Theology*, 40 THEMELIOS 414, 417 (2015).

132. *Id.* (internal citation omitted).

One of the fundamental frameworks for ecotheology begins with making sense of God's ecological directive in the book of Genesis:

> And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.[133]

Scholars have offered several formulations of this command and the general relationship between humankind and creation, three of which are relevant here: dominion, stewardship, and kinship.

Along with the explicit use of the word "dominion" in the passage, a dominion framework for our relationship with the environment roots itself in the centrality of humankind in this creation account: "There is no doubt that in the mind of the sacred writer Man is the climax of the piece, destined to play [a] subordinate yet leading role in the divine scheme."[134] "Dominion" is thus an emanation of humankind's creation in God's likeness: by being made in God's image, humankind shares in God's dominion over creation.[135]

Perhaps in response to connections between this dominion framework and exploitation of the environment,[136] an ostensibly more cooperative conception emerged through a stewardship model. The stewardship model centers on the "harmonization and union between humanity and God, man and woman, humanity and the soil, and humanity and animals."[137] Thus, it

---

133. *Genesis* 1:26-28 (King James).

134. David Tobin Asselin, *The Notion of Dominion in Genesis 1-3*, 16 CATHOLIC BIBLICAL Q. 277, 278-79 (1954).

135. *Id.* at 282.

136. *See, e.g.*, Mark Heuer, *Defining Stewardship: Towards an Organisational Culture of Sustainability*, 40 J. CORP. CITIZENSHIP 31, 37 (2010) (highlighting the resultant "moral justification for harnessing and taming the natural environment for the purposes of commerce" of the dominion framework). *But see* Peter Harrison, *Subduing the Earth: Genesis 1, Early Modern Science, and the Exploitation of Nature*, 79 J. RELIGION 86, 87 (1999) ("[W]hile the biblical imperative 'have dominion' played an important role in the rise of modern science and is undoubtedly implicated in what appears to be the 'exploitation' of nature, the same imperative, when linked to the human fall, also promoted the goal of the restoration of the earth.").

137. Heuer, *supra* note 136.

interprets Genesis 1:26's "dominion" as a command not for domination but for generous rule and governance.[138]

Even more egalitarian is the kinship model, which disclaims the anthropocentric interpretation of the passage along with similar conceptions of God. This kinship relationship demands the deconstruction of such anthropocentrism "so that God can be re-imagined in terms appropriate to the processes of nature and to the emerging understanding of human interconnectedness with Earth's other species that evolutionary ecology provides."[139] While the dominion model imbues God's control and rule into those made in God's likeness, the kinship model transposes God's fundamental "relatedness" on humankind and creation at large. Thus, a trinitarian conception of God[140] imprints a relational image on humankind: "Human beings are *imago trinitas* and only correspond to the triune God of love when they recognize the imprint of the Trinity on their fellow earth creatures and live in kinship solidarity with them."[141]

As much ink as has been spilled interpreting these few verses, it is important to emphasize that "many other biblical laws call on humans to respect the earth and care positively for other creatures' well-being."[142] Ecotheology draws on the Genesis directive, other scriptural texts, and larger Christian traditions to investigate the relationship between the Bible and our current environmental crises: "Ecological theology is an attempt to retrieve the ecological wisdom in Christianity as a response to

138. Katie Kreutter, *Theology of Stewardship*, 10 VERBUM 1, 4 (2012) (footnote omitted) ("Likewise, while human beings are described as being set apart from the land and other creatures by God, it seems that it can be argued that the relationship between the two sets is less hierarchical than symbiotic. Human beings must respect the land for the source of sustenance provided by God therein and God ensures that all living creatures have access to this sustenance, thus all life is regarded as significant.").

139. Anne M. Clifford, *An Ecological Theology of Creaturely Kinship*, J. RELIGION & SOC'Y (2008 & Supp. 132, 138 (2008)).

140. That is, Father, Son, and Holy Spirit, though each being co-equal and co-eternal, composing a single God. *See* James Parkes, *The Bible, the World, and the Trinity*, 31 J. BIBLE & RELIGION 5, 10 (describing the Trinitarian conception of God wherein "Father, Son, and Spirit are equal manifestations of one Godhead, and the Godhead is equally manifested in each. But the Father is not the Son or the Spirit, the Son is not the Spirit or the Father, the Spirit is not the Father or the Son.").

