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Loose Canons: The Supreme Court's New Interpretive Methodology

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NOTE

Loose Canons: The Supreme Court's New Interpretive Methodology

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

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I. INTRODUCTION

Just over fifty years ago, Congress enacted the Clean Water Act ("CWA") to address burning rivers and bacteria infested waterways that plagued the United States.[1] The objective of the Act was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] The judicial branch is responsible for reviewing and interpreting the law,[3] and through such review, the United States Supreme Court has been tasked with interpreting the CWA more than any piece of environmental legislation.[4] In *Sackett v. EPA*, it did so using a new interpretive approach: canonism.[5]

Canonism emerged when the Court was faced with interpreting the proper scope of "wetlands" under the CWA.[6] The Court faced three potential interpretations: reading in the "significant nexus" test proffered by the Environmental Protection Agency ("EPA"),[7] construing "adjacent" wetlands narrowly to include only wetlands with a "continuous surface connection"

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[1] Stephen M. Johnson, *From Protecting Water Quality to Protecting States' Rights: Fifty Years of Supreme Court Clean Water Act Statutory Interpretation*, 74 SMU L. Rev. 359, 365–66 (2021).

[2] 33 U.S.C. § 1251(a)

[3] Marbury v. Madison, 5 U.S. 137, 178 (1803).

[4] Johnson, *supra* note 1, at 362.

[5] *See generally* Sackett v. EPA (*Sackett II*), 598 U.S. 651 (2023).

[6] *Id*.

[7] *Id*. at 679.

with "traditionally navigable water,"[8] or interpreting "adjacent" wetlands broadly to include nearby wetlands separated by a man-made berm, a dune, or a levee.[9] The Court began its interpretation with a textual analysis but ultimately relied on three clear statement rules to adopt the narrower reading of "adjacent."[10]

The stakes are high. On one hand, a family may face steep civil liability for their attempt to build a house on property that might contain wetlands.[11] On the other hand, the federal government's ability to protect the nation's waterways from pollution may be severely hamstrung by an overly narrow interpretation of "adjacent."[12] The *Sackett* decision was an interpretive methodologist's goldmine. The decision had it all: textual analysis, linguistic canons, common law, federalism, and even pachyderms in rodent entryways.[13]

This Note argues that a new interpretive methodology—canonism—has emerged. The Court wielded three substantive canons to shortcut its textual analysis. In doing so, it diverged from textualism and converged on canonism. Alone, each substantive canon poses a formidable force. Combined, however, these canons form a methodology that allows a court to evade unfavorable textual analysis.

This Note progresses in five parts. Part II describes the facts and holding of *Sackett*. Part III explores both the legal background of the CWA and the more general topic of statutory interpretation. Part IV recounts the different rationales and processes taken by the *Sackett* majority and concurrence when interpreting "adjacent." Part V argues that the Court's interpretation departed from textualism and converged on canonism by its overuse of substantive canons.

II. FACTS AND HOLDING

Canonism emerged under a controversy of home construction.[14] Plaintiffs, Michael and Chantell Sackett, owned a lot near Priest Lake in Bonner County, Idaho.[15] To prepare for home construction, the Sacketts backfilled their lot.[16] Shortly thereafter, the EPA notified the Sacketts that, by backfilling the property, they had violated the CWA because their lot was situated on protected wetlands.[17] The EPA then ordered the Sacketts to restore

[8] *Id*. at 678–79.
[9] *Id*. at 717–18 (Kavanaugh, J., concurring).
[10] *See infra* Part IV.A.
[11] *Sackett II*, 598 U.S. at 661–62.
[12] *Id.* at 716 (Kavanaugh, J., concurring).
[13] *See infra* Part III.C.3 for more on pachyderms in rodent entryways.
[14] *Sackett II*, 598 U.S. at 661–62.
[15] *Id.*
[16] *Id.* at 662.
[17] *Id.*

the property.[18] At the time, the agency had jurisdiction over wetlands if they were adjacent to waters that "could affect interstate or foreign commerce."[19]

The EPA used a "significant nexus" test to determine whether it could assert jurisdiction over wetlands "adjacent" to non-navigable waters.[20] A "significant nexus" would be present if the chemical, physical, and biological integrity of traditionally navigable waters were significantly affected by the wetlands alone or combined with "similarly situated lands."[21] The Sacketts' "wetlands" were separated from an "unnamed tributary" by a thirty-foot road.[22] The tributary ultimately fed into Priest Lake, which was considered traditionally navigable by the EPA.[23] As such, the EPA concluded a "significant nexus" was present when combining the Sacketts' property with the "similarly situated" Kalispell Bay Fen, a large nearby wetland complex, because the combined properties "significantly affect[ed]" Priest Lake's ecology.[24] With the EPA's determination, the die was cast.

Facing enforcement action from the EPA, the Sacketts began the process that ushered in the beginning of canonism. Believing their land to be outside EPA jurisdiction, the Sacketts first sought a hearing with the EPA but were denied.[25] The Sacketts then sued, alleging violations of the Administrative Procedure Act and the Takings Clause of the Fifth Amendment of the United States Constitution.[26] The United States District Court for the District of Idaho dismissed the Sacketts' complaint for lack of subject-matter jurisdiction, and the Court of Appeals for the Ninth Circuit affirmed.[27] The Supreme Court reversed and remanded, holding that the Sacketts could bring suit because the EPA's order was a final agency action, and the CWA did not preclude judicial review.[28] On remand, the district court entered summary judgment for the EPA.[29] The Ninth Circuit affirmed by relying on the "significant nexus" test to determine whether EPA could assert jurisdiction over wetlands.[30] The Supreme Court granted certiorari to determine "the proper test for determining whether wetlands are 'waters of the United States.'"[31]

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[18] *Id.*

[19] *Id.* (quoting 40 C.F.R. §§ 230.3(s)(3), (7) (2008)).

[20] *Id.* (quoting EPA & CORPS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U. S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES 7–11 (2007) [hereinafter 2007 Guidance]).

