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"Harm"ing Individual Liberty: Assessing the U.S. Supreme Court's Decision in *Babbitt v. Sweet Home*

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NOTES

“HARM”ING INDIVIDUAL LIBERTY: ASSESSING THE U.S. SUPREME COURT’S DECISION IN *BABBITT V. SWEET HOME*

*The Court’s holding . . . imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.*¹

Justice Antonin Scalia, dissenting.

INTRODUCTION

The Endangered Species Act (ESA)² was enacted into law in 1973³ to protect the world’s diminishing biological diversity from extinction.⁴ In the more than twenty-two years since its passage, the ESA has become regarded as the most powerful environmental law in the United States.⁵ It has also become one of the most contentious as both the use and misuse of the Act have systematically abrogated the property rights of human beings in the name of conserving threatened and endangered species and the habitat upon which they live.⁶ Perhaps the thorniest issue under the ESA has been whether the modification of habitat on private lands is punishable under Section 9⁷ of the Act as a prohibited “taking” of an endangered or threatened species. In the recently decided case of *Babbitt v. Sweet Home Chapter of*

1. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2421 (1995) (Scalia, J., dissenting).

2. 16 U.S.C. §§ 1531-1544 (1988 and 1995 Supp.). All cites to the ESA herein will refer to the 1988 edition of the Code and 1995 Supplement.

3. Amendments were passed in 1976, 1977, 1978, 1979, 1982 and 1988.

4. 16 U.S.C. § 1531(b) (“The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . .”).

5. See, e.g., Timothy Egan, *Strongest U.S. Environmental Law May Become Endangered Species*, N.Y. TIMES, May 26, 1992, at A11. See also Bruce Babbitt, *The Endangered Species Act and “Takings”: A Call for Innovation Within the Terms of the Act*, 24 ENVTL. L. 355, 356 (1994) (“The ESA is undeniably the most innovative, wide-reaching, and successful environmental law which has been enacted in the last quarter century.”).

6. See, e.g., Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 5 (1993) (explaining how “constitutionally protected human rights are being relegated to a secondary status behind legislatively contrived rights for non-human beings”).

7. 16 U.S.C. § 1538.

Communities for a Great Oregon, the United States Supreme Court held that it is.⁸

The legal significance of the Court's decision, which is but the latest in a long history of ESA buck-passing between Congress and the judiciary,⁹ has not escaped the attention of Court onlookers.¹⁰ It is a decision which will have extraordinarily wide-reaching ramifications for both landowners¹¹ and listed species alike as creatures already in danger of extinction are legislatively pitted against the most evolutionarily successful species on earth—*Homo sapiens*.¹² Perhaps the most severe consequence of the Court's decision is

8. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995) (6-3 decision).

9. Noted one reporter, "the high court has declined to do the House and Senate's dirty work." Robert T. Nelson & Eric Pryne, *Ruling Seen Fueling Species-Act Fight*, SEATTLE TIMES, June 30, 1995, at B1. Indeed, as far back as the landmark Supreme Court decision interpreting the ESA, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), Justice Powell declared that "I have little doubt that Congress will amend the Endangered Species Act to prevent the grave consequences made possible by today's decision." *Id.* at 210 (Powell, J., dissenting). After releasing the *Sweet Home* decision, Justice Stevens declared from the bench: "We do not sit as a committee of review, nor are we vested with the power of veto." John H. Cushman, Jr., *Environmentalists Win a Victory, but Action by Congress May Interrupt the Celebration*, N.Y. TIMES, June 30, 1995 at A24. Notably, Justice O'Connor left the door open to Congressional action in her concurring opinion where she wrote, "Congress may, of course, see fit to revisit this issue." *Babbitt v. Sweet Home*, 115 S. Ct. 1407, 1414 (1995) (O'Connor, J., concurring). Rep. Lamar Smith (R-Tx) responded that "[i]f the Supreme Court is not willing to reign in rogue bureaucrats, Congress will. We will restore common sense to the Act, protecting both private property and the environment." *High Court Upholds Agency Assessment of "Harm" Under Species Act*, INSIDE ENERGY WITH FEDERAL LANDS, July 3, 1995 at 15.

10. See, e.g., James J. Kilpatrick, *5th Amendment takes a beating*, SAN DIEGO UNION-TRIB., July 20, 1995, at B10 (commenting that, with the *Sweet Home* decision "the Supreme Court performed an astonishing feat of semantic slight-of-hand" as they "squabbled for 52 pages over the meaning of 'take' in a statute and never said one word about the meaning of 'take' in the Constitution."). Kilpatrick noted elsewhere that with its opinion, "Justice John Paul Stevens helped the spotted owl but did the Fifth Amendment no good at all." James J. Kilpatrick, *A Court-ordered Earthquake*, CINCINNATI ENQUIRER, July 7, 1995, at A14. Indeed, the ESA's contravention of the 5th Amendment's prohibition against uncompensated takings was brought to the Court's attention and argued by one of respondent's amici. See Brief Amicus Curiae of Pacific Legal Foundation, et al. in support of Respondents, *Babbitt v. Sweet Home*, 115 S. Ct. 2407 (1995) (No. 94-859).

11. Noting that the *Sweet Home* decision may be the most important environmental ruling by the high court since the 1970's land use attorney Craig Beam of Luce, Forward, Hamilton & Scripps in San Diego predicted that the decision "is going to result in tremendous uncertainty" as it "pits landowners against state and federal agencies." Thor K. Biberman, *Endangered Species Ruling Has Strong Local Implications*, SAN DIEGO DAILY TR., June 30, 1995 at A1. See also Jeremy Rabkin, *Common Sense v. The Court*, THE AMERICAN SPECTATOR, September 1995 (describing the ruling as one which seems to "acknowledge no limits at all to the power of Congress to commandeer private lands into uncompensated service as wildlife refuges").

12. For an explanation of how the ESA actually thwarts species conservation by encouraging property owners to surreptitiously destroy listed species, see Mike Vivoli, *Shoot, Shovel and Shut Up*, WASH. TIMES, Nov. 27, 1992, at F1. See also Martin Van Der Werf, *Endangered Species Act "Gotta Be Fixed," Foe Says*, ARIZ. REPUBLIC, July 1, 1995 at B1 (quoting Chuck Cushman, executive director of the American Land Rights Association: "A private-property owner is thinking to himself, 'I find a spotted owl on my property, I'm going to lose everything I've worked for all my life.' . . . I'll tell you right now, that owl's just never going to show up on anyone's census.") and Charles C. Mann and Mark L. Plummer, *The Butterfly problem: Government Protection of Endangered Species*, ATLANTIC MONTHLY 47, 49-50 (1992).

the possible end of the ESA itself. As one of the nation's most hotly contested pieces of environmental legislation, it will almost certainly find itself kneeling in the crosshairs of a Congressional rifle scope.¹³

This Note will critically examine the Court's holding in *Babbitt v. Sweet Home* and attempt to cast meaningful light on the legal significance of the Court's decision, its impacts on private property owners, and its potential political consequences. Towards that end, Section I will provide readers with a brief overview of the Act, its purposes, strictures, and enforcement mechanisms. Section II will describe the evolution of the "harm" definition involved in *Sweet Home*, from its initial definition by the Department of the Interior's Fish and Wildlife Service ("FWS") to its judicial interpretation in subsequent cases. Section III will trace the tracks of the *Sweet Home* plaintiffs from the doors of the U.S. District Court for the District of Columbia to the halls of the United States Supreme Court. Section IV will examine some of the more significant aspects of the Supreme Court's holding; both in light of previous environmental caselaw and in terms of its effects on private landowners. Section V will attempt to predict what consequences the Court's resolution of this critical issue will have on the future of the ESA. Finally, this Note will conclude that the ESA is fatally flawed and must be repealed.

I. BRIEF OVERVIEW OF THE ESA

The ESA was passed in response to Congress' perception that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation."¹⁴ In deciding to protect such species, Congress declared that "these species . . . are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."¹⁵ It was through the ESA that Congress hoped to enable these

13. See, e.g., Marianne Lavelle, *Now Spotted Owl Flies To Pro-Business Congress*, NAT'L L.J., July 10, 1995, at B1 ("The Supreme Court has placed one of the most controversial environmental issues of the 1990s into the hands of a ready Congress" and quoting William Perry Pendley of the Denver-based Mountain States Legal Foundation, predicting that the *Sweet Home* decision "will mean the end of the Endangered Species Act."). See also Steve LaRue et al., *Ruling on threatened species may boost preservation here*, SAN DIEGO UNION-TRIB., June 30, at A27 (quoting then-Sen. Bob Packwood, R-Ore. "The Supreme Court has just given those of us in Congress more incentive to change the act [sic] . . . so that people count as much as bugs and birds and plants."). Already, a bill has been proposed which would legislatively overrule the Court's holding. See H.R. 2275 discussion *infra* notes 281-302 and accompanying text.

14. 16 U.S.C. § 1531(a) (1).

15. 16 U.S.C. § 1531(a) (3). Yet, as Ike Sugg notes, "these values are asserted, not demonstrated; nor is any demonstration of such values required to list a species under the ESA." See Sugg, *supra* note 6. See also CHARLES C. MANN & MARK L. PLUMMER, *NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES* 218 (1995) ("passed in a blind surge of piety, the [ESA] represents no considered judgment on the worth of the nation's natural heritage, nor a debate on the means for achieving its protection.").

species to recover to the point at which the protective provisions of the Act would no longer be necessary.¹⁶

This recovery was to be facilitated through the proactive process of identifying potentially imperiled species and listing them as either threatened¹⁷ or endangered¹⁸ pursuant to Section 4 of the Act.¹⁹ In making his listing decisions, the Secretary of the Interior²⁰ is directed to use the "best scientific . . . data available."²¹ Once a species is placed on the list, the Secretary is directed²² to designate its "critical habitat."²³ After being so designated, the species and the habitat upon which it dwells fall under the purview of a wide range of land use restrictions designed to protect the species.²⁴ Enforcement of these restrictions is facilitated through Sections 7 & 9, depending upon the actors involved.²⁵

16. 16 U.S.C. § 1532(3). Thus, the primary goal of the ESA, as manifested in the Act itself, is to recover and delist species.

17. 16 U.S.C. § 1532(20) (defining "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.").

18. 16 U.S.C. § 1532(6) (defining "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range.").

19. 16 U.S.C. § 1533.

20. Also under § 1533, the Secretary of Commerce is charged with the listing of marine species.

21. 16 U.S.C. § 1533(b) (1) (A). At least one author has pointed out that "[t]his is an absurd standard. In reality, this means that decisions may be made upon best available data *regardless of quality*." Stuart L. Somach, *What Outrages Me About the Endangered Species Act*, 24 ENVTL. L. 801, 806 (1994) (emphasis added). Somach also dispels the myth that "staff personnel within the Fish and Wildlife Service or other relevant agencies are unbiased in their review of listing petitions. This is not necessarily the case. In too many situations, low-level agency personnel charged with review and early decisionmaking responsibility in the listing process often belong to or have affiliations with the very entity that has petitioned for the species listing." *Id.* at 805.

22. 16 U.S.C. § 1533(b) (2) ("The Secretary shall designate critical habitat, and make revisions thereto . . .").