141. Clifford, *supra* note 139, at 141.

142. Richard H. Hiers, *Reverence for Life and Environmental Ethics in Biblical Law and Covenant*, 13 J.L. & RELIGION 127, 131 (1996). Other keystone Biblical passages for this theology include the Sabbatical laws (e.g., Leviticus Chapter 25), Job Chapters 37 through 39, some of the Psalms (Chapters 8, 19, 24, 98, 104), some prophetic texts such as Isaiah Chapters through 9-11, 40, 65, Ezekiel Chapter 36, Joel, Amos, some of the sayings of Jesus (e.g. in Matt 6:28-30, 10:29-31), Romans 8:18-23, Colossians Chapter 1, and Revelation Chapters 21 through 22). This Note does not offer the proper context to explore these and other passages and detail. I bring them up only to offer a glimpse of pertinence of such themes through the Bible, though bolstered by Conradie's caveat that "[t]he selection of some favourite texts may unintentionally reinforce the perception that ecology is indeed a marginal concern in the Bible. The focus may be far too narrow." Conradie, *supra* note 127, at 126.

environmental threats."[143] In seeking to recover and apply wisdoms within Christian traditions to environmental crises, ecotheology similarly "offers a two-fold critique: a Christian critique of the cultural habits underlying ecological destruction and an ecological critique of Christianity."[144]

Thus, as ecotheology offers an internal critique, its tenets can apply with equal force externally. As it is both skeptical of Biblical interpretations that ignore the creation with which we've been entrusted[145] and cognizant of the harms such interpretations have caused, its presuppositions offer similarly meaningful criticisms of both the reasoning and result of *Sackett*.

IV. AN ECOTHEOLOGICAL CRITIQUE

Even the above cursory sketch illustrates the potency of ecotheology's available comments on the rationale and result of the *Sackett* opinion, so this Note will omit many of ecotheology's nuances and distinctions in favor of focusing on larger critiques. As the following will demonstrate, ecotheology can situate the analysis of the opinion within a fundamental philosophical starting point—namely, a lowly view of the environment and an essentially competitive estimation of our relationship with it. In doing so, it also highlights both the inadequacies of that starting point and related analysis, and their consequences, including the new vulnerability of nearly half of the United States wetlands.[146]

A. *Philosophical Underpinnings*

From this theological perspective, the *Sackett* opinion's focus is fundamentally misplaced. The opinion's emphasis on harm to landowners devalues the intrinsic worth of the environment because it ignores the collaborative relationship between people and place. With that starting point in mind, the majority's focus on statutory history and plain meaning is as predictable as it is dangerous. It disembodies the tangible reality which the Clean Water Act protects and regulates.[147] Within this ecotheological lens, the *Sackett* majority's low, limited vision of human beings' relationship

143. Conradie, *supra* note 127, at 126.

144. *Id.*

145. Or, with which we merely co-exist, should one subscribe to the kinship conception of the Genesis directive.

146. EARTHJUSTICE, *supra* note 6.

147. Sackett v. Env't. Prot. Agency, 598 U.S. 651, 711, 715 (2023) (Kagan, J., concurring) (highlighting the majority's ignoring wetlands' role as "'integral parts of the aquatic environment'" and thus "prevent[ing] the EPA from keeping our country's waters clean by regulating adjacent wetlands.").

with the environment[148] produces an analysis which unduly elevates person over place, largely ignores the Court's own deficiencies, and results in impermissibly narrowing the scope of the Clean Water Act.

First, ecotheological thought reveals the general deficiencies in the *Sackett* opinion's relative positioning of person and planet. In considering the expansiveness of the Clean Water Act's definition of waters, the Court wonders, "[w]hat are landowners to do if they want to build on their property?"[149] The permitting process complicates landowners' ability to build on their lands, thereby rendering the Clean Water Act's regulations and protections a mere "unappetizing menu of options [where landowners] would simply choose to build nothing."[150] Underlying this logic is a combative relationship between human beings and the environment where one's gains are often mutually exclusive of the other's. Not only that, but when conflicting interests arise, the needs of the land fall to those of the landowner.[151] The Court's interpretation divorces the Clean Water Act from its object of protection to avoid the burden such protections impose on landowners.[152] Thus, non-development is more loathsome than expansive, established protection of the environment.[153] This zero-sum view of the relationship between person and place results in caricatured, outsized concerns. In ascribing to this view, one might be left to wonder whether the "waters of the United States," absent the Court's intervention, "encompass[es] any backyard that is soggy enough for some minimum period of time[,] . . . . [or even] ditches, swimming pools, and puddles?"[154] Within an ecotheological lens, this attitude undervalues the environment specifically and the relationship between humans and the environment broadly.

