Understanding Aims: Environmental Textualism and the Faulty Dissents in *County of Maui v. Hawaii Wildlife Fund*

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ABSTRACT

County of Maui v. Hawaii Wildlife Fund was one of the most significant environmental law rulings in 2020. The case revolved around statutory interpretation of what is considered to be a point source and set new precedent for interpreting permitting requirements regarding the discharge of pollutants. In a 6-3 decision, the Supreme Court ruled in favor of Hawaii Wildlife Fund, determining the County of Maui had violated the Clean Water Act by not receiving permits for discharging pollutants into navigable waters. The dissenting Justices argued that the Court had erred interpreting the statute and instead presented arguments in favor of a textualist approach to interpreting environmental statutes. This article discusses the shortcomings of textualist interpretations of environmental law statutes. Instead, a purposivist approach should be applied to future statutory interpretation of environmental law cases, an approach which begins with thorough consideration of the ultimate aims of the law and the issue that statute was intended to address. Such an approach is preferred over a textualist approach in the context of environmental laws because environmental laws are usually passed to address or prevent a particular harm, so to ignore that intent detracts from environmental laws' effectiveness.

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I. INTRODUCTION

The Supreme Court's ruling in *County of Maui v. Hawaii Wildlife Fund*[1] ("*County of Maui*") was one of the most significant environmental law decisions in 2020. The ruling not only set new precedent for permitting requirements for the discharge of pollutants under the Clean Water Act, but the dissenting opinions also highlighted an equally significant issue in environmental law: the way in which environmental statutes are interpreted. When interpretation of environmental law does not account for the aims of a given statute, the outcome will eviscerate the laws, leaving only a shadow of their intended impact.

Part II of this Article begins by providing background on statutory interpretation and its relation to textualism and purposivism, particularly in relation to environmental law. Part II next provides case background regarding *County of Maui* with a focus on the opinions of the court. These opinions are then considered in greater depth to examine the use of "environmental textualism"[2] in the dissenting opinions to illuminate the shortcomings of this approach in comparison to a purposivist method of statutory interpretation. Part III summarizes how textualist approaches in interpretating environmental statutes severely limit the effectiveness of environmental law, whereas an interpretation that considers the desired aims of environmental statutes is the best approach. Part IV offers concluding remarks.

II. BACKGROUND

Statutory interpretation is the process courts employ to discern the meaning of relevant statutes. Interpretation can involve multiple steps that differ in importance based on the interpretive theory leveraged by a given judge. These steps may include consideration of the ordinary meaning of a statutory text, inspection of the broader statutory context, previous readings of the statute by courts, legislative history of the statutory provision, and existing implementation of the statute.[3] Textualists place prominence in the specific words of the statutory text, looking towards what they consider to be the ordinary meaning of words used in the

[1] County of Maui v. Haw. Wildlife Fund, 140 S.Ct. 1462 (2020).

[2] This Article refers to the interpretative doctrine found in Justices Thomas and Alito's dissents as "environmental textualism." The doctrine of environmental textualism largely mirrors traditional textualism but is referred to as a distinct concept because the purposes for which environmental laws are passed are less easily divorced from the text as other areas of the law.

[3] *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 2 (2018).

applicable statute and using that to bind the judicial interpretation they can then make in relation to the statute.[4]

Both traditional and environmental textualism are juxtaposed against the understanding of environmental law that this Article advocates. The correct legal understanding of environmental laws should be interpreted through consideration of the law's ultimate aim and by reviewing relevant statutory and case law relating to the issue the statute seeks to address. Further, because environmental problems are regularly changing and scientific knowledge of environmental issues are consistently advancing, statutory interpretation of environmental law must account for these changes by considering new legal issues that arise in relation to the aims of the statute. Under the proper analysis of environmental statutes, interpretation is based primarily upon the specific aim of the analyzed statute, such as preventing groundwater pollution from reaching navigable bodies of water like the Pacific Ocean, as discussed in *County of Maui*.