23. 16 U.S.C. § 1532(5) (A) (i)&(ii) ("The term 'critical habitat' . . . means the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." Such habitat even includes "specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.").

24. Secretary of the Interior Bruce Babbitt, perhaps the most vociferous of the Act's defenders, admits that "[w]hen a species is listed under the terms of the ESA, there is an effective freeze across the habitat occupied by that species." Babbitt, *supra* note 5, at 366.

25. 16 U.S.C. § 1536 (Section 7) regulates activities conducted by government agencies and requires that the actions of such agencies do not jeopardize the continued existence of listed species. 16 U.S.C. § 1538 (Section 9) applies to "any person." As the subject of *Sweet Home v. Babbitt* dealt exclusively with the definition of "take" under Section 9, I will not expound on the strictures of Section 7 except to distinguish the two where necessary.

A. Section 9

Section 9 of the ESA²⁶ prohibits a wide range of activities involving listed species.²⁷ For instance, this section of the Act makes it illegal for any person to “possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species.”²⁸ Likewise, Section 9 clearly prohibits any person from delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species.²⁹ Yet, while these provisions of Section 9 clearly identify both the conduct sought to be precluded and the actors subject to enforcement, other provisions are less clear. For instance, Section 9 goes on to provide that “it is unlawful for any person subject to the jurisdiction of the United States to ‘take’ any such species within the United States or the territorial sea of the United States.”³⁰ “Take” is defined in the Act to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”³¹ It was the legislature’s failure to define what constitutes “harm” within the context of Section 9 that led the Secretary of the Interior to promulgate the regulation which would eventually find itself at the heart of the *Sweet Home* controversy.³²

II. EVOLUTION OF THE ISSUE—DEFINING “HARM”

A. Palila I

The first court to interpret “harm” within the context of Section 9 of the ESA was the United States District Court of Hawaii in *Palila v. Hawaii Dept. of Land and Natural Resources* (“*Palila I*”).³³ In that case, certain environmental groups filed an action in the name of the Palila—a six-inch long,

26. 16 U.S.C. § 1538.

27. *Id.* One commentator describes Section 9 at “perhaps the most powerful piece of wildlife legislation in the world.” Frederico M. Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109, 111 (1991).

28. 16 U.S.C. § 1538(a) (1) (D).

29. 16 U.S.C. § 1538(a) (1) (E).

30. 16 U.S.C. § 1538(a) (1) (B). Such actions are also precluded upon “the high seas.” *Id.* at 1538(a) (1) (C).

31. 16 U.S.C. § 1532(19) (emphasis added).

32. The original regulation, which was promulgated in 1975, provided that: “‘Harm’ in the definition of ‘take’ in the Act means an act or omission which actually kills or injures wildlife, including acts which annoy it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of ‘harm’.” 40 Fed. Reg. 44,412, 44,416 (Sept. 26, 1975).

33. *Palila v. Hawaii Dept. of Land and Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff’d*, 639 F.2d 495 (9th Cir. 1981) [hereinafter *Palila I*].

cone-billed descendant of the Hawaiian honeycreeper bird family—seeking declaratory and injunctive relief against the Department of Land and Natural Resources of the state of Hawaii.³⁴ The plaintiffs charged that the defendants' actions in maintaining destructive populations of feral sheep and goats in the Palila's critical habitat on the slopes of Mauna Kea in Hawaii "harmed" the Palila and constituted a "taking" within the meaning of Section 9 of the ESA.³⁵

In assessing their claim, the court began by noting both that the mamane-naio forest was essential for the Palila's survival, and that the browsing game animals' feeding habits posed a threat to the continued existence of the mamane-naio ecosystem.³⁶ Finding further that the Commerce Clause provided a valid basis of power for the federal government to regulate the purely intrastate game involved in the case,³⁷ the district court looked to the landmark ESA case of *Tennessee Valley Authority v. Hill*³⁸ to discern the "legislative history and importance of the Act."³⁹ Drawing from the Supreme Court's conclusion in *Hill* that both the legislative history⁴⁰ and the purposes of the ESA⁴¹ supported a broad reading of the Act's prohibitions, District Judge Samuel P. King concluded that a "taking" of the Palila had occurred in violation of the ESA.⁴²

In affirming the district court's decision, the Ninth Circuit Court of Appeals expressly limited its substantive inquiry to whether the Palila was an endangered species and, if so, whether the defendant's actions had amounted to a "taking."⁴³ The court noted: "Any dispute or uncertainty as to the current population trends of the Palila is immaterial. The relevant inquiry is

34. *Id.* at 987.

35. *Id.*

36. *Id.* at 989-90 ("By consuming seedlings and shoots, the animals prevent regeneration of the forest, and thus bring about the relentless decline of the Palila's habitat.").

37. *Id.* at 992. *But see* Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419, 466 n.232 (1994) ("This reasoning is questionable because any trade in endangered species, presumably including interstate commerce, is prohibited expressly by the ESA.").

38. 437 U.S. 153 (1978).

39. *Palila I*, 471 F. Supp. at 994. Yet this reliance proves poorly founded. *Tennessee Valley Auth. v. Hill* was a Section 7 case involving federal agency action, not the purely private activity that is governed by Section 9.

40. "The legislative proceedings in 1973 are, in fact, replete with expressions of concern over the risk that might lie in the loss of any endangered species." *Id.* at 994 n.37 (quoting *Hill*, 437 U.S. 153, 177-78 (1978)).

41. *Id.* at 994-95 ("Congress has determined that protection of any endangered species anywhere is of the utmost importance to mankind, and that the major cause of extinction is destruction of natural habitat.").

42. *Id.* at 995.

43. *Palila v. Hawaii Dept. of Lands & Natural Resources*, 639 F.2d 495, 496 (1981).

whether the Palila remains an endangered species.”⁴⁴ Finding that the Palila was indeed “endangered” by the presence of the feral sheep and goats, the Ninth Circuit Court affirmed the decision of the district court.⁴⁵

B. Palila II

Recognizing the severity of the *Palila I* decision, the Secretary of Interior proposed to amend the existing definition of “harm.”⁴⁶ In proposing the amendment, the Interior Department Solicitor stated that the *Palila I* decision was “inconsistent with the intent of Congress.”⁴⁷ The proposed redefinition prompted significant protest, with 262 of the 328 comments received opposing the revision.⁴⁸ As a result, only a slightly modified definition of harm was adopted.⁴⁹

The redefinition had little practical effect. In *Palila v. Hawaii Dept. of Land & Natural Resources* (“*Palila II*”),⁵⁰ the district court held that the new definition of harm “remained consistent with the law and regulations in effect.”⁵¹

C. Palila III

The Palila reared its beak again in 1984 when the Sierra Club reopened the issue by moving to amend its original complaint to add mouflon sheep to the list of destructive animals to be removed from the Palila’s habitat.⁵² The

44. *Id.* One might logically conclude that population trends are entirely relevant in determining species’ status. Indeed, one might even consider them dispositive. But as revealed by both the court’s opinion and the everyday actions of the Fish and Wildlife Service (FWS), the agency charged with implementing the Act, such seemingly decisive data are largely, if not entirely, ignored.

45. *Id.* (“[D]efendants’ action in maintaining feral sheep and goats in the critical habitat is a violation of the Act since it was shown that the Palila was endangered by the activity.”).

46. 46 Fed. Reg. 29,490 (1981). The Secretary specifically acknowledged that the *Palila I* decision motivated his proposal. *Id.*

47. *Id.* at 29,490. It is interesting to note that the *Department of the Interior itself* found the expansive definition of harm inconsistent with the ESA. In his finding, the Solicitor found that (1) “the term ‘harm’ should be interpreted to include only those actions that are directed against, and likely to kill, individual wildlife” and that (2) an earlier version of the bill that became the ESA contained the more expansive definition but had been “deleted from the final act.” *Id.*

48. 46 Fed. Reg. 54,748 (1981).

49. The new definition did little to abate the concerns of the Secretary, stating in pertinent part that “harm” includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns.” 46 Fed. Reg. 54,748 (1981).

50. *Palila v. Hawaii Dept. of Land and Natural Resources*, 631 F. Supp. 787 (D. Haw. 1985) [hereinafter *Palila II*].

51. *Id.* at 789.

52. *Palila v. Hawaii Dept. of Land & Natural Resources*, 649 F. Supp. 1070 (D. Haw. 1986), *aff’d*, 852 F.2d 1106 (9th Cir. 1988) [hereinafter *Palila III*]. Apparently, the Sierra Club had not initially included the mouflon sheep because their research into the effects of the sheep

district court again ruled in favor of the Sierra Club, finding that the presence of mouflon sheep "harmed" the Palila within the meaning of 50 C.F.R. § 17.3's definition in two ways.⁵³ First, the court found that the eating habits of the sheep destroyed the mamane woodland, causing habitat degradation that *could* result in extinction.⁵⁴ Second, the court found that if the mouflon were to continue eating the mamane, the woodland would not regenerate, precluding the Palila population from recovering to a "point where it could be removed from the Endangered Species list."⁵⁵ Thus, the district court held that habitat modification was in violation of Section 9 of the ESA if it "prevents the population from recovering."⁵⁶

In reviewing the district court, the Ninth Circuit Court of Appeals looked to the Secretary's 1981 amendment of "harm."⁵⁷ Noting that the Secretary had failed to substantially amend the district court's construction of harm in *Palila I*, the appellate court concluded that the actions of the defendants ran equally afoul of the Secretary's "new" interpretation, which the court found consistent with the "overall purpose" of the ESA.⁵⁸ The court also found the Secretary's redefinition consistent with the legislative history of the Act.⁵⁹ The court found further support for its decision in the 1982 Amendments to the ESA, finding that Congress' failure to amend the Act indicated satisfaction with the current definition of harm and its interpretation by the Secretary and the judiciary.⁶⁰ Yet, while the appellate court upheld the

had not yet been completed.

53. *Id.* at 1074.

54. *Id.* (emphasis added). Note that the court's use of the word "could" seems to require no affirmative showing of causation between "habitat degradation" and possible extinction.

55. *Id.*

56. *Id.* at 1077.

57. *Palila III*, 852 F.2d 1106, 1108 (9th Cir. 1988).

58. *Id.* at 1108 (citing 16 U.S.C. § 1531(b)). Taken literally, the court's opinion seems to indicate that the means for achieving the ESA's goals are always permissible so long as the Act's broad purpose of providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" is arguably furthered.

59. For example, the court noted the Act's initial Senate Report which provided that "[t]ake' is defined in . . . the broadest manner to include every conceivable way in which a person can 'take' of attempt to 'take' any fish or wildlife." *Id.* (quoting S. REP. NO. 307, 93d Cong., 1st Sess. (1973)). *But see* Gidari, *supra* note 37 (explaining that Congress sought to preempt the ingenuity of men who would *intentionally* "take" a species rather than unwitting landowners.). In addition to misreading this legislative excerpt, the court ignored a large body of legislative history which, taken together, suggest that the ESA was not meant to apply to the modification of habitat on private lands. For example, the court failed to note that the original definition of "take" submitted to the Senate Committee on Commerce in the ESA bill included "destruction, modification, or curtailment of its habitat or range" but that the committee *expressly deleted* any reference to habitat modification in the final definition.