---

148. *See, e.g.*, *id.* at 671 (majority opinion) (lamenting the obstacles landowners would face in trying to develop their land under alternative constructions of the Clean Water Act, culminating with the "unappetizing" decision "to simply build nothing."). As here, the Court consistently confines the land as a passive object to be exploited at the landowner's whim. Indeed, throughout the opinion, the Court primarily conceives harms as those threatening the landowner, rather than the waters and aquatic systems the Clean Water Act was intended to protect. *Id.* at 669 (highlighting landowners' "precarious position" in the case of extensive wetland protection).

149. *Id.* at 670.

150. *Id.* at 671.

151. *Id.* at 713 (Kagan, J., concurring) ("There is, in other words, a thumb on the scale for property owners—no matter that the Act (*i.e.*, the one Congress enacted) is all about stopping property owners from polluting.").

152. *Id.* at 660 (majority opinion) (describing the Clean Water Act as a "potent weapon . . . [with] 'crushing' consequences . . . [for p]roperty owners . . . .").

153. As the majority posits, violations of the Clean Water Act protections are negligible, arising from ordinary, benign land-use activities such "moving dirt." *Id.* at 669.

154. *Id.* at 658-59.

A fundamental ecotheological presupposition is the intrinsic worth of human and Earth alike.[155] One of the touchstones of this theology is the reality of creation—that is, that God has created everything, both person and place.[156] This shared fact of creation between context and creature highlights the improper narrowness of the Court's implicit view of the relationship between human beings and the environment.[157] Ecotheology substitutes a combative relationship with a cooperative one. Within this vision, human rights and environmental rights are intertwined such that an either-or vision of who benefits from laws and policies is improper.[158] Thus, opinions that affect the environment do not affect the environment alone. Instead, an opinion that ignores its potential harms to the environment also ignores downstream effects on the individual.[159] The Court's focus on the "'crushing' consequences 'even for inadvertent violations'"[160] of the Clean Water Act disadvantages both the landowner and land.

This shared createdness between person and place is not merely a point of intersection but a call to responsibility, especially considering the Genesis ecological directive and *imago dei* creation of humankind. Creation in God's image effects a representative function: As God cares for the world, so too should human beings. Thus, human beings are at once recipients of and participants in God's care for person and place:

> The human creature attests to the Godness of God by exercising *freedom with* and *authority over* all the other creatures entrusted to its care. The image of God in the human person is a mandate of power

155. *See* Conradie, supra note 127, at 129 ("And, as a 'hermeneutic of retrieval', it seeks to discern and retrieve alternative traditions that would allow Earth community to flourish yet again.").

156. *See, e.g.*, George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1628-29 (1999) ("The basis of egalitarian jurisprudence should not be the state and its interests but, rather, the intrinsic equality of all persons created in God's image.").

157. Stephen Grosse, *Building a Relationship with the Earth: Humans and Ecology in Genesis 1-3*, 5 DENISON J. RELIGION 1, 3 ("The account of God creating humans is certainly not the climax of the story but becomes a sharp contrast in the plot and perspective of the narrative. The primary focus is the revelation of the earth, not the creation of humans, and the early relationship that is established between all entities, including humans, of the new creation is based on interconnection, interdependence and intrinsic value.") (footnote omitted).

158. *See* Chika Okafor, *Returning to Eden: Toward a Faith-Based Framing of the Environmental Movement*, 26 VILL. ENV'T. L.J. 215, 238 (2015) (highlighting that "the environmental movement aims to prevent an outcome detrimental to nearly all people involved. The goal should be common: to protect the 'commons.'").

159. *Id.* at 226 ("Whether it is the 200,000 or more people who died from the 2004 Tsunami in the Pacific, the 9.5 million who required emergency assistance from the 2011 drought in Somalia, Kenya, Ethiopia and Djibouti, or the faceless future masses who must one day cope with unmitigated environmental problems resulting from actions today, the greatest 'victims' of environmental change do not have access to participate.") (footnote and internal citations omitted).