[21] *Id.* (quoting 2007 Guidance, at 8).

[22] Appendix at 33, Sackett v. EPA, 598 U.S. 651 (2023) (No. 21-454).

[23] *Sackett II*, 598 U.S. at 662–63.

[24] *Id.* at 663.

[25] Sackett v. EPA (*Sackett I*), 566 U.S. 120, 125 (2012).

[26] *Id.*

[27] *Id.*

[28] *Id.* at 131.

[29] *Sackett II*, 598 U.S. at 663.

[30] *Id.*

[31] *Id.* (quoting Sackett v. EPA, 142 S. Ct. 896 (2022)).

The Court reversed the circuit court's judgment and remanded for further proceedings.[32] The Court's judgment for the Sacketts was unanimous, but the justices sharply disagreed over the proper test to apply.[33] In other words, the decision regarding the proper test was really a five to four decision.[34] The five-justice majority held that the proper test for determining whether wetlands were "waters of the United States" turned on whether the wetlands had "a continuous surface connection to bodies that [were] 'waters of the United States in their own right,'" so that the wetlands were indistinguishable from those bodies.[35] According to the Court, the narrower continuous waters test was the proper test because the Court's interpretation of "waters" required the term "adjacent" to be read as "adjoining" instead of "neighboring" or "nearby."[36] The four-justice minority, in contrast, would have adopted the broader reading of "adjacent" to include wetlands separated by a man-made berm, a dune, or a levee.[37] According to Justice Kavanaugh, the broader reading of "adjacent" was the better interpretation because the definition of "adjacent" that included "nearby" and "adjoining" was used separately throughout other provisions of the CWA.[38]

III. LEGAL BACKGROUND

To understand canonism's inception, this Part of the Note will first lay a foundation for the Court's CWA precedence and its statutory interpretation. *Sackett* was an environmental law case, which will have a colossal impact on how the EPA can regulate pollution. But, *Sackett* was also a statutory interpretation case—the focal point here.

This Part starts with the pertinent statutory provisions at issue in *Sackett* and its prior interpretation by the Supreme Court. Next, it discusses textualism and its contours. Finally, it explains both linguistic and substantive canons of interpretation. The statutory interpretation foundation will help elucidate the Court's rationale and pare the textual layer from the canon-heavy interpretation.

A. The CWA and its Interpretation

The statutory provisions at issue in *Sackett* lie within the CWA. Adopted in 1972, the CWA attempted to remediate the pollution that plagued America's waterways.[39] The scope of the CWA is defined across multiple

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[32] *Id.* at 684.

[33] *See generally id.*

[34] *See generally id.*

[35] *Id.* at 678 (quoting Rapanos v. United States, 547 U.S. 715, 742, 755 (2006) (plurality opinion)).

[36] *Id.* at 676–79.

[37] *Id.* at 717–18 (Kavanaugh, J., concurring).

[38] *Id.* at 718–19 (Kavanaugh, J., concurring).

[39] Johnson, *supra* note 1, at 361.

provisions.[40] The Act makes unlawful, with various exceptions, "the discharge of any pollutant by any person."[41] The "discharge of a pollutant" includes the "addition of any pollutant to navigable waters."[42] "Navigable waters" are defined as "waters of the United States including the territorial seas."[43] Under Section 1344(g)(1), adjacent wetlands are included within "navigable water."[44] The EPA and Army Corps of Engineers are both tasked with enforcing the CWA.[45] Statutory provisions, especially the ones at issue here, require interpretation.

Three cases are important for understanding the precedential development of the CWA: *United States v. Riverside Bayview Homes, Inc.*;[46] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*");[47] and *Rapanos v. United States*.[48] In each case, the Court interpreted the CWA to determine whether an agency's interpretation of "navigable waters" was valid.[49] All three cases are important for understanding how the Court reached its decision in *Sackett*. Rapanos is especially noteworthy because the *Sackett* Court adopted its interpretation.[50]

In *Riverside Bayview*, the Court wrestled with the issue of whether the CWA combined with regulations promulgated by the Army Corps of Engineers permitted the Corps to exercise jurisdiction over wetlands.[51] After the passage of the CWA, the Corps promulgated regulations to interpret the Act as including adjacent wetlands within "navigable waters."[52] In 1976, Riverside Bayview Homes began a housing development project on eighty acres of marshy land.[53] Believing the property was within the definition of "waters of the United States," the Corps sued to prevent Riverside Bayview from filling the land without the Corps's permission.[54] The Court held that the Corps's construction of the statute asserting that wetlands adjacent to

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[40] *See* 33 U.S.C. §§ 1311(a), 1344(g)(1), 1362(7), 1362(12).

[41] *Id.* § 1311(a).

[42] *Id.* § 1362(12).

[43] *Id.* § 1362(7).

[44] *Id.* § 1344(g)(1) ("The Governor of any State desiring to administer its own individual or general permit program from discharge of dredged or fill material into the navigable waters (other than [traditionally navigable waters], including wetlands adjacent thereto) . . . .").

[45] Johnson, *supra* note 1, at 363; *see also* Sackett v. EPA (*Sackett II*), 598 U.S. 651, 661 (2023).

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

[47] Solid Waste Agency v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 162 (2001).

[48] Rapanos v. United States, 547 U.S. 715 (2006) (plurality opinion).

[49] *See generally Riverside Bayview Homes*, 474 U.S. 121 (1985); *SWANCC*, 531 U.S. 159 (2001); *Rapanos*, 547 U.S. 715 (2006).

[50] *Sackett II*, 598 U.S. at 678.

[51] *Riverside Bayview Homes*, 474 U.S. at 123.

[52] *Id*. at 124.

[53] *Id*.