Considering the aim of environmental laws when carrying out statutory interpretation provides a broader—and more accurate—method for interpreting environmental law because it places primacy in determining which distinct issue or issues environmental laws were promulgated to address and applies the understanding of these aims to subsequent legal interpretation. Accordingly, statutory interpretation of environmental law is then best conducted through a purposivist approach, which primarily considers the ultimate aim of the statute and evolves alongside scientific advances regarding environmental issues. Contrasted with a purposivist interpretation, environmental textualism provides a decidedly narrow conception of how law relates to the human relationship with the natural world, resulting in incorrect legal interpretation and negative effects on the trajectory of environmental laws.

County of Maui centered around interpretation of the Clean Water Act (CWA),[5] which is the primary federal law regulating water pollution

[4] Although interpreting the text through "ordinary meaning" is central to textualist interpretation, there remains a lack of clarity as to whom this meaning is ordinary. *See, e.g.*, Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 736–37 (2020) (discussing the difficulty in determining what "ordinary meaning" is); Anita S. Krishnakumar, *Metarules for Ordinary Meaning*, 134 HARV. L. REV. F. 167, 167–69 (2021) (responding to Professor Tobia's article). Justice Scalia has offered a solution, suggesting that textualists should read statutes as "ordinary Member[s] of Congress would have read them." Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

[5] Clean Water Act, 33 U.S.C. §§ 1251–1389. The provisions discussed were first found in the Federal Water Pollution Control Act Amendments of 1972, which rewrote the Federal Water Pollution Control Act enacted in 1948.

in the United States. The County of Maui ("County") relies on four injection wells at its Lahaina Wastewater Reclamation Facility for disposing treated wastewater effluent from the local sewage system. In 2013, the United States Environmental Protection Agency (EPA), as well as University of Hawaii researchers, the State of Hawaii Department of Health, and the U.S. Army Corps of Engineers, carried out tracer dye studies that tracked the path of the wastewater effluent and found that this pollutant had been reaching the Pacific Ocean.[6] The CWA regulates pollution from point sources through the National Pollutant Discharge Elimination System (NPDES), with the permit program being administered through state governments under the authority of the EPA.[7]

The Hawaii Wildlife Fund, along with other environmental groups, first brough suit in 2012 against the County for discharging pollutants into navigable waters without a permit, in violation of the CWA.[8] In the district court, the Hawaii Wildlife Fund was granted partial summary judgment after the court found that the tracer dye studies showed that the path of discharged pollutants clearly led to the Pacific Ocean.[9] The County appealed, arguing that the NPDES permitting requirement did not apply because the wastewater effluent travelled through groundwater prior to reaching navigable waters. The County argued that, as a result, it was not in violation of the statute for bypassing NPDES permitting requirements. The Ninth Circuit affirmed the district court ruling that the County violated the CWA by discharging pollutants into the Pacific Ocean in 2018 without going through the NPDES permitting process.[10]

The Supreme Court granted review in February 2019. Arguments were heard in November 2019, and a decision was issued on April 23, 2020. The specific question before the court was whether the CWA requires a permit to be obtained when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, which in this case was groundwater.[11] In a 6-3 decision, the Supreme Court ruled in favor of Hawaii Wildlife fund, affirming lower court rulings that the

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[6] *See generally* CRAIG R. GLEN ET AL., SCH. OF OCEAN AND EARTH SCI. AND TECH. AT UNIV. OF HAW. AT MANOA, LAHAINA GROUNDWATER TRACER STUDY – LAHAINA, MAUI, HAWAII (2012), https://bit.ly/3FyJCQ5 (detailing the findings of the tracer dye study).

[7] *See National Pollutant Discharge Elimination System (NPDES)*, ENV'T PROT. AGENCY, https://bit.ly/30dUliJ (last visited Dec. 20, 2021) (describing the NPDES's history, permitting system, and resources).

[8] *See* County of Maui v. Haw. Wildlife Fund, 140 S.Ct. 1462, 1469 (2020).

[9] *See* Haw. Wildlife Fund v. County of Maui, 24 F.Supp.3d 980, 1005 (D. Haw. 2014).

[10] Haw. Wildlife Fund v. County of Maui, 881 F.3d 754, 768 (9th Cir. 2018).

[11] *See County of Maui*, 140 S.Ct. at 1470.