160. Sackett v. Env't Prot. Agency, 598 U.S. 651, 660 (2023) (citation omitted).

> and responsibility. But it is power exercised as God exercises power. The image images the creative use of power which invites, evokes, and permits. There is nothing here of coercive or tyrannical power, either for God or for humankind.[161]

The ecological directive in Genesis is thus an extension of "God's desire for others to flourish and the divine pronouncements that created beings are good . . . ."[162] The *Sackett* opinion, however, endorses a distorted view of this relationship. In the Court's view, the environment functions as a commodity to be exploited, rather than a responsibility entrusted to human beings.[163] The majority's subsequent burden-shifting[164] ultimately paints a picture of competition and hierarchy between human beings and our environment.[165] Thus, this separation between person and place is harmful for both as it ignores the responsibility with which human beings are tasked and leaves the environment to bear the costs of spurning that responsibility. This dynamic enables an intense individualism representing a larger disinterest for environmental protection.[166]

B. The Court's Analysis

Indeed, this unifying responsibility for which ecotheology advocates is "not reserved for landowners[,] and the concept of stewardship can imply obligations for the state and individuals as well, thus extending the network of actors who might be involved in constituting concepts of stewardship."[167] There are, of course, obstacles to translating the ecotheological prominence of this relationship between person and place to the judicial sphere. For example, federal standing doctrine inherently narrows the expansive relationship and common concerns between people, communities, and

---

161. WALTER BRUGGEMAN, GENESIS 32 (1982).

162. David J. Bryant, Imago Dei, *Imagination, and Ecological Responsibility*, 57 THEOLOGY TODAY 35, 36 (2000).

163. *See Sackett*, 598 U.S. at 669-71 (characterizing the Clean Water Act's regulations and permitting processes forcing landowners into the "precarious position" of potentially not developing their properties).

164. I.e., imposing the costs of narrowing "waters of the United States" on the waters the statute is meant to protect rather than on landowners who develop on and around those waters.

165. *Sackett*, 598 U.S. at 670 ("What are landowners to do if they want to build on their property?").

166. *See, e.g.*, Devadatta Gandhi, *The Limits and Promise of Environmental Ethics: Eco-Socialist Thought and Anthropocentrism's Virtue*, 31 ENVIRONS ENV'T. L. & POL'Y J., 35, 39-40 (2007) (highlighting an environmental ethic system wary of unchecked, self-interested individual behavior).

167. *See, e.g.*, Emily Barritt, *Conceptualising Stewardship in Environmental Law*, 26 J. ENV'T. L. 1, 9 (2014) (footnote omitted).

places by its "concrete and particularized"[168] injury requirement. Absent such a constitutionally specified injury, a person can't bring a suit on behalf of the environment.[169] Indeed, this theological insight cannot replace more formal interpretive modes.

However, these obstacles do not negate the law's ability to navigate a path forward in this ecological moment.[170] Instead, ecotheology might supplement those traditional interpretative tools and refocus courts' analysis in deciding which of those tools to employ in any given case. As such, ecotheology's concerns provide valuable insight into the shortcomings of *Sackett*. At best, the *Sackett* Court gives those concerns insufficient weight. At worst, the Court totally ignores them.[171]

Accordingly, the *Sackett* Court's devaluing of this fundamental relationship between humankind and the environment allows distraction with lexicological and historical digressions in ultimately narrowing the Clean Water Act's definition of "waters of the United States." To understand the relevance of an ecotheological critique on this aspect of the majority opinion, it is important to consider the way ecotheology critiques its own Christian traditions. Beyond underscoring Christianity's "real complicity . . . in the historical processes that led to the present environmental crisis,"[172] the ecotheological hermeneutic[173] "articulate[s] the suspicion that the Biblical texts and their interpretations have been distorted as a result of an anthropocentric bias that marginalises other

168. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

169. However, some advocate for a conferral of standing on the environment. *See* Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); Sierra Club v. Morton, 405 U.S. 727, 743 (1972) (Douglas, J., dissenting) ("Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.").

170. Marie-Catherine Petersmann, *Narcissus' Reflection in the Lake: Untold Narratives in Environmental Law Beyond the Anthropocentric Frame*, 30 J. ENV'T. L. 235, 249 (2018) ("[L]aw defines what the common interest of society is and paves the way for future actions and behaviours in the name of this common interest.") (footnote omitted).

171. Where the Court acknowledges the ecological consequences of its opinion, it does so on the opinion's penultimate page. *See* Sackett v. Env't. Prot. Agency, 598 U.S. 651, 683 (2023) ("The EPA also advances various policy arguments about the ecological consequences of a narrower definition of adjacent. But the CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority.").

172. Conradie, *supra* note 127, at 125 n.3 (citing LEONARDO BOFF, CRY OF THE EARTH, CRY OF THE POOR (1997) (highlighting six instances of anti-ecological sentiment in both Jewish and Christian traditions)).

173. "A method or principle of interpretation." *Hermeneutic*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2019); *see also* Conradie, *supra* note 127, at 129 ("[T]he concept [of] of 'hermeneutics' is best used in the sense of a theoretical reflection on and an analysis of the process of interpretation.") (footnote omitted).

creatures and the voice of the Earth itself."[174] It thus seeks to investigate, reveal, and critique Biblical interpretation which distorts the environmental realities of the Bible and of those who now read it.[175] Accordingly, the way the majority divorces the Clean Water Act from environmental realities renders the opinion vulnerable to a similar ecotheological critique.