[54] *Id*.

navigable waters were part of the "waters of the United States" was permissible.[55] The Court concluded that this interpretation was reasonable under *Chevron v. NRDC*.[56] Because Congress knew of and declined to curb the Corps's jurisdiction when it amended the CWA in 1977 to include both Section 1344(g)(1) and an appropriation of funds to the Department of the Interior for the completion of a "National Wetlands Inventory," the Court determined that Congress acquiesced to the Corps's interpretation.[57]

In *SWANCC*, the Court was tasked with determining whether the Corps's interpretation of the CWA permissibly granted it authority to exercise jurisdiction over bodies of water that served as habitats for migratory birds.[58] Petitioners, a consortium of Chicago suburbs looking for a disposal site, were denied a permit to fill permanent and seasonal ponds created by an abandoned gravel pit mining operation.[59] Petitioners responded to the denial by filing suit, alleging that the Corps exceeded statutory authority in promulgating the "migratory bird rule."[60] This rule interpreted "waters of the United States" to include intrastate waters that were or would be used by migratory birds.[61] The Court determined that the "migratory bird rule" was impermissible.[62] The acquiescence argument made in *Riverside Bayview* failed because the Court determined such an argument was insufficient for the Corps to overcome the text of the Act.[63] Because the Court held that the statute was unambiguous, *Chevron* deference did not apply.[64] Relying on the doctrine of constitutional avoidance, the Court noted that clear indication by Congress was required when an agency's interpretation invoked the margins of Congress's power, and the concern for a clear statement was heightened when the interpretation raised federalism concerns, that is, the interpretation would alter the federal-

[55] *Id*. at 134–35.

[56] *Id*. at 131, 134–35. *See also* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984). The Court's holding relied on *Chevron* deference. *Riverside Bayview Homes*, 474 U.S. at 131, 134–35. *Chevron* deference requires (1) the statute which the agency administers be silent or ambiguous on the question at issue and (2) the agency's interpretation be reasonable. *Chevron*, 467 U.S. at 842–44. If an interpretation satisfies the requirements, a Court will defer to the agency. *Riverside Bayview Homes*, 474 U.S. at 131. It is important to note that the Court has recently overturned *Chevron*. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

[57] *Riverside Bayview Homes*, 474 U.S. at 135–39 (citing 33 U.S.C. § 1288(i)(2)).

[58] Solid Waste Agency v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 162 (2001).

[59] *Id.* at 162–63, 165.

[60] *Id.* at 165–66.

[61] *Id.* at 164; *see also* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206-01, 41217 (Nov. 13, 1986).

[62] *SWANCC*, 531 U.S. at 174.

[63] *Id.* at 169–70.

[64] *Id.* at 172.

state balance.[65] Because there was a lack of clear statement by Congress in the CWA, the Court concluded *Chevron* deference was not afforded to the Corps.[66]

In *Rapanos*, the Court faced the question of whether wetlands constitute "waters of the United States."[67] There, petitioner Rapanos backfilled property that was intermittently saturated with the nearest navigable water located over ten miles away.[68] The regulators claimed jurisdiction and filed criminal charges and a civil suit against Rapanos.[69] In a plurality opinion, the Court concluded some wetlands were included within "waters of the United States" but only those with "continuous surface connection" to those waters.[70] The Court noted that the scope of federal jurisdiction under the CWA was limited by the interpretation of "waters."[71] The definition of "waters" showed examples of permanent, standing, or continuously flowing bodies of water like streams, rivers, oceans, and lakes.[72] On the other hand, the Court reasoned that intermittent waters were not continuous and were excluded from the definition of "waters."[73] Therefore, intermittent waters could not be within the scope of "waters," and the Corps could not exercise jurisdiction over wetlands adjacent to them.[74] In conclusion, the plurality relied on *SWANCC*'s narrower reading of *Riverside Bayview*'s holding to limit "adjacent" to a continuous surface connection.[75] The precedential development of the CWA is important for understanding the contours of the Court's rationale in *Sackett*, and interpretive methodology is imperative for understanding this Note's argument.

B. Textualism

All three decisions leading up to *Sackett* called upon the Court to interpret the phrase "waters of the United States" used in the CWA.

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[65] *Id.* at 172–73. Under the doctrine of constitutional avoidance, a court will construe a statute to avoid an interpretation that would raise a question of constitutionality unless congress indicated otherwise. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, Inc., 485 U.S. 568, 575 (1988).

[66] *SWANCC*, 531 U.S. at 174. In a footnote the *SWANCC* Court noted the rule of lenity could be applicable but was unnecessary since the court reached the conclusion that the interpretation exceeded statutory authority. *See id.* at 174 n.8.

[67] Rapanos v. United States, 547 U.S. 715, 729 (2006).

[68] *Id.* at 719–20.

[69] *Id.* at 720–21.

[70] *Id.* at 742.

[71] *Id.* at 731.

[72] *Id.* at 732–33.

[73] *Id.* at 733.

[74] *Id.* at 742.

[75] *Id.* at 740–42. *See also* Solid Waste Agency v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 167 (2001).

Textualism is an interpretive methodology that favors text over spirit.[76] Textualists seek to discern the ordinary meaning of the text,[77] interpreting it with a fixed meaning—the meaning at the time of adoption.[78] Dictionaries are one aid used to discern the meaning of text.[79] As textualist Judge Easterbrook notes, "Original meaning is derived from words and structure, and perhaps from identifying the sort of problem the legislature was trying to address."[80] In other words, original meaning is gleaned from words and context. Textualists object to the idea of relying on original intent leading to the interpretation because the words within the statute, not the intent behind it, are the law.[81] Consequentially, textualists generally avoid usage of legislative history when interpreting text.[82] Textualists see the text as a product of legislative compromise.[83] Furthermore, textualism is less concerned with consequentialism, or how a decision effectuates particular outcomes, unless the consequences arise from the text itself.[84] Textualists use canons of interpretation to assist them in determining the meaning of words.[85]

C. Canons of Interpretation

Canons of interpretation shortcut statutory interpretation by directing the interpreter toward a particular reading.[86] Canons are numerous and can be divided into multiple categories.[87] This Part *briefly* highlights a few key canons found in two such categories: linguistic canons and substantive canons. Linguistic canons focus on interpreting the text,[88] and substantive

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[76] John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2013); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 56–58 (2012) (describing the "Supremacy-of-Text Principle").