County violated the CWA by allowing wastewater effluent discharges to reach navigable water without proper permitting. The Court reasoned that the addition of pollutants to the Pacific Ocean through groundwater was the "functional equivalent" of direct discharge.[12]

Justice Breyer penned the opinion of the Court. The phrase at issue in *County of Maui* was "from any point source," found in the section of the CWA defining the terms "discharge of a pollutant" or "discharge of pollutants."[13] Those phrases are defined as both "(A) any addition of any pollutant to navigable waters from any point source, [and](B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."[14] The County argued that the conveyance through which the pollutants from the wastewater injection wells reached the Pacific Ocean was the groundwater, not the wells, because, between the injection wells and the Pacific Ocean, the effluent had to travel through groundwater.[15] Therefore, the County contended, it had not explicitly violated the CWA by not having NPDES permits. The Supreme Court disagreed, finding that the language used in the CWA is broader in reach than the County had argued. Further, the Court found that the path through which the injection well pollutants reached the Pacific Ocean was clear and direct enough to warrant being considered functionally equivalent to direct pollution.[16]

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[12] *Id.* at 1477.

[13] Justice Kavanaugh wrote a concurring opinion, joining the Majority, but also noting the vagueness of the CWA statutory text as it related to "from any point source," and contending that the Majority's interpretation of the CWA aligned with a previously written opinion by Justice Antonin Scalia in *Rapanos v. United States*. See *County of Maui*, 140 S. Ct. at 1478 (Kavanaugh, J., concurring) (citing *Rapanos v. United States*, 547 U.S. 715 (2006)).

[14] Clean Water Act § 502(12), 33 U.S.C. § 1362(12).

[15] *See County of Maui*, 140 S.Ct. at 1470.

[16] *Id.* at 1477. However, Justice Breyer states that the Majority disagrees with the breadth with which the Ninth Circuit had previously interpreted the language of the CWA, underlining the Majority's position that proximate cause must clearly be shown between the point source of the pollutant and navigable waters. *See id.* at 1471 ("Our view is that Congress did not intend the point source-permitting requirement to provide EPA with such broad authority as the Ninth Circuit's narrow focus on traceability would allow. First, to interpret the word 'from' in this literal way would require a permit in surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird's feathers, or, to mention more mundane instances, the 100-year migration of pollutants through 250 miles of groundwater to a river.").

However, the Court's decision was far from unanimous. Dissenting opinions[17] from Justice Thomas, joined by Justice Gorsuch,[18] and Justice Alito[19] diverged from the Majority and Concurring opinions based on the dissents' use of environmental textualism. The core of environmental textualism is that environmental statutes, such as the CWA, should be interpreted by looking first at the text under consideration, determining the text's official dictionary definition, and then applying that definition to the case at hand, regardless of the specific contours of environmental circumstances. Any form of textualism is a narrow approach to statutory interpretation that tries to determine the law's meaning by considering no more than the ordinary meaning of statutory text.[20] As discussed below, this narrow approach in the context of environmental law is patently incorrect.[21]

True to form of a textualist analysis, Justice Thomas's dissent in *County of Maui* begins with a lengthy discussion of the dictionary.[22]

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[17] Although dissenting opinions are non-controlling, legal analysis of these opinions remains relevant for multiple reasons. First, dissenting opinions provide a window into one or more arguments that may be used to rebut the position of the majority opinion. Through assessment of counterarguments to majority opinions, legal scholars are able to better understand and consider the central arguments at hand within the court on issues raised in cases. Second, dissenting opinions can also highlight what may be viewed as potential pitfalls in the reasoning or interpretation of the majority opinion. Aside from simply presenting counterarguments, dissenting opinions can call into question ways in which majority opinions have been presented in an inconsistent or incoherent manner. Third, since the composition of the court changes over time, dissenting opinions may serve as a way to forecast future opinions of judges in relation to specific issues and how these opinions could hold greater or lesser weight depending on this change in court composition. Finally, dissenting opinions can raise discussion of additional relevant legal principles. While the majority opinion may focus on certain aspects of the case at hand, dissenting opinions can raise additional considerations which may not have been touched upon, or discussed at length, in the majority opinion.