Cast against this ecotheological vision of collaboration between person and place, where the safety of one is directly related to the welfare of the other, the majority's concern for the landowner rings hollow: "What are landowners to do if they want to build on their property?"[176] Per ecotheology's insight, the majority's misguided view of the relationship between person and place enables the above question to feature prominently and distract from the environmental realities the Clean Water Act addresses: "We start, as we always do, with the text of the CWA."[177] What is certainly a good starting point is insufficient to remedy the Court's undue focus on dictionary definitions and selective consultation of statutory and legislative histories.

Statutory interpretation, which relies heavily on dictionary definitions, is often misguided and ill-suited for considering Congressional purpose.[178] The definition of a particular word can vary substantially between different dictionaries, resulting in two effects that demonstrate the impropriety of the majority opinion's extensive reliance on them.[179] First, the wealth of dictionaries available means reliance on them can be counterproductive. Indeed, the existence of so many different definitions renders dictionary usage malleable, as Justices can cherry-pick their preferred dictionary entries. Selection of definitions may well serve as a tool for the very policymaking the Court decries.[180] Outcome-oriented Justices can select the definition most suited to their normative beliefs.[181] Indeed, what is couched as plain meaning may serve as another rhetorical element of an argument.

---

174. Conradie, *supra* note 127, at 128-29.

175. *Id.* at 129.

176. *Sackett*, 598 U.S. at 670 (2023).

177. *Id.* at 671 (citation omitted).

178. Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. TIMES (June 13, 2011), https://www.nytimes.com/2011/06/14/us/14bar.html.

179. *See generally* Aaron J. Rynd, *Dictionaries and the Interpretation of Words: A Summary of Difficulties*, 29 ALTA. L. REV. 712 (1991).

180. *Sackett*, 598 U.S. at 683 ("The EPA also advances various policy arguments about the ecological consequences of a narrower definition of adjacent. But the CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority.").

181. James Andrew Wynn, *When Judges and Justices Throw out Tools: Judicial Activism in Rucho v. Common Cause*, 96 N.Y.U. L. REV. 607, 643 (2021) ("Because the statute did not define the term . . . and because dictionaries defined the term in a variety of potentially applicable ways, a result-oriented court could have cherry picked from this diverse group of definitions the definition . . . that allowed it to reach its preferred its preferred policy result . . . .").

Second, dictionary definitions themselves are alone incapable of illustrating Congress's intent in writing a federal statute. The meanings of words are best understood within the context of the statutory scheme:

> [T]he task of the court is not to pick any pre-existing meaning out of any dictionary, or even out of the aggregate existing mental lexicons of all English and non-English speakers, but rather, for the first time in human history to construct a meaning that is sensible in light of the purposes of the statute at issue and other purposes simultaneously operating in the law.[182]

There is little to gain from removing the word to obtain its plain meaning from a myriad of dictionaries, inserting it back into the statute, and expecting a clearer picture of the spirit of the statute. Perhaps counterintuitively, over-reliance on these definitions and words' plain meaning may distort the spirit and purpose of a statute.

The Court does, however, address this last deficiency in analyzing the Clean Water Act's legislative and statutory histories.[183] Still, without more, the majority's analysis remains too narrow. Rather than strengthen its analysis, the Court's historical review exacerbates its existing deficiencies. Perhaps the most telling evidence of the shortcoming of over-dependence on statutory history lies within the *Sackett* opinion itself. Like Justice Alito in the majority, Justice Thomas,[184] Justice Kagan,[185] and Justice Kavanaugh[186] analyze the statutory history of the Clean Water Act and different courts' treatment of "waters of the United States," but come to inconsistent conclusions on the proper test for wetland coverage within the Clean Water Act.[187] Again, this is not to say that this historical analysis is

182. Gordon Christy, *A Prolegomena to Federal Statutory Interpretation: Identifying the Sources of Interpretive Problems*, 76 MISS. L.J. 55, 66-67 (2006).

183. *See Sackett*, 598 at 663-69, 673.

184. *Id.* at 685-91 (Thomas, J., concurring) (looking at historical Commerce Clause authority and precursor statutes, such as the River and Harbor Acts of 1890, 1894, and 1899 to determine other operative words' meaning within the Clean Water Act).

185. *Id.* at 711-12 (Kagan, J., concurring).