[77] SCALIA & GARNER, *supra* note 76, at 69.

[78] *Id.* at 78.

[79] *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 210–12 (Saul Levmore et al. eds., 4th ed. 2021) (discussing the use and abuse of dictionaries).

[80] Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988).

[81] *Id.* at 60.

[82] SCALIA & GARNER, *supra* note 76, at 369.

[83] John F. Manning, *supra* note 76, at 424; Easterbrook, *supra* note 80, at 63.

[84] SCALIA & GARNER, *supra* note 76, at 352–54.

[85] *Id.* at 59.

[86] MANNING & STEPHENSON, *supra* note 79, at 324.

[87] *See generally* SCALIA & GARNER, *supra* note 76 (documenting over 50 canons of construction); *see also* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 191 (2018) (concluding Scalia and Garner's list of canons in *Reading Law* is short).

[88] MANNING & STEPHENSON, *supra* note 79, at 327.

canons "place a thumb on the scale" toward an interpretation to promote a particular value or policy.[89]

1. Linguistic Canons

Linguistic canons are heuristic rules that help decipher text.[90] The ordinary and fixed-meaning canons have already been highlighted in the background on textualism.[91] The whole act canon uses, well, the whole act to ascertain the meaning of a particular provision.[92] The whole act canon relies on the assumption that Congress drafts consistently when it legislates and therefore gives language consistent meaning throughout the particular legislation.[93] This canon is used in the instant decision by both the majority and Justice Kavanaugh in their separate textual analyses.[94] Yet another canon—the canon against surplusage (also known as the presumption against superfluousness)—assumes that different words imply different meanings, so if an interpretation would render a term superfluous or redundant, that interpretation is to be avoided.[95] This Note uses the canon against surplusage in the textual discussion of Part V.[96] The harmonious-reading canon requires the adoption of an interpretation that is compatible with other provisions of the text and avoids adopting contradictory interpretations.[97] As discussed later, the Court uses the harmonious-reading canon in its textual analysis in *Sackett*.[98] Finally, the negative implication canon assumes that the inclusion of something implies the exclusion of others.[99] This canon will similarly resurface in Part V.[100]

2. Substantive Canons

Substantive canons, by contrast, "place a thumb on the scale" to divert a court's interpretation toward a particular outcome because of a particular policy or value—not because of the text.[101] Substantive canons have varying

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[89] *Id.* at 382.

[90] *Id.* at 327.

[91] *See supra* Part III.B.

[92] WILLIAM N. ESKRIDGE, JR., ET AL., LEGISLATION AND STATUTORY INTERPRETATION 263 (Foundation Press 2000); SCALIA & GARNER, *supra* note 76, at 167.

[93] ESKRIDGE ET AL., *supra* note 92, at 263.

[94] *See infra* Part IV.A, B.

[95] SCALIA & GARNER, *supra* note 76, at 174–76; ESKRIDGE ET AL., *supra* note 92, at 266.

[96] *See infra* Part V.B.

[97] Antonin Scalia & Bryan A. Garner, *Reading Law*, 180 (2012).

[98] *See infra* Part IV.B.

[99] ESKRIDGE ET AL., *supra* note 92, at 255.

[100] *See infra* Part V.B.

[101] MANNING & STEPHENSON, *supra* note 79, at 382.

levels of strength, ranging from having a tiebreaking effect to being a clear statement rule.[102] Tiebreaker rules apply when there are two equally plausible statutory interpretations.[103] On the stronger side, clear statement rules require explicit expression from Congress on a specific issue to be rebutted.[104] Two such canons are highlighted in this subpart: the clear statement rule against intrusion of traditional state function (hereinafter the "federalism canon") and the rule of lenity.[105] The Court uses both to shortcut its textual analysis in *Sackett*.[106]

The federalism canon is a clear statement rule canon which, by its name, promotes federalism.[107] In brief terms, this canon requires Congress to clearly express its intention to alter the balance between the federal government and the states.[108] Without a clear statement, the Court will not adopt an interpretation that regulates "core state functions."[109] The federalism canon acts as a "clarity tax" for legislation that could encroach upon state regulatory functions or displace state law.[110] Some commenters note that the inclusion of text equivalent to "magic language" is required to overcome such a clear statement rule.[111] The federalism canon applies even if the avoided interpretation was lawful and constitutional.[112]

The rule of lenity is a rather simplistic substantive canon. If a criminal statute is ambiguous, the rule of lenity directs the interpreter to adopt the interpretation that favors the criminal defendant.[113] The rule of lenity only

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[102] ESKRIDGE ET AL., *supra* note 92, at 341–42.

[103] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117 (2010).

[104] ESKRIDGE ET AL., *supra* note 92, at 342.

[105] It should be noted that there seems to be much more than just one federalism substantive canon. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619–29 (1992) (discussing five separate substantive canons that promote federalism and notes a potential sixth canon). *But see* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 407–10 (2010) (discussing the federalism canon as a generic canon with a group of clear statement rules) [hereinafter Manning, *Clear Statement Rules*].

[106] *See infra* Part IV.A.

[107] Manning, *Clear Statement Rules*, *supra* note 105, at 407. The federalism canon is derived from Gregory v. Ashcroft, 501 U.S. 452 (1991). *Id.* at 407–408; *see also* ESKRIDGE, ET AL., *supra* note 92, at 356.

[108] Manning, *Clear Statement Rules*, *supra* note 105, at 407–08 (citing Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).

[109] Barrett, *supra* note 103, at 118–19 (citing *Gregory*, 501 U.S. at 464).

[110] Manning, *Clear Statement Rules*, *supra* note 105, at 403.

[111] ESKRIDGE ET AL., *supra* note 92, at 342.