60. *Palila III*, 852 F.2d at 1108. A more persuasive explanation for Congress' failure to act can be found in Donald J. Barry, *Amending the Endangered Species Act, The Ransom of Red Chief, and Other Related Topics*, 21 ENVTL. L. 587 (1991). Barry, formerly an attorney for the FWS, offers four alternative explanations, in addition to the innate political volatility of the Act, for the lack of significant ESA reform: (1) A lack of Committee jurisdiction on the part of ESA reformers; (2) "It is easier to do nothing than it is to do something"; (3) It's better to move no bill than to move a bad bill; and, (4) "You need a point of leverage to move an immovable

district court's finding that a taking had occurred, they refused to address the issue of whether "harm" includes habitat degradation that merely retards recovery.⁶¹

III. THE ROAD TO *SWEET HOME*

Against this backdrop of Section 9 takings "analysis," the northern spotted owl was listed as a threatened species on June 26, 1990.⁶² In July of 1990, Region 1 of the FWS promulgated "informal" guidelines for timber harvesting and related activities in and around known spotted owl sites.⁶³ The FWS's guidelines, dubbed the 70-500-40⁶⁴ rule, "imposed owl protection circles on lands covering as much as 9,900 total acres of publicly and privately owned timberland in the Olympic Peninsula."⁶⁵ At the then-current market value of \$10,000-\$40,000 per acre for timberland, the direct economic impact of each owl circle exceeded \$160,000,000.⁶⁶

Pursuant to these guidelines, the FWS gave notice that any person carrying out activities in a manner inconsistent with the guidelines would be subject to criminal investigation for possible violation of the ESA.⁶⁷ This threat also extended to states in their capacity as a licensing agency.⁶⁸ In

object." See generally, *id.* Indeed, each of Barry's explanations seems more persuasive than the court's and infinitely more so than one observer's baseless interpretation that "[o]nce again, Congress, faced with clear evidence that the [ESA] could and would have a significant impact, reaffirmed its commitment to protect species threatened with extinction." Cheever, *supra* note 27, at 146-47.

61. Palila III, 852 F.2d at 1110. The Ninth Circuit's determination that habitat modification could constitute "harm" within the meaning of Section 9's "take" prohibition was subsequently followed by a district court in Texas. In *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988) *aff'd*, 926 F.2d 429 (5th Cir. 1991), the court found that the timber management practices of the U.S. Forest Service in Texas "harmed" the endangered red-cockaded woodpecker by harvesting the bird's habitat. However, this opinion was bolstered by the court's acknowledgment that, as a federal agency, the USFS was subject to heightened duties under Section 7 of the ESA. *Id.* at 1266-68. This confusion by the courts about the respective duties of private citizens and federal agencies often proves the case as courts generally fail to distinguish between the scopes of Section 9 and Section 7; particularly when dealing with federal agencies as parties.

62. *Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl*, 55 Fed. Reg. 26,114 (June 26, 1990) (codified at 50 C.F.R. § 17.11).

63. *Gidari*, *supra* note 37, at 426 (explaining that the Guidelines were "promulgated without the benefit of public notice, comment, or other rule-making procedures required under the Administrative Procedures Act" (5 U.S.C. § 553 (1988)); U.S. Fish and Wildlife Service, Region 1, PROCEDURES LEADING TO ENDANGERED SPECIES ACT COMPLIANCE FOR THE NORTHERN SPOTTED OWL (July 1, 1990).

64. *Gidari*, *supra* note 37, at 427. So named because they required that activities must not result in less than:

*70 acres of the best available owl habitat encompassing the owl activity center.

*500 acres of suitable habitat within a 0.7-mile radius of a nest site or activity center.

*40% coverage with suitable owl habitat of the entire circle.

65. *Id.*

66. *Id.*

67. *Id.* at 426.

68. *Id.* at 427 n.15.

short, the *Sweet Home* plaintiffs found themselves impaled on the horns of a dilemma: either forfeit their property rights outright by following guidelines mandated in contravention of the APA,⁶⁹ or face criminal prosecution under the ESA for developing their land.

A. *Sweet Home I*

In response to the FWS's illegally-mandated guidelines, a collection of various small landowners, small logging companies, and families dependent upon the timber industry filed two lawsuits.⁷⁰ In *Sweet Home Chapter of Communities for a Great Oregon v. Lujan* ("*Sweet Home I*"),⁷¹ the plaintiffs challenged two regulations promulgated by the Secretary of the Interior.⁷² The plaintiffs alleged that 50 C.F.R. Section 17.3, which dealt with the FWS's definition of "harm," was contrary to the ESA and void for vagueness. A second regulation, 50 C.F.R. Section 17.31(a), which afforded all "threatened" species the protections normally reserved for "endangered" species, was also challenged on the ground that the Secretary was obligated to make such decisions on a strictly species-by-species basis.⁷³ The case was decided on cross-motions for summary judgment.

In charging that Section 17.3 failed to comply with the ESA, the plaintiffs first pointed out that the original ESA bill, which was referred to the Senate Committee on Commerce, S. 1983, defined "take" with respect to fish or wildlife to include "destruction, modification, or curtailment of its habitat or range." The fact that the bill was reported out of committee without any reference to habitat modification, plaintiffs argued, showed that the Senate intended that the scope of the word "take" would not encompass habitat modification.⁷⁴

While the court conceded that S. 1983 offered a different definition of the word "take" than the one that was adopted by the Committee, it noted that "the other bill [that was before the Senate], S. 1592, defines 'take' exactly as it now appears in the statute. From this legislative history, the court can conclude no more than that the Senate chose to adopt the definition in one bill over that in another."⁷⁵ "In fact," the court noted, "the Senate Report

69. See sources cited *supra* note 63.

70. One of the lawsuits, filed against John Turner, the Director of FWS, was dismissed under dubious circumstances which suggest conduct on the part of FWS reminiscent of Nixon's Committee to Reelect the President (CREEP), the group responsible for the Watergate break-in. See Gidari, *supra* note 37, at 427-31.

71. 806 F. Supp. 279 (D.D.C. 1992), *aff'd*, 1 F.3d 1 (D.C. Cir. 1993), *rev'd in part*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 115 S. Ct. 2407 (1995) [hereinafter *Sweet Home I*].

72. *Id.* at 282.

73. The court quickly rejected this contention, finding that "the plain language of the ESA clearly grants the Secretary the authority to promulgate regulations such as 17.31(a)." *Id.* at 286.

74. *Id.* at 283.

75. *Id.*

indicates just the opposite, that 'take' was being defined 'in the broadest possible manner.'"⁷⁶

Plaintiffs next argued that Congress intended to address the problem of habitat modification exclusively through federal land acquisition, rather than through the take provision of Section 9.⁷⁷ The court quickly rejected this argument, noting that "Congress considered land acquisition a critical tool in preserving habitat, but they do not suggest that Congress intended it to be the *only* tool."⁷⁸

After finding Section 17.3's definition of "harm" consistent with the ESA's definition of "take," the court went on to explain that Congress had, in fact, already acted to lessen the severity of the definition.⁷⁹ This "relief" purportedly came in the form of Section 10(a) incidental take permits.⁸⁰ The court drew this conclusion, which would later prove important to the Supreme Court, from a suspect interpretation of Congressman William J. Tauzin's political bullet-dodging.⁸¹

Plaintiffs next maintained that, due to the regulation's unconstitutional vagueness, they were unable to determine exactly what conduct was impermissible under the ESA. The court began by noting that plaintiffs' challenge was facial, requiring them to show that the regulation was impermissibly vague in all of its applications.⁸² In rejecting the vagueness argument, the court held that the definition of 'harm' found in Section 17.3

76. *Id.*

77. *Id.*

78. *Id.* (emphasis added). The court seems to suggest that Congress should have the option of paying for species habitat or taking it without compensation. Such a choice in the hands of a bureaucrat is no choice at all. This mindset allows for what one author has likened to what Madison referred to as a "tyranny of the majority" as the public's interest in wildlife is furthered at the expense of individual landowners. See Sugg, *supra* note 6, at 14.

79. *Sweet Home I*, 806 F. Supp. at 284.

80. 16 U.S.C. § 1539 et. seq. Added by amendment in 1982, Section 10 allows the Secretary to issue permits and exemptions to "take" listed species under certain circumstances.

81. The court's conclusion that Section 10(a) permits were intended to mitigate the severity of Section 17.3's "harm" definition was based on its interpretation of a hearing before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries reported at 97th Cong., 2d Sess. 291, 329, 331, 343 (1982). There, Ken Berlin of the National Audubon Society and Robert Carlton of the National Forest Products Association were battling over the "harm" definition before the committee. The court in *Sweet Home I* noted that "[r]ather than argue about statutory interpretation, Congressman . . . Tauzin turned the panelists' attention to the exemption process in Section 10(a) of the ESA, and the discussion subsequently focused on amending that section to promote its efficiency." *Sweet Home I*, 806 F. Supp. at 284. Noting that "the reauthorization bill that was eventually adopted by Congress did not amend the original definition of 'take' to exclude the word 'harm' or to correct the Secretary's definition of that term," the court looked to the fact that "[i]nstead, it amended the provisions of the Section 10(a) permit process. . . ." *Id.* Thus, Tauzin's reluctance to settle a potentially controversial attack against the Act's impermissible breadth became binding legislative intent. Ironically, Tauzin has since become one of the ESA's fiercest critics and has sought to limit the Act's applicability to private landowners.

82. *Sweet Home I*, 806 F. Supp. at 285. As Gidari has pointed out, "[g]iven the express threats in the Guidelines, one wonders why the [as applied] allegations were not made." Gidari, *supra* note 37, at 491 n.373.

clearly limited prohibited conduct, including habitat modification, to that which "actually kills or injures wildlife."⁸³ Finding further that a conviction under the ESA required the government to show that a defendant had knowledge of the violation, the court refused to find the regulation impermissibly vague and found for the Secretary.⁸⁴

B. *Sweet Home II*

On appeal to the D.C. Circuit Court of Appeals, Chief Judge Mikva wrote the opinion for the court affirming the district court's decision and finding that the "challenged regulations are reasonable interpretations of the ESA."⁸⁵ The court also affirmed the lower court's determination that the regulation was not void for vagueness.⁸⁶

Though the *Sweet Home* plaintiffs had alleged that the regulation's vagueness left them vulnerable to the "whims and predictions of biologists to determine when a habitat modification is 'significant' and when such modification 'significantly impairs behavioral patterns,'"⁸⁷ the court responded by pointing out that theirs was a facial challenge.⁸⁸ As such, the court found that plaintiffs were not entitled to have the regulation "wiped off the books . . . merely by showing that it will be impermissibly vague in the context of some hypothetical application."⁸⁹

Turning to Section 17.3, the court found that "there are obviously types of activity, including habitat modification, that [the regulation] clearly prohibits without a hint of vagueness."⁹⁰ "For example," the court contin-

83. *Sweet Home I*, 806 F. Supp. at 286.