186. *Id.* at 717, 720-22 (Kavanaugh, J., concurring).

187. *Compare id.* at 709-10 (Thomas, J., concurring) ("Despite our clear guidance in *SWANCC* that the CWA extends only to the limits of Congress' traditional jurisdiction over navigable waters, the EPA and the Corps have continued to treat the statute as if it were based on New Deal era conceptions of Congress' commerce power."), *with id.* at 714 (Kagan, J., concurring) ("But there is no peculiar indeterminacy in saying—as regulators have said for nearly a half century—that a wetland is covered *both* when it touches a covered water *and* when it is separated by only a dike, berm, dune, or similar barrier.").

without use,[188] but this aspect of the majority's analysis does not overcome its relative flatness when the Court's main analytical complement is extensive appeal to dictionary definitions.

C. Sackett Results

As ecotheology offers a critique of the Court's analysis, it can similarly point to the deficiencies in the opinion's results. For example, the majority opinion attempts to highlight the practical fallacies in the EPA's construction of "waters of the United States." Absent a continuous surface definition, the Court considered the outer bounds of the Clean Water Act's purview so uncertain as to be absurd: "Does the term encompass any backyard that is soggy enough for some minimum period of time? . . . How about ditches, swimming pools, and puddles?"[189] Without judicial intervention and clarification, such needless inanity seems to be the fate of the Clean Water Act's ambiguities, at least in the eyes of the Court.[190]

In his concurrence, Justice Kavanaugh turns to a perhaps more pressing and realistic concern of the majority's *de facto* substitution of "adjacent" for "adjoining" in adopting its continuous surface test: "As applied to wetlands, a marsh is adjacent to a river even if separated by a levee, just as your neighbor's house is adjacent to your house even if separated by a fence or an alley."[191] Thus, wetlands, though ecologically adjacent, are impermissibly distant for EPA protection purposes per the Court's linguistic and historical analysis of "waters of the United States."[192] As such, where ecotheology places the fundamental human condition within a shared ecological community of intrinsic worth and dependence on God,[193] it might also offer a similar re-contextualization of judicial work with respect to

188. *But see* Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL'Y 809, 876 (1997) (footnote omitted) (highlighting more generally the dangers of interpretation of history within judicial opinions, a concept to which he refers as "the common law of history").

189. *Sackett*, 598 U.S. at 658-59.

190. *Id.* at 712 (Kagan, J., concurring).

191. *Id.* at 719 (Kavanaugh, J., concurring).

192. As an additional element of the Court's deficient consideration of the ecological subject and effect of its decision, one might consider karst wetlands, which are below-ground wetland systems. It seems unlikely that the Clean Water Act would be able to protect such systems under the narrowed definition of "waters of the United States." *See Karst Landscapes*, NATIONAL PARK SERVICE https://www.nps.gov/subjects/caves/karst-landscapes.htm (last visited Sept. 30, 2024) ("About 20% of the United States is underlain by karst landscapes and 40% of groundwater used for drinking comes from karst aquifers.").

193. Ronald A. Simkins, *The Bible and anthropocentrism: putting human in their place*, 38 DIALECTICAL ANTHROPOLOGY 397, 411 (2014) ("In a theocentric worldview, humans have more in common with the other living creatures than they have differences. All alike are dependent upon God for creation and subsistence, and all alike are valuable to God as part of his creation.") (citation omitted).

environmental regulation. Lexicological differences, for example, pale next to ecological differences.

Indeed, as ecotheology contextualizes person with respect to place, it also contextualizes person with respect to other people. Though the Court contemplates scenarios that would allow wetlands to enjoy protection under the Clean Water Act,[194] it consults neither ecological realities nor environmental authorities in considering wetland protection under the Clean Water Act. Instead, the Court's narrowing of "waters of the United States" largely follows from the fact that "[d]ictionaries tell us that the term 'adjacent' may mean either 'contiguous' or 'near.'"[195] Having consulted three dictionaries on the point, the majority may, in good faith, hold that "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."[196]

As this opinion poignantly demonstrates, justices are not ecologists. Just as there are legal terms of art, so too are there scientific terms of art.[197] An acknowledgment of the inherent limitations of judicial review of environmental realities might better situate that analysis within "the context of implementing policy decisions in a technical and complex arena."[198] The lexicology of water has relevant value within statutory interpretation, but surely the ecology of water has some relevance as well. Though one might counter that the Court is not a fit forum for such considerations,[199] the effects of the decision extend far beyond the courtroom, even as its analysis remains confined within it.