[112] MANNING & STEPHENSON, *supra* note 79, at 413.

[113] SCALIA & GARNER, *supra* note 76, at 296. The rule of lenity holds that criminal defendants should receive clear and fair notice by Congress that they are committing a criminal act. MANNING & STEPHENSON, *supra* note 79, at 460; ESKRIDGE ET AL., *supra* note 92, at 362.

applies when the statute is found ambiguous.[114] According to some commentators, the rule promotes due process,[115] and others have noted that the rule has been modified to promote separation of powers.[116]

3. The Elephants-in-Mouseholes Canon

The Court uses one more canon to shortcut its textual analysis—the elephants-in-mouseholes canon. This canon is one the Court wields with force to shortcut its textual analysis in *Sackett*.[117] In *Whitman v. American Trucking Associations*, the majority articulated that Congress does not "hide elephants in mouseholes."[118] In other words, this canon provides that Congress does not bury major aspects of regulatory frameworks in obscure provisions or ambiguous terms.[119] The pachyderm (the elephant) in the canon represents a broad exercise of power, while the rodent entryway (the mousehole) represents an ancillary statutory provision.[120] Legal commenters Loshin and Nielson note that the canon, in effect, operates as a clear statement rule, which means the canon has substantive canon qualities.[121] Just as the federalism canon promotes balance between the federal government and the states, and the lenity canon upholds due process and separation of powers, the elephants-in-mouseholes canon protects the value of nondelegation.[122] On the linguistic canon side, however, the canon presumes Congress does not legislate by delegating broad powers to agencies in small provisions.[123] Essentially, it is unclear whether the elephants-in-mouseholes canon is a linguistic canon, a substantive canon, or both.

IV. INSTANT DECISION

In *Sackett v. EPA*, the Supreme Court adopted the "continuous surface connection" test from *Rapanos* as the proper test for determining which wetlands were covered by the CWA.[124] The Court was unanimous in its judgment for the Sacketts, but the adoption of the "continuous surface

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[114] Barrett, *supra* note 103, at 131; SCALIA & GARNER, *supra* note 76, at 296 (noting the rule of lenity does not apply when the statute is clear).

[115] *See* Eskridge & Frickey, *supra* note 105, at 600.

[116] Barrett, *supra* note 103, at 133–34.

[117] *See infra* Part IV.A.

[118] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

[119] *Id.*

[120] Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 61 (2010).

[121] *Id.* at 21.

[122] *Id.* at 22.

[123] Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787–88 (2017).

[124] Sackett v. EPA (*Sackett II*), 598 U.S. 651, 684 (2023).

connection" test resulted in a five to four split.[125] The decision elicited concurrences in judgment from Justice Kagan and Justice Kavanaugh, both of whom disagreed with the Court's adoption of the *Rapanos* test.[126] The decision also prompted a concurrence from Justice Thomas who believed the test should be narrower.[127] For the purposes of this Note, only Justice Kavanaugh's concurrence is of importance because it raises the textual argument for "adjacent" to be read as including "nearby" wetlands.

A. Majority Opinion

The Court first started with a historical recount of water pollution regulation in the United States before the adoption of the CWA in 1972.[128] It then described the CWA's provisions as well as the penalties imposed for violating the Act.[129] The Court briefly highlighted the regulatory structure before presenting the facts of the case.[130] Following the facts, the Court reviewed the history of the CWA's application to wetlands.[131] The Court then began its textual analysis.[132]

First, the Court noted both the CWA's limitation to "navigable waters" and the Act's definition of "navigable waters" as "waters of the United States."[133] Specifically, the Court focused its analysis on defining "waters."[134] It reiterated the *Rapanos* holding and then used dictionaries to reaffirm "waters" as being permanent, standing or continuously flowing bodies of

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[125] *See generally id.*

[126] *Id.* at 710 (Kagan, J., concurring), 715 (Kavanaugh, J., concurring). Justice Kagan's concurrence agrees with Justice Kavanaugh's concurrence that "adjacent" included "nearby." *Id.* at 710 (Kagan, J., concurring). She offered the historical context and purpose for the adoption of the CWA. *Id.* at 711. Justice Kagan uses the rest of her opinion to critique the Court's usage of clear statement rules noting such rules operate as "get-out-of text-free-cards." *Id.* at 712–15 (quoting West Virginia v. EPA, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting)).

[127] *Id.* at 684–710 (Thomas, J., concurring). Justice Thomas's concurred to elaborate further on the jurisdictional scope of the Clean Water Act. *Id.* at 684–85. Specifically, Thomas focused on the terms "navigable" and "of the United States." *Id.* at 685. Thomas also makes comment about the Court's Commerce Clause jurisprudence. *Id.* at 708–10.

[128] *Id.* at 659–60 (majority opinion).

[129] *Id.* at 660–61.

[130] *Id.* at 661–63.

[131] *Id.* at 663. The Court first looked at the regulatory development following the adoption of the CWA. *Id.* at 664. The Court then turned to the prior precedent. *Id.* at 664–69. See Part III.A. for a discussion of the prior precedent. The Court finished background by discussing the current regulatory practice under the CWA. *Id.* at 669–71.

[132] *Id.* at 671.