84. *Id.* But, as Gidari has pointed out, the court fundamentally misunderstood the knowledge requirement of Section 9 prosecutions. See Gidari, *supra* note 37, at 491 n.376. To prosecute a Section 9 case, the government need only prove that the party knowingly committed the act at issue, not that it was illegal under the ESA. Such a lessened standard of intent is not uncommon with environmental laws, which have been held to be public welfare statutes. See, e.g., *United States v. Hayes Intern. Corp.*, 786 F.2d 1499, 1503 (11th Cir. 1986). In fact, courts have upheld criminal convictions based upon strict liability in two cases under the Federal Food, Drug & Cosmetic Act. See *United States v. Dotterweich*, 320 U.S. 277 (1943); *U.S. v. Park*, 421 U.S. 658 (1975). Thus, the precise circumstance which the court denies as possible, specifically, a prosecution for unknowing violation of the ESA, is not only possible, but entirely likely under the ESA. See, e.g., *United States v. St. Onge*, 676 F. Supp. 1044 (D.C. Mont. 1988) (holding that, to prosecute a defendant under Section 9, the government need not prove that defendant knew he was shooting a protected grizzly bear at the time he pulled the trigger).

85. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 2 (D.C. Cir. 1993) (hereinafter *Sweet Home II*).

86. *Id.*

87. *Id.* at 4. Indeed, Charles C. Mann and Mark L. Plummer have explained, "Invariably the choices [of scientists] will be arbitrary, because scientists have no claim to represent the values of other people." MANN & PLUMMER, *supra* note 15, at 207.

88. *Sweet Home II*, 1 F.3d at 4.

89. *Id.* (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). Rather, the court was required to uphold the challenge only if the law was shown to be impermissibly vague in all of its applications. *Id.* at 4.

90. *Sweet Home II*, 1 F.3d at 4-5.

ued, "it obviously forbids the very sort of conduct that appellants argue it should be limited to—habitat modification that causes ascertainable physical injury or death to an individual member of a listed species."⁹¹ Thus, the court found that plaintiffs had failed to demonstrate the regulation's facial invalidity.⁹² Moreover, the court found that the "knowledge requirement" of the ESA further vitiated plaintiffs' challenge, declaring that a "scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is prescribed."⁹³

Turning to Section 17.31(a)'s expansion of Section 9 prohibitions, the court justified the extension as supported by the Act's structure and purpose. Moreover, the court refused to challenge an apparently broad and potentially unconstitutional delegation to the Secretary of the Interior, hiding instead behind the "substantial deference" principles of *Chevron USA, Inc. v. NRDC*.⁹⁴

In his dissenting opinion, Judge Sentelle observed that "some will find ambiguity even in a 'No Smoking' sign."⁹⁵ While conceding that Congress' intent was ambiguous as to the proper definition of "harm," Judge Sentelle remarked that he could not "cram the agency's huge regulatory definition into the tiny crack of ambiguity that Congress left."⁹⁶ Rather, he urged observance of the ancient principle of statutory construction known as *noscitur a sociis*, giving general words in a list narrow interpretation to avoid giving "unintended breadth" to the Acts of Congress.⁹⁷ The standoff between

91. *Id.* at 5. The court completely ignores that plaintiffs had been threatened with criminal prosecution for refusing to follow FWS guidelines *irrespective of any tangible injuries to listed species!*

92. *Id.* Indeed, the court cautioned that "[a]ppropriate judicial restraint obligates us to wait for specific applications of the regulation to arise, for, . . . the government may in the meantime take further steps that will sufficiently narrow potentially vague or arbitrary interpretations of the regulation." *Id.* One wonders how Mikva could realistically believe that FWS would remedy their interpretation considering that the duplicitous actions of the FWS revealed little intent to act in good faith, let alone remedy an obviously over-broad interpretation.

93. *Sweet Home II*, 1 F.3d at 4 (quoting *Flipside*, 455 U.S. at 499). *But see supra* note 84 (explaining the court's misunderstanding of the knowledge requirement under the ESA).

94. 467 U.S. 837 (1984). The *Chevron* principle holds that, where an agency has interpreted ambiguous Congressional intent, courts will defer to the agency's interpretation so long as it is a "permissible construction of the statute." *Id.* at 843. Mikva wrote an entire separate concurring opinion explaining how his refusal to set aside the "harm" regulation comported with the *Chevron* principle. *Sweet Home II*, 1 F.3d at 8-11.

95. *Sweet Home II*, 1 F.3d at 11 (citing *International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1575 (D.C. Cir. 1987)). Sentelle went on to posit that "in the present case, the [FWS] has established that it would . . . deem Congressional authorization for the erection of 'No Smoking' signs to authorize the adoption of regulations against chewing and spitting [tobacco]." *Id.*

96. *Id.* at 12.

97. *Id.* (citing Mikva Op. at 4). Under this principle, Judge Sentelle concluded that "it appears to me that the Fish and Wildlife Service has engaged in . . . [an] unreasonable expansion of terms in the present case." *Id.* Sentelle also rejected the agency's interpretation because to read Section 9 so broadly would be to render Section 7, which applies to federal actors, "surplusage." *Id.*

Mikva and Sentelle was broken by Judge Williams, who concurred with Mikva because of the 1982 amendments.⁹⁸

C. *Sweet Home III*

After granting plaintiffs' petition for rehearing, the D.C. Circuit Court of Appeals reversed, in part, its prior decision in *Sweet Home II*. In an opinion by Judge Williams, the court held that the FWS's definition of "harm" was not a permissible interpretation of Congressional intent.⁹⁹ Rather, the court found that the Service's definition was "neither clearly authorized by Congress nor a 'reasonable interpretation' of the statute."¹⁰⁰

The court began by noting that the FWS had found habitat modification within the word "harm," which the court described as "the most elastic of the words Congress used to define the acts that Section 9 of the ESA forbids private individuals to commit."¹⁰¹ However, in limiting the breadth of "harm," the court quoted the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*¹⁰² for the proposition that "the distinction between 'harm-preventing' and 'benefit-conferring' regulations is often in the eye of the beholder."¹⁰³ Thus, although the court conceded that a farmer who harvests crops or trees on which a species depends might technically "harm" the species if the benefits withdrawn were important to the species, the court found that the "immediate context of the word" argued against such a broad reading.¹⁰⁴

98. *Sweet Home II*, 1 F.3d at 11 ("But for the 1982 amendments, I would find Judge Sentelle's analysis highly persuasive—including his discussion of the *noscitur a sociis* canon.").

99. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 17 F.3d 1463, 1464 (D.C. Cir. 1994) (hereinafter *Sweet Home III*).

100. *Id.*

101. *Id.* at 1464. Indeed, the apparent incongruity of interpreting harm in such a way has not escaped the attention of at least one ESA expert, who notes that "the take prohibition is often a clumsy tool for habitat protection. Of the components in the statutory definition of take, only the term 'harm' does not expressly convey the notion of direct application of physical force or effect." J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555, 586-587 (1995).

102. 505 U.S. 1003 (1992).

103. *Sweet Home III*, 17 F.3d at 1464. Williams went on to explain that "[i]n one sense of the word, we 'harm' the people of Somalia to the extent that we refrain from providing humanitarian aid, and we harm the people of Bosnia to the extent that we fail to stop 'ethnic cleansing.' By the same token, it is linguistically possible to read 'harm' as referring to a landowner's withholding of the benefits of a habitat that is beneficial to a species." See also David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 308 (1995) ("Landowners can be ordered to prevent harm, but not to provide benefits. Benefits must be paid for.").

104. *Sweet Home III*, 17 F.3d at 1465. Within this context, the court noted that "[w]ith the single exception of the word 'harm,' the words of the [Section 9] definition contemplate the perpetrator's direct application of force against the animal taken." *Id.* at 1465 ("Harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect . . . fir, in ordinary language, the basic model 'A hit B.'").

In support of its position that “harm” should be interpreted narrowly, with attention given to the nature of the surrounding prohibited acts, the court cited a Ninth Circuit Court of Appeals case which sought to interpret “harass” within the context of the Marine Mammal Protection Act (MMPA).¹⁰⁵ In that case, the Ninth Circuit Court applied *noscitur a sociis* to the word “harass” as it appeared in the statute along with “hunt, capture and kill” as prohibited “takings” of protected marine mammals. For the defendant in *Hayashi* to be convicted under the MMPA for “harassing” protected porpoises, the court ruled that his acts must amount to the same types of sustained and significant intrusions upon a marine mammal that accompanied the other prohibited acts.¹⁰⁶

With the Ninth Circuit Court’s *Hayashi* decision in mind, the *Sweet Home* court turned to the ESA, finding that the nine verbs accompanying “harm” in the ESA’s “take” definition all involved a substantially direct application of force, which the FWS’ concept of forbidden habitat modification lacked.¹⁰⁷ Moreover, the court found that the practical implications of the Service’s definition suggested its improbable relation to congressional intent.¹⁰⁸

In addition to the strict construction principles of *noscitur a sociis*, the D.C. Circuit Court found further support for its holding in both the structure and history of the ESA. After examining the structure of the Act, the court concluded that the ESA’s conservation purposes were intended to be carried out through three basic mechanisms: (1) a federal land acquisition program set up by Section 5¹⁰⁹ of the ESA; (2) the imposition of strict obligations on federal agencies to avoid adverse impacts on endangered species, as set out in Section 7¹¹⁰ of the Act; and (3) a prohibition on the deliberate taking of endangered species by anybody, as embodied in Section 9.¹¹¹

105. *Id.* at 1465 (citing *United States v. Hayashi*, 5 F.3d 178, 1282 (9th Cir. 1993)).

106. *United States v. Hayashi*, 5 F.3d 1278, 1282 (9th Cir. 1993). The Ninth Circuit Court found that the defendant, who had fired a rifle twice into the water behind some porpoises, had not harassed the porpoises within the meaning of the statute because his actions were not “direct and significant intrusions upon the mammal’s ordinary activities.” *Id.*

107. *Sweet Home III*, 17 F.3d at 1465.

108. *Id.* In explaining these implications, the court noted that:

Species dependency may be very broad. One adherent of aggressive protection, for instance, notes that ‘some scientists believe that as many as 35 million to 42 million acres of land are necessary to the survival of grizzlies,’ about as much land in the northern Rockies of the United States and Canada as is still usable grizzly habitat.

Id. (citing *ROCKY BARKER, SAVING ALL THE PARTS* 34 (1993)). Taking this figure into account, and noting that the Act provides for criminal penalties of up to a \$100,000 fine and imprisonment for one year for each violation, the court concluded that the impact of the Service’s concept of “harm” and its resulting extinction of private rights “counsel application of the maxim *noscitur a sociis*.” *Id.*

109. 16 U.S.C. § 1535.

110. 16 U.S.C. § 1536.

111. 16 U.S.C. § 1538.