Though the Court disavows the propriety of considering policy arguments regarding the ecological consequences of their narrowing the relevant term,[200] the policy effects of its decision-making cannot be so easily dismissed: "Here, [the majority's] method prevents the EPA from keeping our country's waters clean by regulating adjacent wetlands. The vice in both instances is the same: the Court's appointment of itself as the national decision-maker on environmental policy."[201] Sadly, and contrary to the Court's express assertions,[202] a cursory glance at states' water pollution laws

194. *Sackett*, 598 U.S. at 671.
195. *Id.* at 676.
196. *Id.*
197. *See, e.g.*, *Science Glossary*, https://www.centralvalleysd.org/Downloads/Science_Glossary.pdf (last visited Sep. 30, 2024).
198. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863 (1984).
199. *See Sackett*, 598 U.S. at 683 ("But the CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority.").
200. *See id.*
201. *Id.* at 715 (Kagan, J., concurring).
202. *Id.* at 683 (majority opinion) ("States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use.").

reveals the poignancy of Justice Kagan's designation of the Court as the self-appointed, *de facto* "national decision-maker on environmental policy."[203] Twenty-four states "rely entirely on the federal Clean Water Act for protection of these waters and do not independently protect them."[204] Thus, the Court poses a twofold threat to federalism in its opinion. First, the Court arguably exceeds its judicial role by engaging in *de facto* policymaking. Second, its deference to state governments' protection of their waters is inappropriate because a significant portion of states merely adopt and rely on the Clean Water Act for that safeguarding. Indeed, in this improper, *de facto* environmental policy decision-maker role, the Court amplifies its federal power by exceeding its judicial role. The Court simultaneously disguises this move in retreating to states' regulations over their local waters – regulations which often mimic the same federal statute the Court has severely limited here. Deference to other governmental branches might produce a more accurate picture of environmental realities.[205] Instead, the Court retreats to the abstraction of plain language and handpicked statutory history under the guise of institutional competence,[206] all the while engaged in *de facto* policymaking.

As the Court cements this twofold separation (i.e., between person and place and between person and person), the Court hides it under the pretext of simplicity and practicability. Wetlands that are "as a practical matter indistinguishable from waters of the United States"[207] are certainly easy to identify and protect within the Court's analysis.[208] Just as the Court issues this wide-sweeping bright line rule, it immediately anticipates a potential obstacle to the application of its holding: "We also acknowledge that temporary interruptions in surface connection may sometimes occur

---

203. *Id.* at 715 (Kagan, J., concurring).

204. James M. McElfish, Jr., *What Comes Next for Clean Water? Six Consequences of Sackett v. EPA*, ENV'T. L. INST. (May 26, 2023), https://www.eli.org/vibrant-environment-blog/what-comes-next-clean-water-six-consequences-sackett-v-epa.

205. *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 928 (2003) ("First, agencies are likely to be in a better position to decide whether departures from the text actually make sense. This is so mostly because agencies have a superior degree of technical competence; but it is not irrelevant that agencies are subject to a degree of democratic supervision. Second, agencies are likely to be in a better position to know whether departures from the text will seriously diminish predictability or otherwise unsettle the statutory scheme.") (footnote omitted).

206. *Sackett*, 598 U.S. at 683 ("But the CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority.").

207. *Id.* at 678 (internal citation omitted).

208. "This requires the party asserting jurisdiction over adjacent wetlands to establish 'first, 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.'" *Id.* at 678-79 (internal citation omitted).

because of phenomena like low tides or dry spells."[209] While the Court identifies the issue, it presses on without providing any suggestions for alleviating the uncertainty.[210] Would such seasonally dry bodies of water constitute waters of the United States? If not, would wetlands with continuously connected surfaces to those waters thus be outside the scope of the Clean Water Act? The Court is silent.[211] The Court's failure to offer any solution highlights the deceptiveness of the continuous surface connection test. Not only does its simplicity come at the expense of its practicality, but the simplicity it offers is hollow.[212]

CONCLUSION

This critique ultimately functions as a larger invitation. Just as ecotheology criticizes Biblical interpretation that fails to account for the environment, so too might it decry judicial opinions whose preoccupation with definitions, statutory history, and plain meaning come at the expense of acknowledging the felt realities of those opinions. Ecotheology highlights the inevitability of the *Sackett* holding and analysis alike. That inescapability connects both to the opinion's philosophical underpinnings—namely, the shallowness of the opinion's view of nature—and the separateness with which it regards land and landowner.