[133] *Id.*

[134] *Id.*

water.[135] According to the Court, the meaning of "waters" was difficult to reconcile with "wetlands."[136] The Court used the meaning of "navigable" to confirm that "waters" were in fact limited to navigable bodies of water like rivers, lakes, and oceans.[137] This definition was subsequently affirmed by comparing it to other provisions in the United States Code, statutory history, and precedent.[138] The EPA argued that "wetlands" should be included in the definition of "waters" because of the presence of water in wetlands, but the Court disagreed by noting that even puddles ordinarily have a presence of water.[139] The Court further argued that it would be difficult for states to maintain the primary role of regulating water resources protected by the CWA if anything with a presence of water was under EPA's jurisdiction.[140]

The Court used statutory context to ascertain that some wetlands were "waters of the United States" and then considered which of those qualified as such.[141] According to the Court, Section 1344(g)(1) was insufficient to determine which wetlands were included because it was not the operative provision that limited the scope of the CWA.[142] The Court used the harmonious-reading canon between Sections 1344(g)(1) and 1362(7) to conclude that wetlands needed to be "waters of the United States" by themselves to be included.[143] With this interpretation in mind, the Court used dictionaries to conclude that "adjacent" wetlands could only be read to mean wetlands "contiguous" or "adjoining" to "waters of the United States."[144] The Court then invoked the elephants-in-mouseholes canon because it believed Section 1344(g)(1) to be a "relatively obscure provision."[145] Finally, the Court held that the *Rapanos* test for "continuous surface connection" was the proper test.[146]

After announcing its holding, the Court turned its attention to the EPA's request for deference and contention that "adjacent" includes neighboring.[147] The Court focused on the "background principles of construction" to expose the inconsistency of EPA's interpretation with the text and structure of the CWA.[148] First, the Court invoked the federalism canon to note the EPA's interpretation would need a clear congressional statement, especially given Section 1251(b)'s preservation of states' primary land and water use

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[135] *Id.* at 671–72.
[136] *Id.* at 672.
[137] *Id.*
[138] *Id.* at 672–73.
[139] *Id.* at 674.
[140] *Id.*
[141] *Id.* at 674–76.
[142] *Id.* at 676.
[143] *Id.*
[144] *Id.*
[145] *Id.* at 677–78.
[146] *Id.* at 678–79.
[147] *Id.* at 679.
[148] *Id.* (quoting Bond v. United States, 572 U.S. 844, 858 (2014)).

authority.[149] Next, the Court relied on the rule of lenity because the EPA's interpretation raised vagueness concerns combined with the CWA carrying criminal penalties.[150] According the Court, the "significant nexus" test's use of dynamic factors and the unclear line between which of those factors are significant and insignificant provides landowners with little notice of how to comply with the CWA.[151] With these two clear statement rules, the Court concluded that the EPA failed to establish whether there was clear congressional authorization for the EPA's interpretation.[152] The EPA raised an implied ratification argument to include "neighboring" in the definition of "adjacent."[153] The Court rejected this implied ratification argument because it did not fall within its textual interpretation and precedent and because the EPA failed to provide sufficient evidence to show acquiescence.[154] The Court also dismissed the EPA's ecological consequence policy arguments against the narrower definition of "adjacent" because ecological importance was not within the CWA's definition of EPA's "jurisdiction."[155]

The Court concluded its decision by addressing the opinions by Justice Kagan and Justice Kavanaugh.[156] It specifically stated that "[t]extualist arguments that ignore the operative text cannot be taken seriously."[157] The Court reversed the lower court's judgment and remanded for further proceedings.[158]

B. Kavanaugh's Concurrence

Justice Kavanaugh started his concurrence in judgment by outlining the general effect of the CWA and by agreeing with the Court's decision to decline adoption of the "significant nexus" test.[159] He then set forth his disagreement with the adoption of the "continuous surface connection" test because of its alleged departure from text, regulatory practice, and precedent.[160] According to Kavanaugh, the Court's holding altered the definition of "adjacent" to mean "adjoining"—words which have distinct meanings.[161] Justice Kavanaugh began his textual analysis by providing historical background of the CWA.[162] He agreed with the majority's decision

[149] *Id.* at 679–80.
[150] *Id.* at 680.
[151] *Id.* at 681.
[152] *Id.*
[153] *Id.* at 681–82.
[154] *Id.* at 682–83.
[155] *Id.* at 683.
[156] *Id.* at 683–84.
[157] *Id.* at 684.
[158] *Id.*
[159] *Id.* at 715–16 (2023) (Kavanaugh, J., concurring).
[160] *Id.* at 716.
[161] *Id.*
[162] *Id.* at 717.

in that "adjacent" *includes* "adjoining" but further contested that "adjacent" also includes "neighboring" or "nearby."[163]

As part of his textual analysis, Justice Kavanaugh used dictionary definitions to ascertain ordinary meaning.[164] Next, he used the whole act canon to note the usage of "adjoining" instead of "adjacent" in other parts of the CWA.[165] He then pointed to prior precedent that interpreted "adjacent" as broader than "adjoining" before concluding, textually, that "adjacent" wetlands have a distinct meaning from "adjoining" wetlands.[166] Kavanaugh then recounted forty-five years of consistent agency practice around "adjacent" wetlands to confirm the ordinary meaning of "adjacent."[167] Toward the end of his concurring opinion, his focus shifted to critiquing the majority opinion.[168] Specifically, Kavanaugh critiqued the majority's invocation of clear statement rules when the term "adjacent" was not ambiguous.[169] He then concluded his opinion by describing the consequential effect of the majority's holding.[170]

V. COMMENT

The Court wielded three substantive canons to shortcut its textual analysis. In doing so, the Court diverged from textualism and converged on canonism. Alone, each substantive canon poses a formidable force. Combined, however, these canons form a methodology that allows a court to evade unfavorable textual analysis. Canonism creates tension not only with textualism but also with the practice of statutory construction.

This Part is structured in two subparts. First, it discusses canonism, which is the usage of multiple substantive canons to create an aggregating effect on the interpretive process. To understand canonism, the Court's interpretation in *Sackett* must be discussed in its distinct parts. Second, this Part dives into the tension between canonism and textualism.

A. Canonism

Sackett began its interpretation with the text of the CWA.[171] The Court's textual analysis was rather limited and failed to address multiple issues. In its analysis, the Court used only one linguistic canon to exclude the "nearby" interpretation from wetlands: the harmonious-reading canon.[172] While the

[163] *Id.* at 718.
[164] *Id.*
[165] *Id.* at 719.
[166] *Id.* at 719–20.
[167] *Id.* at 720–22.
[168] *Id.* at 722–25.
[169] *Id.* at 725.
[170] *Id.* at 725–28.
[171] *Id.* at 671 (majority opinion).
[172] *Id.* at 676.