The court found further support for its conclusion that “harm” was not intended to include habitat modification in the legislative history of the Act.¹¹² For example, the court cited the explanation of the land acquisition program given by Senator Tunney, then Senate floor manager for the ESA.¹¹³ Acknowledging that the principal threat to animals stems from the destruction of their habitat, Senator Tunney explained that “[t]hrough these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.”¹¹⁴ Further bolstering the position that the land acquisition was to be the sole method of protecting species threatened by the indirect acts of private landowners, the court cited a statement by then-floor manager for the House version of the ESA bill Representative Sullivan.¹¹⁵ Noting that the destruction of habitat may be intentional or unintentional, Rep. Sullivan stated that “the result is unfortunate for the species of animals that depend on that habitat.”¹¹⁶ Rep. Sullivan went on to explain that “H.R. 37 will meet this problem by providing funds for acquisition of critical habitat through the use of the land and water conservation fund.”¹¹⁷

In addition to these compelling statements by the legislators responsible for shaping and enacting the ESA, the court referred to the Congress’ deliberate deletion of habitat modification from the definition of “take” as further strengthening its conclusion.¹¹⁸ So, while the district court in *Sweet Home I* refused to “speculate as to Congress’ intent” in deleting the definition,¹¹⁹ Judge Williams remained “mindful that Congress had before it, but failed to pass, just such a scheme.”¹²⁰

The court then turned to the 1982 amendments of the ESA that Judge Williams had found so persuasive in *Sweet Home II*. Upon further reflection, he found that the 1982 amendments entailed two possible implications which would support a broad interpretation of harm; either that the amendments so altered the context of the definition of “take” as to render the Service’s definition reasonable, or, that the process of amendment, in which the agency’s interpretation of “harm” and a judicial enforcement thereof came to

112. *Sweet Home III*, 17 F.3d at 1466.

113. *Id.*

114. *Id.* (quoting Statement of Senator Tunney, 119 CONG. REC. 25669 (July 24, 1973)).

115. *Id.* at 1466.

116. *Id.* (quoting a statement by Representative Sullivan, floor manager for H.R. 37, 119 CONG. REC. 30162 (Sept. 18, 1973)).

117. *Id.* Sullivan further explained that this “land and water conservation fund” would enable the government to “cooperate with *willing* landowners who desire to assist in the protection of endangered species, but *who are understandably unwilling to do so at excessive cost to themselves.*” *Id.* (emphasis added)

118. *Id.* at 1467.

119. *Sweet Home I*, 806 F. Supp. 279, 283 (D.D.C. 1992).

120. *Sweet Home III*, 17 F.3d at 1467 (citing *John Hancock Mutual Life Ins. Co. v. Harris Trust Sav. Bank*, 114 S. Ct. 517 (1993) for the proposition that courts must give meaning to Congress’ *failure* to act when appropriate).

the attention of the congressional subcommittee, constituted a ratification of the regulation.¹²¹ After considering each, the court rejected both theories.¹²²

As for the proposition that the Congress' amendment in 1982 brought the Secretary's interpretation into the realm of reasonability, the court noted that the only legislative act from which the government claimed support was the addition of the Section 10(a) incidental take permits.¹²³ In rejecting this contention, the court noted that the language clearly implied that some prohibited takings are 'incidental' to otherwise lawful activities but that it did not necessarily follow that such incidental takings included the habitat modifications embraced by the Service's definition.¹²⁴

In rejecting the ratification argument, the court conceded that the committee in charge of amending the Act was aware that the FWS' definition of "harm" had been given judicial approval in the *Palila* cases. However, the court noted that "[s]o far as appears, no congressional awareness of the Service's regulation or of *Palila* reached the floor of either House."¹²⁵ So, after rejecting each of the government's arguments in favor of the agency's interpretation, the court held the regulation invalid, concluding that "on a specific segment of society, the federal government, the Act imposes very broad burdens (through Section 7), including the avoidance of adverse habitat modifications."¹²⁶ As for the more broad segment of society, "it imposes relatively narrow ones,"¹²⁷ prohibiting only direct actions against listed species.

While Judge Sentelle was "most pleased to concur in the decision of the court" and did so "with enthusiasm,"¹²⁸ Judge Mikva was less than enthused with the court's departure from his earlier opinion. In a strong dissent, Mikva cautioned that the "majority's decision in this case is unfortunate. It scuttles a carefully conceived Fish and Wildlife Service regulation and creates

121. *Id.* at 1467.

122. *Id.*

123. *Id.* 16 U.S.C. § 1539(a) (B) provides that the "Secretary may permit, under such terms and conditions as he shall prescribe any taking otherwise prohibited by [Section 9] of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(B).

124. *Sweet Home III*, 17 F.3d at 1467. The Supreme Court would later disagree, concluding that it *does* necessarily follow.

125. *Id.* at 1469. Similarly, the court refused to imply ratification from Senator Garn's act of withdrawing a potential amendment of the Service's definition, or from language contained in the Conference Reports on the 1982 amendments. *Id.*

126. *Id.* at 1466. 16 U.S.C. § 1536(a) (2) provides, in relevant part, that "[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . . ." 16 U.S.C. § 1536(a)(2) (emphasis added).

127. *Sweet Home III*, 17 P.3d at 1466.

128. *Id.* at 1472 (Sentelle, J., concurring).

a split in the circuits on an important statutory question.”¹²⁹ To Mikva, the court should have upheld the Service’s regulation under the agency deferential standard laid out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹³⁰ Since the burden, under *Chevron*, is on the private party to prove that the agency’s interpretation of a statute is impermissible rather than on the agency to defend its interpretation, Mikva would have upheld the regulation. On a subsequent petition for rehearing and suggestion for rehearing en banc to the D.C. Circuit Court of Appeals, Mikva joined with Circuit Judges Wald, Silberman and Rogers in dissent as the court denied the government’s petition.¹³¹ On January 6, 1995, the United States Supreme Court granted the government’s petition for certiorari.¹³²

IV. THE SUPREME COURT’S DECISION

After the D.C. Circuit Court of Appeals struck down the Secretary of the Interior’s regulatory definition of “harm” as an impermissible construction of the ESA, one critic openly queried whether the decision should not be viewed as a victory for private property owners, especially in light of the court’s reference to a possible “extinction of private rights” and its favorable citing of *Lucas v. South Carolina Council*.¹³³ Perhaps the U.S. Supreme Court’s final decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*¹³⁴ should just as surely be viewed as a defeat for those same private land owners, particularly since the Court’s opinion was drafted by Justice John Paul Stevens,¹³⁵ a *Lucas* dissenter.¹³⁶

129. *Id.* at 1473 (Mikva, C.J., dissenting) (referring to the court’s departure from the Ninth Circuit Court of Appeals’ decisions in the *Palia* cases).

130. 467 U.S. 837, 865-66 (1984). Under the *Chevron* standard, where the intent of Congress is ambiguous and an agency’s interpretation is challenged, a court is obligated to uphold the agency’s interpretation so long as that interpretation is a permissible construction of the statute. *Id.*

131. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 30 F.3d 190 (D.C. Cir. 1994).

132. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 115 S. Ct. 714 (1995).

133. *See* *Gidari*, *supra* note 37, at 496 n.397.

134. 115 S. Ct. 2407 (1995).

135. Notably, Stevens was on the bench and played an important role on the Court when the landmark ESA case, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), was decided. Arguing that case for the government before the Court was Griffin Bell, attorney general for the Carter administration. As recounted in MANN & PLUMMER,

A big man with a raspy, deeply southern voice, Bell interrupted his oral argument to withdraw a test tube from his jacket pocket. “I have in my hand a darter,” he proclaimed, ‘a snail darter.’ The snail darter, a freshwater fish no bigger than a human thumb, had been placed on the endangered species list three years before; the case involved a dam that would destroy its only known habitat. Bell handed the fish to the bench. The test tube made its way along the line of nine justices, each of whom solemnly peered at its contents before passing it to a neighbor. Stopping a dam that would provide thousands of jobs for the sake of this insignificant fish? Ridiculous! The attorney general stood back, satisfied, as laughter filled the court. The laughter

In reversing the D.C. Circuit Court of Appeals, the Supreme Court held 6-3 that the Secretary of the Interior had reasonably construed Congress' intent when he defined "harm" to include habitat modification. After reviewing the pertinent case history, the majority cited three reasons for preferring the Secretary's interpretation. First, the Court found that the ordinary meaning of "harm" naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.¹³⁷ Citing the Webster's definition of "harm" as meaning "to cause hurt or damage to; injure," the Court concluded that unless "harm" encompassed indirect as well as direct injuries, the word would be deprived of independent meaning.¹³⁸ As for respondents' claim that the Secretary should have limited the purview of "harm" to direct applications of force against a listed species, the Court pointed out that the dictionary definition does not include the word "directly" or suggest in any way that only direct or willful action that leads to injury constitutes "harm."¹³⁹ Moreover, the Court found support for its interpretation in several other words included in the Act's definition of "take," such as "harass," "pursue" and "wound," which the Court found no more out of place than "habitat modification."¹⁴⁰

Second, the Court found that the ESA's broad purpose of providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" supported the Secretary's decision to extend Section 9's prohibitions against "activities that cause the precise harms

was halted by the quiet voice of Justice John Paul Stevens. 'Mr. Attorney General,' he said, 'your exhibit makes me wonder. Does the Government take the position that some endangered species are entitled to more protection than others?' Bell's smile disappeared . . . [he] had no answer.

MANN & PLUMMER, *supra* note 15, at 147-48.

Stevens' question, and more particularly its timing, are deeply revealing of the sympathy Stevens has for the purpose of the ESA. It also reveals at least a partial acceptance on his part that all species, both the "warm fuzzys" and the "creepy crawlies" merit protection.

136. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (Stevens, J., dissenting). In his *Lucas* dissent, Stevens urged the Court to give states more flexibility to "revise the rights and uses of property" in order to implement their "new learning" which, according to Stevens, is a natural byproduct of the human condition which is in a state of "constant learning and evolution." Stevens' willingness to allow states such power to "revise rights" suggests that he has too little distrust for the inherent nature of government to repress such liberties. For an excellent criticism of Stevens' willingness to "unglue the common law," as evinced in his *Lucas* dissent, see Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council*, 26 LOY. L.A. L. REV. 955, 975-978 (1993).

137. *Sweet Home*, 115 S. Ct. at 2412-13.

138. *Id.*

139. *Id.* at 2413. Indeed, the Court replied that such an implied limitation "ill serves the statutory text, which forbids not taking 'some creatures' but 'taking any endangered species'—a formidable task for even the most rapacious feudal lord." *Id.*

140. *Id.* at 2413 n.10.

Congress enacted the statute to avoid.”¹⁴¹ In support of this conclusion, the Court noted that while previous efforts to conserve endangered species had not contained any sweeping prohibition against the taking of endangered species except on federal lands, the ESA was intended to apply to “all land in the United States and to the Nation’s territorial seas.”¹⁴² The Court again harkened back to its decision in *Tennessee Valley Authority v. Hill*,¹⁴³ where it held that “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, *whatever the cost*.”¹⁴⁴

Lastly, the Court found that the 1982 amendments, which authorized the Secretary to issue permits for takings that Section 9 would otherwise prohibit so long as “such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,” strongly suggested that Congress understood Section 9’s prohibitions to encompass indirect as well as deliberate takings.¹⁴⁵ Since the Section 10(a) permit process requires the applicant to prepare a “habitat conservation plan,” which specifies how the applicant plans to “minimize and mitigate” the impact of his activity on endangered and threatened species,¹⁴⁶ the Court found further that “Congress had in mind foreseeable rather than merely accidental effects on listed species.”¹⁴⁷

The Court then turned to the Court of Appeals’ decision, pointing out what the Supreme Court identified as their three errors in asserting that ‘harm’ must refer to a direct application of force because the words

141. *Id.* at 2413 (citing 16 U.S.C. § 1531(b)). *But see id.* at 2426 (Scalia, J. dissenting) (“I thought we had renounced the vice of ‘simplistically assuming that whatever furthers the statute’s primary objective must be the law.’” (citing *Rodriguez v. United States* 480 U.S. 522, 526 (1987))).