[18] *County of Maui*, 140 S. Ct. at 1479 (Thomas, J., dissenting).

[19] *Id.* at 1482 (Alito, J., dissenting).

[20] *See, e.g.*, ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (Amy Gutmann ed., 1997).

[21] *See infra* Part III.

[22] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008). In the *Heller* ruling, Justice Scalia, writing for the majority, utilized a dictionary analysis to interpret the Second Amendment as providing an individual right to bear arms for the purpose of self-defense. *Id.* at 581–84. Yet in dissent, Justice Breyer contends that the majority failed to apply the textualist interpretation outlined in the Scalia opinion and fails to support its position that the Second Amendment provides an individual right to bear arms for self-defense—citing the majority's failure to find credible historical or textual support for the basis of bearing arms as a means of individual self-defense. *See id.* at 720–21 (Breyer, J. dissenting). Legal scholars have also argued that the opinion written by Scalia, a self-described textualist, as being antithetical to textualist interpretation of the constitution. *See generally* Jeffrey P. Kaplan, *Unfaithful to Textualism*, 10 GEO. J.L. PUB.

Justice Thomas's dictionary examination began following his explicitly stated concern about the Majority's departure from how he read the text.[23] Justice Thomas analyzes numerous definitions of the word "addition" to clarify why, in his opinion, it is the most important word limiting the statutory text when coupled with the words "to" and "from," which the Majority purportedly failed to understand. That Justice Thomas's approach is rooted in environmental textualism is further exhibited as his opinion concludes by clarifying that the Supreme Court is not a "superlegislature" and that the Justices' job is simply to "'follow the text.'"[24]

Justice Alito's dissent appeared even more at odds with the Majority opinion, claiming that the Majority was "devis[ing] its own legal rules, instead of interpreting those enacted by Congress."[25] Justice Alito continues by raising his confusion over the term "functional equivalent," because it has no clear textual meaning and stating that the Majority's "nebulous standard" is not a plausible interpretation of the statutory text.[26] While Justice Alito's dissent is less heavily riddled with definitions and contains more analysis of the statutory text than Justice Thomas's, the concluding section of his opinion still begins by stating that "[i]nstead of concocting our own rule, I would interpret the words of the statute"—clearly showing his opinion that the Majority departed from the statutory text.[27]

The dissenting Justices argue that the intent of the environmental act and its practical considerations are unimportant and, instead, what matters are dictionary definitions of what we see in the text. Textualism in the context of environmental statutes is not only wrong but completely backwards. The intent and practical considerations—the aim of the statute—is exactly where the analysis should begin, and the text simply provides the codified rules which serve as the endpoint for applying the aim of the statute to the case under consideration.

POL'Y 385 (2012) (presenting significant evidence for the contradictory nature of textualist principles and their application to the ruling in *Heller* regarding the Second Amendment); Dennis Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171 (2009) (same).

[23] *Id.* at 1479 (Thomas, J., dissenting) ("Because I would adhere to the text, I respectfully dissent.").

[24] *Id.* at 1482 (quoting Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. 121, 135 (2015)).

[25] *Id.* at 1482 (Alito, J., dissenting).

[26] *Id.* at 1483.

[27] *Id.* at 1486.

III. PROPER CONSIDERATIONS IN INTERPRETING ENVIRONMENTAL LAW

The problem with environmental textualism is that it begins by focusing on the text and moving forward to *determine* an aim. But this focus is incorrect and creates situations in which incorrect judicial interpretations mischaracterize environmental laws. Instead, analyses of environmental laws must begin with the aim. Courts must ask: What is the reason that this law was put in place and what was the aim? The reason that environmental laws are put into place is to address environmental harm. These laws protect the environment from harm caused by human activity. It would make no sense to think of the text coming first and the aim of the law to come later. The text only arises to achieve the goal of protecting an aspect of the environment. To interpret environmental law, we must consider what the statute's aim is, or was, and work back to what the text may properly include. The problem is that environmental textualism flips the appropriate way of interpreting environmental law and resolutely arrives at wholly incorrect interpretations.