Court used the whole act canon to define "waters,"[173] it did not use this canon to assess the "adjoining" interpretation. Rather, only Justice Kavanaugh did this check.[174] The Court's interpretation of "adjacent" to mean "adjoining" when "adjoining" is explicitly used in other parts of the Act may render part of the text superfluous.[175] The Court's only attention to the invocation by Justice Kavanaugh was a line toward the end of the opinion that stated, "[t]extualist arguments that ignore the operative text cannot be taken seriously."[176] While not the operative text, Section 1344(g) modified Section 1362(7), which means it had at least some connection to the operative provision of Section 1311(a). The Court recognized that fact.[177] As discussed earlier, however, the Court used the harmonious-reading canon to shortcut its analysis of Section 1344(g).[178] To reinforce its interpretation, the Court pulled off the textualist trench coat to show the three substantive canons.

Standing on the shoulders of all the other canons is the elephants-in-mouseholes canon. After using the harmonious-reading canon and dictionary definitions to exclude "neighboring" from "adjacent,"[179] the Court invoked the elephants-in-mouseholes canon to bolster its interpretation.[180] It is unclear why the Court included this canon, as it had just concluded that nearby wetlands could not be within the scope of the CWA if they were separate from traditionally navigable waters.[181] Still, the inclusion of the canon is problematic. As some critics note, the elephants-in-mouseholes canon is particularly problematic because it is subjective in nature and therefore cannot be consistently applied.[182] Here, there are three potential interpretations available to the Court: the "significant nexus" interpretation, the inclusion of "nearby" or "neighboring" within "adjacent," and the reading of "adjacent" as "adjoining" or "contiguous."[183]

If one sizes up these interpretations as elephants or mice, the "significant nexus" is the broadest of the three and most likely to exhibit the characteristics

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[173] *Id.* at 672 ("More broadly, this reading accords with how Congress has employed the term 'waters' elsewhere in the CWA and in other laws. The CWA repeatedly uses 'waters' in context that confirm the term refers to bodies of open water.").

[174] *Id.* at 719 (Kavanaugh, J., concurring) ("By contrast to the Clean Water Act's express inclusion of 'adjacent' wetlands, other provisions of the Act use the narrower term 'adjoining.'").

[175] *See supra* Part III.C.1 (discussing the canon against surplusage).

[176] *Sackett II*, 598 U.S. at 684 (majority opinion).

[177] *Id.* at 675–76 ("Thus, § 1344(g)(1) presumes that certain wetlands constitute 'waters of the United States.'").

[178] *See supra* text accompanying note 143.

[179] *Sackett II*, 598 U.S. at 676.

[180] *Id.* at 677.

[181] *Id.* at 676.

[182] Loshin & Nielson, *supra* note 120, at 45.

[183] *See generally Sackett II*, 598 U.S. at 681; *id*. at 718 (Kavanaugh, J., concurring); *id*. at 676 (majority opinion).

of a pachyderm.[184] The narrower reading of "adjacent" is sufficient, given the Court adopted it as the proper interpretation, but the level at which an interpretation becomes too expansive is unclear. The regulatory scope of reading "nearby" into "adjacent" does not seem too expansive. The difference between the two interpretations is the inclusion of "nearby," which is already included in the dictionary term of "adjacent."[185] The "nearby" reading is certainly more expansive than the "adjoining" reading, but it is hard to see how it is an elephant—a gerbil, if that.

Expansiveness of authority is also only one aspect of the elephants-in-mouseholes canon. There is also the subjective determination of whether a particular provision is ancillary enough to render it a mousehole. Here, the Court noted Section 1344(g)(1) was a relatively obscure state-permitting provision.[186] Section 1344(g), however, does not seem so obscure; it is the permitting provision for dredged or filled material.[187] Not only that, but Section 1344 is also one of the exception provisions listed in Section 1311(a), the provision that prohibits the discharge of any pollutant.[188] Subsection (g) allows states to create their own permitting programs but limits them to "navigable waters" within their own jurisdiction.[189] Among other things, adjacent wetlands are excluded from state navigable waters.[190] It is hard to see how such a provision is small or obscure when the provision as a whole is an exception to the general prohibition of discharging pollutants.[191] Therein lies the difficulty of using the canon—it relies on subjective determinations of whether a provision is ancillary or overly expansive.[192] As such, some critics argue the canon should be abandoned all together.[193]

Further within its opinion, the Court invoked the second substantive canon in the trench coat: the federalism canon. It did so when challenging the EPA's interpretation of wetlands within the CWA.[194] Noting Section 1251(b)'s federalist policy, the Court asserted that the scope of "waters of the United States" required a clear statement from Congress.[195] Of the three canons, the federalism canon seems the most consistent with the text of Section 1251(b), although there are still consistency issues. The CWA was

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[184] *See id.* at 681.

[185] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 26 (2002) (defining adjacent as "not distant or far off . . . nearby but not touching); *Adjacent*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining adjacent as "[l]ying near or close to, but not necessarily touching.").

[186] *See supra* Part IV.A.

[187] 33 U.S.C. § 1344.

[188] *Id.* § 1311(a).

[189] *Id.* § 1344(g)(1).

[190] *Id.*

[191] *See id.* § 1311(a).

[192] Loshin & Nielson, *supra* note 120, at 45.

[193] *Id.* at 63.

[194] Sackett v. EPA (*Sackett II*), 598 U.S. 651, 679 (2023).

[195] *Id.* at 680.

adopted in 1972,[196] and as discussed earlier, the federalism canon emerged in 1991.[197] If the ordinary and fixed-meaning canons applied, Congress did not enact the CWA against the backdrop of the federalism canon. Use of the federalism canon might actually upset the meaning of the CWA because Congress lacked notice of a clear statement requirement when it enacted the statute.