142. *Id.*

143. 437 U.S. 153 (1978).

144. *Sweet Home*, 115 S. Ct. at 2413 (quoting *Tennessee Valley Auth. v. Hill*, 473 U.S. 153, 184 (1978) (emphasis added)). Note the Court’s failure to address the D.C. Circuit Court of Appeals decision in *Sweet Home III*, which finally distinguished between the very broad burdens (under Section 7) placed upon the federal government by the ESA, and the “relatively narrow ones” placed upon the citizenry (under Section 9). *Sweet Home III*, 17 F.3d 1463, 1466 (D.C. Cir. 1994). As to this distinction, the Supreme Court in its decision merely conceded that “[a]lthough the Section 9 ‘take’ prohibition was not at issue in *Hill*, we took note of that prohibition, placing particular emphasis on the Secretary’s inclusion of habitat modification in his definition of ‘harm.’” *Sweet Home*, 115 S. Ct. 2407, 2413. *But see id.* at 2426 n.3. (Scalia, J., dissenting) (explaining, at long last, that “[e]ven if we had said that the Secretary’s regulation was authorized by [Section 9], that would have been utter dictum, for the only provision at issue was [Section 7]. But in fact we simply opined on the effect of the regulation *while assuming its validity*, just as courts always do with provisions of law whose validity is not at issue.” (emphasis added)).

145. *Sweet Home*, 115 S. Ct. at 2414 (citing 16 U.S.C. § 1539(a) (1) (B)).

146. 16 U.S.C. § 1539(a) (2) (A).

147. *Sweet Home*, 115 S. Ct. at 2414. The Court went on to declare that “[n]o one could seriously request an ‘incidental’ take permit to avert Section 9 liability for direct, deliberate action against a member of an endangered or threatened species, but respondents would read ‘harm’ so narrowly that the permit procedure would have little more than that absurd purpose.” *Id.*

surrounding it did.¹⁴⁸ First, the Court explained, the Court of Appeals' premise was flawed in assuming that the direct application of force was implicated by the nine terms which constitute "take." In fact, the Court noted, "several of the words that accompany 'harm' in the Section 3 definition of 'take,'¹⁴⁹ especially 'harass,' 'pursue,' 'wound,' and 'kill' refer to actions or effects that do not require direct applications of force."¹⁵⁰ Thus, the Court reasoned, the Court of Appeals erred when it imputed such a meaning to "harm" as it exists in the statute.

Second, the Supreme Court pointed out that, to the extent that the Court of Appeals read a requirement of intent or purpose into the words used to define "take," the lower court failed to observe Section 9's express provision that a "knowing" action is enough to violate the Act.¹⁵¹ In light of the "knowing" action provision, which dramatically lowers the intent requirement of Section 9, the Supreme Court found that the Court of Appeals erred in presuming a higher required showing of intent.¹⁵²

Finally, the Court pointed to the D.C. District Court of Appeals' misapplication of the *noscitur a sociis* canon in interpreting "harm." Noting that the canon counsels that a word "gathers meaning from the words around it,"¹⁵³ the Court pointed out that the appellate court actually misused the canon to limit "harm" to essentially the same function of surrounding words, denying it independent meaning.¹⁵⁴ In fact, the Court explained, the statutory context of "harm" suggested that Congress meant the term to serve a particular and distinct function under the ESA, which the appellate court had undercut with its decision. For these three reasons, the Supreme Court dismissed the D.C. Circuit Court of Appeals' decision in *Sweet Home III* as clear error.

The Court next turned to other arguments offered by the landowners. To their argument that, under the Secretary's interpretation of "harm," the federal government lacks any incentive to purchase land under the land acquisition provision of Section 5 of the Act,¹⁵⁵ the Court responded that purchasing habitat lands "may well cost the Government less in many circumstances than

148. *Id.* at 2415.

149. 16 U.S.C. § 1532(19).

150. *Sweet Home*, 115 S. Ct. at 2445.

151. *Id.*

152. Note that the Supreme Court uses the ESA's egregiously low knowledge requirement to actually *defend* the Act from judicial attack.

153. *Sweet Home*, 115 S. Ct. at 2415 (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

154. *Id.* The Court also pointed out that the respondents were wrong to place reliance on *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1993), which involved a statute whose "take" definition included neither "harm" nor other words which appear in the ESA definition. Moreover, the Court noted, *Hayashi* was decided by the very court that heard the *Palila* case, yet in deciding the *Hayashi* case, neither the majority or the dissent of the Ninth Circuit Court saw any need to "distinguish or even cite *Palila II*." *Sweet Home*, 115 S. Ct. at 2415 n.16.

155. 16 U.S.C. § 1534.

pursuing civil or criminal penalties.”¹⁵⁶ Moreover, the Court noted that only through the proactive process of Section 5 habitat acquisition could the government avoid harm to listed species, while Section 9 cannot be utilized until after a protected species has been killed or injured.¹⁵⁷

Next, the landowners argued that Section 7’s express prohibition against habitat modification¹⁵⁸ demonstrated that Congress was aware of the habitat problem but intentionally left any such provision out of Section 9 because it did not intend for private citizens to be liable for such actions. In response, the Court noted that the Section 7 duty simply “imposes a broad, affirmative duty to avoid adverse habitat modifications that Section 9 does not replicate” and that “Section 7 does not limit its admonition to habitat modification that ‘actually kills or injures wildlife.’”¹⁵⁹ Moreover, the Court pointed out that Section 7 contained other limitations that Section 9 does not, but that “any overlap that Section 5 or Section 7 may have with Section 9 in particular cases is unexceptional and simply reflects the broad purpose of the Act.”¹⁶⁰ Thus, the ESA’s failure to even mention adverse habitat modification in Section 9 while expressly including such a prohibition in Section 7 was ultimately dismissed as inconsequential.

In addition to its earlier enunciated reasons, the Court found support for the Secretary’s interpretation of “harm” in the legislative history of the Act. For example, the Court noted that the Committee Reports accompanying the bills that would become the ESA made it clear that Congress intended “take” to apply as broadly as possible, to include indirect as well as purposeful actions.¹⁶¹ The Court found particular significance in a statement by then-floor manager of the Senate ESA bill Senator Tunney, who upon offering “harm” to the definition of “take,” remarked that the amendment, *along with others*, would “help to achieve the purposes of the bill.”¹⁶²

156. *Sweet Home*, 115 S. Ct. at 2415. Note that this statement implies that, among other things, the government actually takes cost into account; a premise which would appear fundamentally inconsistent with the current state of the budget! Moreover, no less than the director of the Fish and Wildlife Service, Mollie Beattie, appears to have had no idea that Section 5 of the Act even existed, much less that it offers a constitutional method of habitat conservation. Urging the importance of upholding the Secretary’s “harm” regulation before the Court’s decision was handed down, Ms. Beattie asked “How can we conserve endangered species without having a way to conserve habitat?” Linda Kanamine & Tony Mauro, *Courtwise: Spotted Owls vs. Landowners*, USA TODAY, April 17, 1995, at 3A (quoting Beattie). With such a high ranking FWS official obviously oblivious to even the existence of Section 5, the Court’s contention that FWS might choose it in the interest of efficiency is, at best, disingenuous.

157. *Sweet Home*, 115 S. Ct. at 2415. Note, too, that this statement implies that the government cares more about species than it does about money; a similarly doubtful premise.

158. 16 U.S.C. § 1536(a) (4).

159. *Sweet Home*, 115 S. Ct. at 2415-16.

160. *Id.*

161. *Id.* at 2416 (1995) (citing S. REP. NO. 93-307, p. 7 (1973), which provided that “[t]ake” is defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.”).

162. *Id.* at 2416-17 (citing 119 CONG. REC. 25683 (July 24, 1973)).

To respondents' argument that the lack of debate about the amendment that added "harm" should counsel a narrow reading of the term, the Court simply replied that "[w]e disagree."¹⁶³ Similarly, when respondents pointed out that the definition of "take," which originally appeared in S. 1983, was deleted by the Senate prior to passage, the Court responded "[w]e do not find that fact especially significant."¹⁶⁴

In a separate, concurring opinion, Justice O'Connor agreed with the majority's opinion for two reasons. First, she based her opinion on the understanding that the challenged regulation was limited to significant habitat modification that caused actual, as opposed to hypothetical or speculative, death or injury to identifiable listed species.¹⁶⁵

163. *Id.* at 2417 ("An obviously broad word that the Senate went out of its way to add to an important statutory definition is precisely the sort of provision that deserves a respectful reading.").

164. *Id.* Yet, in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), where the Court (Stevens included) sought to decipher Congressional intent in passing Section 7 of the ESA, the Court noted that:

this provision had its genesis in the Endangered Species Act of 1966, but that legislation qualified the obligation of federal agencies by stating that they should seek to preserve endangered species only '*insofar as is practicable and consistent with their primary purposes. . . .*' Likewise, every bill introduced in 1973 contained a qualification similar to that found in the earlier statutes. . . . What is significant in this sequence is that the final version of the 1973 Act *carefully omitted all of the reservations described above.*

Id. at 181-82 (emphasis added).

Thus, while the Court in 1978 found Congressional omission of a phrase to be "very significant," the Court in 1995 refused to acknowledge an *express refusal* by Congress to include habitat modification within the definition of take.

165. *Sweet Home*, 115 S. Ct. at 2418 (O'Connor, J., concurring). O'Connor's "understanding" is based largely upon the representations of the Fish and Wildlife Service (FWS) that the challenged regulation is "limited" to such habitat modifications in practice. Yet, as Gidari has pointed out, under the FWS administered ESA landowners are routinely threatened with criminal prosecution for "causing" precisely the "speculative" injuries of which O'Connor expressly disapproves. Gidari, *supra* note 37, at 427-31. These threatened prosecutions rarely specify any actual injury to a listed species. See, e.g., Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605, 613-614 (1991) (quoting a "typical letter from [Gail Kobetich, Field Supervisor of the Sacramento branch of] the FWS to [Peter Chamberlin, director of the Sand City Planning Commission, who] . . . proposed to zone property for development within the habitat of an endangered species": "Section 9 of the [ESA] . . . makes it unlawful for any person to take an endangered species without a permit. . . . Section 11 of the Act prescribes civil penalties of up to \$10,000 . . . or imprisonment for up to one year, or both, for knowingly violating any provision of the [ESA]. . . . [W]e must advise you, unless you first secure a section 10(a) permit authorizing the incidental take . . . the approval and implementation of the proposed action may subject . . . city officials to investigations by our law enforcement branch regarding potential violations of the [ESA].").