The opinion's philosophical starting point renders its disembodied analysis—heedless of ecological authorities or environmental impacts of its decision—almost preordained. As the Court's conception of person and place guides its analysis, its subsequent definitional work allows similar dissonance with respect to judicial policymaking. Indeed, the majority could have reached the same holding (i.e., that the Sacketts' property did not constitute "waters of the United States" and thus was not subject to Clean

209. *Id.* at 678.

210. Justice Kavanaugh just as easily identifies examples of additional scenarios that demonstrate that the "Court''s overly narrow view of the Clean Water Act will have concrete impact." *Id.* at 726 (Kavanaugh, J., concurring).

211. The Court includes a footnote that addresses the unrelated scenario of a landowner's "carv[ing] out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA." *Id.* at 678 n.16 (majority opinion). Its solution, of course, does nothing to remedy the problem the Court posed in the main text of its opinion.

212. For the hidden inconsistencies in simplicity in other contexts, see for example William H. Burgess, *Simplicity at the Cost of Clarity: Appellate Review of Claim Construction and the Failed Promise of Cybor*, 153 U. PA. L. REV. 763 (2004); Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1 (2011).

Water Act authority)[213] without overruling the decades-long conception[214] of "waters of the United States."[215] Instead, the Court cursorily dismisses environmental policy arguments[216] through the course of the Court's own *de facto* policymaking. This discordance should come at little surprise, considering the Court's base, disconnected view of the relationship between person and planet.

Again, this is not to say that this ecotheological motivation should replace the modes of analysis the Court employs. Rather, ecological concern should at least *feature* in the opinion, complementing those formal modes of legal construction. As it stands now, however, such a concern is, at best, undervalued and, at worst, absent in *Sackett*. There are, of course, realities that a modern society must balance. American citizens are simultaneous participants in a natural economy (i.e., the give-and-take between ecosystems and their participants) and the financial economy (i.e., the wealth, resources, production, and consumption of goods and services). The Clean Water Act itself anticipates this economic reality, maintaining that within its comprehensive programs, "due regard shall be given to the improvements which are necessary . . .[for] the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes."[217] Indeed, that Justice Kagan[218] and Justice Kavanaugh,[219] despite disagreeing with the *Sackett* majority's analysis, agreed with its holding,[220] illustrates that the Clean Water Act cannot indiscriminately protect all wetlands.[221] Accordingly, ecotheology might lack realistic checks on its prominent regard for environmental concerns. Too much environmental deference might fail to account for the loss of citizens' private rights (e.g., land development) and ability to participate in the financial economy. Ecotheology's collaborative vision of person and place is likely ill-suited as

213. *Sackett*, 598 U.S. at 684 ("The wetlands on the Sacketts' property are distinguishable from any possibly covered waters.").

214. *See id.* at 720 (Kavanaugh, J., concurring) ("But throughout those 45 years [since Congress included 'adjacent wetlands' in the Clean Water Act's coverage] and across all eight Presidential administrations, the Army Corps has *always* included in the definition of 'adjacent wetlands' not only wetlands adjoining covered waters but also those wetlands that are separated from covered waters by a man-made dike or barrier, natural river berm, beach dune, or the like.").

215. Indeed, Justice Kavanaugh's concurrence does exactly that. *See id.* at 715-16.

216. *See id.* at 683 (majority opinion) (addressing and dismissing the EPA's "various policy arguments about the ecological consequences of a narrower definition of 'adjacent'" in two sentences).

217. 33 U.S.C. § 1252(a).

218. *Sackett*, 598 U.S. at 715 (Kagan, J., concurring).

219. *Id.* at 715-716 (Kavanaugh, J., concurring).

220. I.e., that the wetlands on the petitioners' property were distinct and separate from waters protected by the Clean Water Act.

221. *Sackett*, 598 U.S. at 684 (majority opinion) (pinpointing 33 U.S.C. § 1362(7) as the key geographic limitation on the reach of the Clean Water Act).

a primary tool for the practical statutory analysis of Clean Water Act coverage for the contested property in *Sackett*.

Nonetheless, that same vision is well-equipped to highlight the opinion's environmental blind spots and revise its analysis to acknowledge those same weaknesses. This ecotheological critique is thus an invitation to more honest and responsible judicial analysis that acknowledges its own shortcomings when dealing with environmental statutes, recognizes the ecological realities which those statutes protect and regulate, and understands the faultiness of burden shifting and line drawing between land and landowner. Ecotheology reckons with and seeks to remedy the way Christianity has aided our ecological crises. The *Sackett* Court's ecological deficiencies and errors mirror those of the Christian church. Accordingly, the critical and reformative work ecotheology offers internally can apply with similar force to the philosophical underpinnings, analysis, and effect of *Sackett*.