The failure of environmental textualism has been exemplified in Justices Thomas and Alito's dissents in *County of Maui*. The aim of the CWA is quite clear. The CWA explicitly states that the goal of the act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[28] As we look to the specific case of *County of Maui*, we should consider the CWA's enumerated goal the starting point for interpreting whether or not the County was required to go through the federal permitting process for running injection wells whose wastewater effluent was reaching the Pacific Ocean, which constitutes a navigable water under the CWA.

That the CWA was enacted to expressly address situations such as the one in *County of Maui* should be readily apparent. The CWA's aim is to ensure that navigable waters are not being subject to unprotected pollution arising from the most basic examples of collective action problems. Historically, the CWA served as a way for the federal government to codify and control water pollution through legislative action.[29] Justice Thomas's argument presents an antithesis to the history of the CWA, presuming that this act was an exercise in regulating commerce[30] and then attempting to claim that a mosaic of dictionary definitions somehow limits the breadth of the CWA and eliminate NPDES

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[28] Clean Water Act § 101(a), 33 U.S.C. § 1251(a).

[29] *See*, e.g., Robert L. Glicksman and Matthew R. Batzel, *Science, Politics, Law, and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark*, 32 WASH. U. J. L. & POL'Y 99, 100 (2010).

[30] *See County of Maui*, 140 S.Ct. at 1481 (Thomas, J., dissenting).

permitting requirements. Similarly, Justice Alito's discontent with the Majority's opinion reflects a theory of interpretation using each word as a starting point, with no connection to the contours of the environmental issues at hand.

County of Maui illuminated multiple environmental law issues. The Supreme Court's ruling in favor of Hawaii Wildlife Fund helped clarify the scope of the CWA and the NPDES permitting program.[31] The dissenting opinions from Justices Thomas and Alito helped provide an important window into a flawed perspective on interpreting environmental law based on environmental textualism. This theory of interpretation examines the statutory text and the dictionary definitions of that text. Under environmental textualism, there is no need to regard historical aims or congressional intent surrounding the statute as it applies to the case at hand, as judge's only obligation is to define each separate word and determine the law based on the sum of those definitions.

Considering this theory in application reveals that environmental textualism is seriously flawed. Instead, to interpret environmental statutes, the analysis should begin by considering the aims of the law. The analysis must include the reasons for the adoption of the environmental statute or statutes applicable to each case and the contours of the case at hand. We begin with the CWA, an act put into place to control unregulated levels of pollutants from tainting waters across the country. As seen in *County of Maui*, pollutants from the County's wastewater injection wells were clearly entering navigable waters, going directly through the groundwater and into the Pacific Ocean. Finally, we arrive at the CWA's text, which requires officials to go through a permitting process before sending any pollutants from a point source into navigable waters. As it had been established that there is a clear, strong, and direct connection between the injection wells (the point source) and the Pacific Ocean (the navigable waters), any analysis need not go much further to see that the County was in violation of federal law by not going through the proper NPDES permitting process while sending pollutants into the ocean.

IV. CONCLUSION

The dissents in *County of Maui* exemplify how environmental textualism is an unfit and harmful method for interpreting environmental

[31] Previous rulings in both the Fourth and Sixth Circuit Courts of Appeals had reached decisions contradicting the interpretation from the Ninth Circuit. *See* Upstate Forever v. Kinder Morgan Energy Partners, 887 F.3d 637, 650–51 (4th Cir. 2018); Ky. Waterways All. v. Ky. Utils. Co., 905 F.3d 925, 932–33 (6th Cir. 2018). The Supreme Court's ruling in *County of Maui* helped clarify this split amongst the circuits interpretating the scope of CWA and NPDES permitting requirements.

law. Environmental law is severely limited from its intended impact if primacy is not placed on historical aims and contours of protecting and regulating the natural world. Environmental textualism tramples on the necessary consideration of these aims. Instead, we must begin with consideration of the reason legislation was originally put into place to protect the environment from considerable harm and how this relates to the environmental statutes we are seeking to interpret and apply. Focusing on the laws' desired outcomes is the best way to uphold the meaning of environmental law and ensure that environmental protection measures are not crushed under the weight of interpretations that turn a blind eye to the natural world around them.