Secondly, O'Connor observed that "even setting aside difficult questions of scienter, the regulation's application is limited by ordinary principles of proximate causation, which introduce notions of foreseeability."¹⁶⁶

A. Scalia's Dissent

In a fervent dissent characteristic of his traditional regard for individual liberty,¹⁶⁷ Justice Scalia denounced the Court's decision, which, in his view, "imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."¹⁶⁸ To Scalia, it was "unmistakably clear" that the ESA, as it was meant to apply to private landowners, merely forbade the hunting and killing of endangered animals and provided federal lands and federal funds for the acquisition of private lands to preserve the habitat of endangered species.¹⁶⁹

Scalia began his dissent by detailing three features of the challenged regulation which, in his view, failed to comport with the ESA.¹⁷⁰ First, he attacked the Court's interpretation of the statute as prohibiting habitat modification which constitutes no more than a cause-in-fact of death or injury to a listed species, irrespective of whether the resulting injury was intended or even foreseeable.¹⁷¹ Next, Scalia noted that as interpreted by the majori-

166. *Sweet Home*, 115 S. Ct. at 2418. *But see* *Defenders of Wildlife v. Environmental Protection Agency*, 688 F. Supp. 1334 (D. Minn. 1988), *aff'd in part and rev'd in part*, 882 F.2d 1294 (8th Cir. 1989). In a case which demonstrates the extreme end of the causation spectrum under Section 9 of the ESA, plaintiffs alleged that the EPA's continued registration of strychnine constituted an impermissible taking of protected species in violation of Section 9 of the ESA and other wildlife statutes. Without even addressing the chain of causation between the registration of strychnine and the ultimate death of any listed species (indeed, plaintiffs introduced *no evidence of such a connection*), both the district court and court of appeals agreed that a "taking" had occurred within the meaning of Section 9. *Id.* at 1301. In light of the court's holding in *Defenders v. EPA*, it would appear that O'Connor's confidence that "ordinary principles of proximate causation" would apply to Section 9 is misplaced since no such requirement was necessary to find a "take" in that case. Perhaps her decision can be best understood in light of O'Connor's position on environmental laws in general, which one commentator describes as "much more sympathetic to the goals of environmental laws, although . . . [she is] still concerned about the potential for abuse." Lavelle, *supra* note 13, at B1 (quoting Prof. Richard Lazarus of Washington University School of Law in St. Louis). Note, however, that Justice O'Connor did express her disapproval with the *Palila II* decision as an impermissible breach of the regulation's causal limitations. *Sweet Home*, 115 S. Ct. at 2421 (O'Connor, J. concurring).

167. For an excellent account of Scalia's regard for individual liberty, specifically with regard to his respect for property rights, *see generally* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

168. *Sweet Home*, 115 S. Ct. at 2421 (Scalia, J., dissenting).

169. *Id.* Indeed, Scalia makes a compelling and well documented case for such an interpretation. *Id.* at 2422-26.

170. *Id.* at 2421.

171. *Id.* Notably, Scalia singled out the result in *Palila II* as an illustration of the definition's practical absurdity; arguing that the virtual absence of a chain of causality between modification and injury alone rendered the regulation invalid. *Id.* at 2421-22.

ty, a violation of the challenged regulation, and thus the ESA, did not even require an "act" which harms a listed species; an omission would suffice.¹⁷²

The third failure of the challenged regulation to comport with the ESA that Scalia identified was the fact that under 50 CFR Section 17.3's definition of "harm," "significantly impairing essential behavioral patterns, including breeding" was in violation of the ESA.¹⁷³ Since such impairment does not "injure" currently living creatures, but merely prevents such species from propagating, Scalia saw the regulation as stretching the definition of "take" to an impermissible breadth to protect not only individual species, but *future populations* of species as well; a goal not attainable through Section 9.¹⁷⁴

As for each of these inconsistencies, Scalia found the challenged regulation all the more conspicuous when contrasted against the traditional definition of "take" as historically applied to wildlife.¹⁷⁵ To place the term in its proper context, Scalia cited the historic case of *Greer v. Connecticut*¹⁷⁶ and the Migratory Bird Treaty Act¹⁷⁷ for the proposition that, when applied to wildlife, "take" describes a direct, intentional act against an identifiable animal, rather than the indirect and unintentional actions targeted by the "harm" regulation.¹⁷⁸ When considered in its proper context—rather than in the ESA's definitional context¹⁷⁹—and evaluated against Section 9's "take" prohibition, the impropriety of the Secretary's definition becomes abundantly clear.¹⁸⁰

172. *Id.* at 2422. Though the Secretary deleted the "omission" reference in his 1981 redefinition of "harm," Scalia noted that he did so only because, as the final publication of the rule revealed, FWS mistakenly believed that "act" was inclusive of either commissions or omissions which were prohibited by Section 9; negating the need to expressly provide for an "omission" in the definition of "harm." *Id.* (citing 46 Fed. Reg. 54,748-50 (1981)).

173. *Id.*

174. *Id.* Scalia went on to chastise Justice O'Connor for finding that impairment of breeding intrinsically injures an animal because "[t]o make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete." *Id.* at 2430 n. 5 (quoting O'Connor in her concurring opinion). To Scalia, the only harm an individual animal suffers from impairment of such functions is "the *psychic harm* of perceiving that it will leave this world with no issue (assuming, of course, that the animal in question, perhaps an endangered species of slug, is capable of such painful sentiments)." *Id.*

175. *Id.* at 2422 ("If 'take' were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself.")

176. 161 U.S. 519, 523 (1896) ("[A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them.")

177. 16 U.S.C. § 703 (1988 ed., Supp. V) (no person may "pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill" any migratory bird).

178. *Sweet Home*, 115 S. Ct. at 2422-23 (Scalia, J., dissenting) ("It is obvious that 'take' in this sense—a term of art deeply embedded in the statutory and common law concerning wildlife—describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).")

179. 16 U.S.C. § 1532(19).

180. *Sweet Home*, 115 S. Ct. at 2423 (Scalia, J., dissenting) ("The Court treats the statute as though Congress had directly enacted the Section 1532(19) definition as a self-executing prohibition, and had not enacted [Section 9] at all. But [Section 9] *is* there, and if the terms contained in the definitional section are susceptible of two readings, one of which comports with

In addition to disagreeing with what he saw as the majority's failure to keep the term "take" in its traditional context,¹⁸¹ Scalia also took exception with the Court's misconstruction of "harm" as it applied to the ESA.¹⁸² While the majority found that "harm" encompassed the unintentional and indirect action of modifying habitat, Scalia sought to narrow the scope of the term. In support of his reading of "harm," Scalia cited a legal opinion delivered by the Solicitor of the Fish and Wildlife Service in 1981 which concluded that "the term 'harm' should be interpreted to include only those actions that are *directed against*, and likely to injure or kill, *individual* wildlife."¹⁸³

To Scalia, the clearest evidence of the challenged regulation's invalidity were the practical consequences of the regulation when considered against the penalty provisions of the Act. Noting that a "large number of routine private activities" such as farming, ranching, roadbuilding and construction could subject individuals to strict-liability penalties for fortuitously injuring protected wildlife "no matter how remote the chain of causation," Scalia concluded that the consequences were "a result that no legislature could reasonably be thought to have intended."¹⁸⁴

As for the legislative history of the ESA relied upon by the majority, Scalia again reiterated his long-standing disapproval for employing such an

the standard meaning of 'take' as used in application to wildlife, and one of which does not, an agency regulation that adopts the latter reading is necessarily unreasonable, for it reads the defined term 'take'—the only operative term—out of the statute altogether.”)

181. Indeed, the Secretary's definition of "take" was not only inconsistent with the historical meaning of the term, but with other sections of the Act as well. For instance, Scalia notes that Section 9(e) (1), which exempts Alaskan Indians from punishment for "taking" endangered species "primarily for subsistence purposes," renders the "environmental modification" definition of "harm" meaningless by obviously communicating an understanding that "take" encompasses only direct, intentional actions directed at an individual species. In light of such contradictory scheme, one in which the operative words have a consistent meaning throughout, . . . the regulation must fall." *Id.* at 2425 (quoting *Gustafson v. Alloyd Co.*, 115 S. Ct. 1661, 1667 (1995)).

182. *Id.* at 2424.

183. *Id.* at 2423-24 (citing 46 Fed. Reg. 29,490-91 (1981)) (emphasis added). Indeed, the Solicitor's opinion, which predates the 1982 amendments, plainly concludes that the definition of "harm" enunciated in *Palila* was wrong, since it encompassed actions not originally contemplated by Congress. *Id.*

184. *Id.* at 2424. In rejecting the results of the Act as interpreted by the majority, Scalia notes what several before him did not; that the "knowledge" requirement of the ESA requires *not* that the defendant knew that what he did *violated the Act*, but that his actions, *however innocent*, were "knowingly" taken. Thus, a hunter who shoots a protected elk in the mistaken belief that it was a mule deer has committed a "purposeful taking" within the meaning of the ESA because he *knowingly shot* at an animal whose unknown protected status rendered him guilty of a federal crime. *Id.* Such an egregiously low "knowledge" requirement hardly rises to the level of a "scienter" requirement, as it was characterized by Judge Mikva in the *Sweet Home II* case. See *Sweet Home II*, 1 F.3d 1, 4-5 (D.C. Cir. 1993).

“illegitimate” and “unreliable” tool of interpretation.¹⁸⁵ Yet, even assuming that the Court was correct in analyzing the text relied upon by the majority, he concluded that “here [the legislative history] shows quite the opposite of what the Court says.”¹⁸⁶ Rejecting the Court’s reliance upon broad statements in Committee Reports, which he referred to as “empty flourish,”¹⁸⁷ Scalia went on to explain the two main passages from the Act’s history which were relied upon by the majority. The first was the statement by the Senate floor manager when the word “harm” was added to the definition of take. There, the manager explained that the added term would “help to achieve the purposes of the bill.”¹⁸⁸ The second historical tidbit cited by the majority dealt with the Senate’s apparent refusal to adopt the definition of “take” which included the “destruction, modification or curtailment of the habitat or range.”¹⁸⁹ Chiding the Court for inflating the first and belittling the second,¹⁹⁰ Scalia went on to point out that the Senate and House floor managers of the bill which became the ESA both made it abundantly clear that the Section 9 merely prohibited direct actions against listed species, while the land acquisition provisions of Section 5¹⁹¹ were to be the sole means for alleviating habitat modification concerns on private property.¹⁹²

185. Indeed, Justice Scalia has been one of the Court’s fiercest opponents against using legislative history as a guide to statutory construction. *See, e.g., Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 617-20 (1991) (“Committee Reports are [unreliable] . . . not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not. . . . [These reports do] not necessarily say anything about what Congress as a whole thought.”). In *Mortier*, Justice Scalia might just as easily been referring to the *Sweet Home* case in his scathing criticism of legislative history, which proves to be particularly misleading when interpreting the ESA. *See, e.g., infra* notes 217-24 and accompanying text.

186. *Sweet Home*, 115 S. Ct. at 2426-27 (Scalia, J., dissenting).

187. *Id.* The specific statement to which Scalia refers was one which declared that “[t]ake” is defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” *Id.* (citing S. REP. NO. 93-307, p. 7 (1973), U.S. Code & Admin. News 1973, 2995). To Scalia, this empty statement meant little more than “this statute means what it means all the way” and counted for little; even when made part of the ESA itself. *Id.*

188. *Id.* at 2427 (quoting the Senate floor manager).