The low canon on the totem pole is invoked last: the rule of lenity. The Court invoked the rule right after the federalism canon to further cast doubt on the EPA's interpretation.[198] According to the Court, the EPA's interpretation raised vagueness concerns, which, combined with the CWA's criminal penalties, would trigger the rule of lenity.[199] It is unclear why the rule of lenity was invoked at all. It only applies when a court finds a statute ambiguous,[200] and there is no particular reason for its use if two clear statement rules are included. Because the rule typically acts as a tiebreaker, the rule of lenity's inclusion was judicial overkill.[201] No tiebreaker was needed where clear statement rules had been invoked because the clear statements rules' strength would have controlled.[202] Furthermore, the Court only invoked the rule of lenity to address the EPA's "significant nexus" interpretation, but there was no discussion as to whether the "nearby" interpretation would have also triggered the rule of lenity.[203]

The aggregate effect of the substantive canons is powerful and erects a high barrier for broad statutory drafting. According to the Court, not only did the EPA's interpretation need a clear statement from Congress to avoid the elephants-in-mouseholes canon, but it also needed a clear statement that Congress intended to encroach on a state function to avoid the federalism canon.[204] Even then, the EPA still had to beat the tiebreaking rule of lenity.[205] Notably, it is unclear whether the rule of lenity would have even been triggered under the "nearby" interpretation because such discussions focused on the "significant nexus" interpretation.[206] To reiterate, the Court performed a textual analysis but then used three substantive canons to seemingly confirm its interpretation—elephants-in-mouseholes, federalism, and the rule of

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[196] *See supra* Part III.A.

[197] *See generally* Gregory v. Ashcroft, 501 U.S. 452 (1991); *see supra* Part III.C.2.

[198] *Sackett II*, 598 U.S. at 680–81.

[199] *Id.*

[200] Barrett, *supra* note 103, at 131.

[201] *See* ESKRIDGE ET AL., *supra* note 92, at 366–67 (noting the perception of the rule of lenity's usage in state courts as a tiebreaker and noting Professor Solan's contention that the canon was treated as a tiebreaker by the Supreme Court by the mid-twentieth century).

[202] *See supra* Part III.C.2.

[203] *Sackett II*, 598 U.S. at 681.

[204] *See id.* at 677, 679–80.

[205] *See id.* at 680–81.

[206] *Id.*

lenity. With each invoked substantive canon, the methodology shifted toward subjective value determinations.

Therein lies the core of canonism—the aggregation of substantive canons rooted in certain values to interpret statutes. Alone, each substantive canon applies force toward a particular interpretation. In aggregate, the canons apply an insurmountable force on any broad interpretation. So, the more values one incorporates into the interpretive process, the more force there is applied toward a particular interpretation. This is true regardless of the plain text and structure of the statute. With that explanation of what canonism is and its impact in statutory interpretation, the next Part of this Note shifts the focus toward the conflict between canonism and textualism.

B. Canonism's Tension with Textualism

It can hardly be said that the Court's analysis was a textualist one. As discussed above, the Court's textual analysis had holes, so it turned to substantive canons to further develop its interpretation. Notably, however, substantive canons on their own may be in tension with textualism, which is already a topic in legal scholarship.[207] Commenters Eskridge and Frickey have argued that substantive canons, especially clear statement rules, raise empirical and normative issues in interpretation.[208] Justice Scalia has characterized clear statement rules as "dice-loading" rules, which can pose problems to the "honest textualist."[209] Aggregating substantive canons may create more problems because the analysis becomes centered around not just one value but multiple. Whatever tension exists between textualism and singular substantive canons may be exacerbated when more values are added to the analysis.

The inclusion of more values has a particularly detrimental effect on broad statutes. Essentially, the more values that bleed into the analysis, the more a broad statute risks being gerrymandered in multiple ways. A clear congressional statement within legislation might come at the expense of broad construction where a Court might invoke the negative implication canon to exclude its application in other instances. The only solution would be for Congress to apply a clear statement for every rule it may face. In effect, however, that could result in wordier statutes that may have been simplified using broader terms. Additionally, even with these clear statements, there would not be a guarantee of sufficient clarity to defeat a clear statement rule.

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[207] *See generally* Loshin & Nielson, *supra* note 120, at 49–52 (addressing the development and issues surrounding the elephants-in-mouseholes canon); *see also* Barrett, *supra* note 103, at 181–82 (concluding the usage of substantive canons cannot advance an interpretation at the expense of the statute's plain language).

[208] Eskridge & Frickey, *supra* note 105, at 646 (concluding the quasi-constitutional law surrounding substantive canons, clear statement rules specifically, raises empirical and normative issues).

[209] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 27–29 (Amy Gutmann ed., Princeton University Press 1997).

Congress also lacks the foresight to account for the inception of future clear statement rules. Therefore, that exhaustive solution would only work if there were no other substantive canons being developed. Essentially, canonism is problematic because it is centered around subjective values that require exceedingly high clarity in statutory construction to negate the invoked substantive canons.

In *Sackett*, the Court used a facially textualist approach, but subversively used canonism by invoking three substantive canons to construct its interpretation.[210] In sum, the Court used a textual analysis that quickly shifted into a substantive canons analysis. It is hard to see how the Court's textual analysis could have stood on its own because it would have conflicted with the ordinary meaning of "adjacent." Because canonism imposes an immense hurdle for any textual interpretation that faces its fury, courts should avoid using it when statutory text and structure can easily ascertain the proper interpretation.

VI. CONCLUSION

In conclusion, the Court's interpretation is not a textualist one. The overuse of substantive canons leads one to conclude that the Court used an entirely separate methodology of interpretation: canonism. Litigants can only hope such a methodology is cabined in the future. Otherwise, the substantive canons in a textualist trench coat will appear again to hunt textual interpretations that lacked clear statements, and judges' own subjective determinations may bleed into the interpretive process.

[210] *See supra* Part IV.A.