189. *Id.* (citing S. 1983, 93d Cong., 1st Sess., § 3(6)(A) (1973)).

190. *Id.* at 2427.

191. 16 U.S.C. § 1534.

192. *Sweet Home*, 115 S. Ct. at 2427. The court cited Senator Tunney’s statement that:

[a]lthough most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to *predation by man for commercial, sport, consumption, or other purposes*. The provisions of [Section 9] would prohibit the commerce in or the importation, exportation, or taking of endangered species as evidence that Section 9 was intended only to address direct, intentional actions against listed species.

Id. By contrast, Representative Sullivan, then the House floor manager noted that “[t]he principal threat to animals stems from destruction of their habitat” and that Section 5 “*will meet this problem by providing funds for acquisition of critical habitat.*” *Id.* Taken together, Scalia noted that they were “bad enough to destroy the Court’s legislative-history case, since they display the clear understanding (1) that habitat modification is separate from ‘taking,’ and (2) that habitat

As for the majority's assumption that the addition of Section 10(a) incidental take permits by Congress in the 1982 amendments "clearly" indicated that Congress understood Section 9 to encompass "indirect takings," Scalia concluded that the "Court shows that it misunderstands the question."¹⁹³ Noting that the majority's inference was reliant upon the premise that habitat modification constituted the *only* form of lawful activity which could result in the incidental taking of a listed species, he explained that there were a number of "otherwise lawful" activities which could result in an incidental "take."¹⁹⁴ Thus, the majority was incorrect in assuming that the addition of Section 10(a) incidental take permits obviated Congressional intent to prohibit habitat modification which "harmed" a listed species.¹⁹⁵

V. ASSESSING THE COURT'S OPINION

The deleterious effects of the Supreme Court's opinion upon the individual liberties of private property owners cannot be overstated. Notwithstanding attempts by Congress to slow the ESA's erosion of property rights by rescinding appropriations for the FWS,¹⁹⁶ as well as an attempt by the Clinton administration to quell political opposition to the Act by providing small property owners with exemption from the ESA,¹⁹⁷ the Court's decision is a disaster for private property owners, species¹⁹⁸ and consumers

destruction on private lands is to be remedied by public acquisition and *not* by making particular unlucky landowners incur 'excessive cost to themselves.'" *Id.* at 2427-28 (quoting Statement by Representative Sullivan, 119 CONG. REC. 30162 (1973)).

193. *Id.* at 2428.

194. *Id.* Justice Scalia pointed to another case which involved the issuance of an incidental take permit to fishermen who—while fishing for unprotected salmon—could inadvertently "take" a protected species with their nets. *Id.* (citing *Pacific Northwest Generating Coop. v. Brown*, 38 F.3d 1058, 1067 (9th Cir. 1994)).

195. Another error pointed out by Justice Scalia was to, at long last, explain how both the majority and a host of courts before it (including the *Palila* courts) had misconstrued the Court's holding in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978). In that case, Scalia explained, the Court dealt only with Section 7 of the Act. As such, any reference to Section 9 in that case was "utter dictum" which the Court had simply opined while *assuming* the validity of Section 9; not accepting or endorsing it. *Sweet Home*, 115 S. Ct. at 2426 n.3.

196. *See Budget Clause Puts 96 Proposed Listings Of Species On Hold Until End of Fiscal 1995*, BNA NAT'L ENVTL. DAILY, May 2, 1995 (discussing HR 889, which rescinded \$1.5 million from the Fish and Wildlife Service's \$8 million 1995 appropriation for the listing of species and critical habitat.). The purpose of this rescission, according to Sen. Kay Bailey Hutchinson (R-Texas), was to "provide a 'time out' from new listings controversy and will provide the momentum necessary for reauthorization of the ESA." This "'short moratorium' would prevent further erosion of private property rights and access to water sources until the Endangered Species Act can be amended to take economic and social impacts into account." *Id.*

197. *See, White House Eases Impact of Species Act on Small Property Owners*, INSIDE ENERGY, July 17, 1995 at p. 16 (explaining how the new regulation would "essentially exempt homeowners with five acres or less from ESA requirements on 'threatened' species, but would not apply to species listed as 'endangered.'"). When asked whether the exemptions were initiated to improve the law or to head off impending Congressional attacks, Secretary of the Interior Bruce Babbitt answered: "Both." Randy Lee Loftis, *Endangered Species Act Under Siege; Law's Republican Foes Say it Puts Nature Before People*, DALLAS MORNING NEWS, July 2, 1995 at A1.

198. *See infra* notes 254-278 and accompanying text.

alike.¹⁹⁹ Already, the Court's decision has produced a firestorm of opposition to the Act by landowners from across the country.²⁰⁰ Although an exhaustive list of all of the potential implications of the U.S. Supreme Court's resolution of *Sweet Home* would be virtually impossible to construct within the narrow confines of this article, several aspects of the decision merit attention.

A. Rejection of Chevron

One surprising aspect of the Court's *Sweet Home* decision was its election not to employ the standard of review enunciated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*²⁰¹ Decided in 1984, *Chevron* stands for the proposition that the agencies charged with administering particular statutes should be permitted to utilize their expertise in deciding how to interpret otherwise ambiguous Congressional intent. At its core, the standard represents a decision by the courts to place important issues of

199. Sugg, *supra* note 6, at 5 (quoting *Endangered Species Blueprint*, NWI RESOURCE, Fall 1992, issue 3, at 1):

[T]his article strives to impress upon the reader that, by virtue of mere serendipity and geographical accident, the ESA "can affect you if you own or plan to own property, if you want to build on or otherwise improve your property, if you like to hunt or fish, if you enjoy hiking, camping or even mountain biking." Even if you never venture far beyond your rented urban apartment, "it still affects you in the form of [higher] taxes and prices."

Indeed, Sugg's message has never been more true. Nor has it been more urgent. According to land use attorney Craig Beam, habitat preservation measures necessitated by the ESA could take 5,411 of 7,224 acres of private agricultural land out of production in San Diego County alone. Biberman, *supra* note 11, at A1. With Charles C. Mann and Mark L. Plummer estimating that some 210 million Americans live close to at least one listed species, "a number that will grow as the list grows," the potential consequences of the Court's decision become difficult to fathom. MANN & PLUMMER, *supra* note 15, at 15.

200. Luke Popovich, a spokesman for the American Forest & Paper Association, declared that the Court's decision "is just further evidence of why Congress has to once again take up the Endangered Species Act, this time with a view toward fixing what is broken for landowners." Biberman, *supra* note 11, at A1. In somewhat more colorful language, Marshall Kuykendall, a rancher from Hays County, Texas declared: "It's time to cut the head off the snake." Loftis, *supra* note 197, at A1.

201. 467 U.S. 837 (1984). Indeed, despite a vast array of legislative history suggesting the contrary, the Court concluded that Congress "did not unambiguously manifest its intent to adopt [the Secretary's] view" and that "the Secretary's interpretation is reasonable." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2416 (1995). Thus, with its unsupported conclusion that there was no Congressional ambiguity to resolve firmly in place, the Court declined to conduct a *Chevron* analysis.

statutory construction into the hands of the “experts” charged with executing them; with the only limitation being that the agencies act “reasonably.”²⁰²

Rather than seize the opportunity to reaffirm the Court’s policy of deferring to agency interpretations, as the *Chevron* standard advocates, the Court merely opined that its conclusion, reached independently, was consistent with the policy behind *Chevron*.²⁰³ Thus, while the Court did cite *Chevron* in support of its refusal to second-guess the Secretary, the Court declined to embrace a precedent which at least one commentator predicted would decide the case.²⁰⁴ Perhaps the Court should have accepted Dill’s invitation and confined itself to a *Chevron* analysis; a holding which, though wrong, would have at least been legally defensible. As it exists, the Court’s decision is wrought with internal inconsistencies and blatant factual inaccuracies.

B. Judicial Reshaping of the ESA

As decided, the opinions of both the Court majority and Justice O’Connor display a stunning willingness to twist and contort the language, structure and legislative history of the ESA to uphold an interpretation which could not possibly have been anticipated, much less intended, by Congress in 1973.²⁰⁵ For instance, in response to the argument by the landowners that

202. *Chevron*, 467 U.S. at 845 (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations ‘has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.’” (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961))). The Court, in its *Sweet Home* opinion, referred specifically to the “degree of regulatory expertise necessary to [the ESA’s] enforcement” as further grounds for refusing to scuttle the Secretary’s definition. *Sweet Home*, 115 S. Ct. at 2418.

203. *Sweet Home*, 115 S. Ct. at 2418. In the final part of the Court’s opinion, it declared that the Congress had vested broad administrative and interpretive power to the Secretary, for whom “we are especially reluctant to substitute our views of wise policy.” *Id.* For a discussion of how the Court has gradually turned away from the *Chevron* decision, see generally Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 Colum. L. Rev. 749 (1995) and Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractibility, and the Proper Incentives*, 44 DUKE L.J. 1133, 1134 (1995) (“Indeed, the current Supreme Court is developing what it believes to be a highly determinate doctrine of statutory interpretation that gives little deference to administrative agencies.”).

204. See Starla K. Dill, *Animal Habitats in Harm’s Way: Sweet Home Chapter of Communities For a Great Oregon v. Babbitt*, 25 ENVTL. L. 513, 529 (1995) (arguing that the Court “should remain true to the *Chevron* doctrine and uphold the FWS regulation as a permissible construction of an ambiguous statute.”).

205. Only Justice Scalia seemed to object to the Court’s conclusion that, in passing the ESA, Congress sought to implement a regulatory regime which would jail unwitting landowners for daring to place their needs and those of their families ahead of the interests of creatures already teetering on the brink of extinction. To Scalia, the egregious consequences of the Act as interpreted by the majority provided sufficient evidence to counsel against imputing such intent to the members of Congress. *Sweet Home*, 115 S. Ct. at 2424 (Scalia, J., dissenting). Yet more

the Secretary's definition rendered them subject to criminal and civil penalties for unintended and sometimes unforeseeable "harm" to listed species under the "otherwise violates" provision of the Act, the Court replied that the Act could be "read to incorporate ordinary requirements of proximate causation and foreseeability."²⁰⁶ This charitable type of reading by the highest court in the land seems to imply that an unconstitutional law may be saved simply by attributing an improbable meaning to other words in the statute. Yet even that fails to save the ESA since prior caselaw has revealed that "ordinary requirements of causation and foreseeability" are tossed out the courthouse window when dealing with ESA Section 9 cases.²⁰⁷

To further bolster its decision that the Secretary's interpretation of "harm" comported with constitutional requirements, the Court pointed out that neither the respondents nor their amici had suggested that the Secretary employed the "otherwise violates" provision with any frequency.²⁰⁸ Taken

evidence that Congress never anticipated—much less intended—for the Act to work this way is the fact that the ESA was passed with virtually no legislative opposition. *See* MANN & PLUMMER, *supra* note 15, at 160 ("Not a single senator cast a ballot against the bill and only four members of the House of Representatives did."). The extent to which and fervor with which legislation is debated has long been considered relevant in determining legislative intent. *See, e.g.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402 (1819)

The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first, in the fair and open field of debate, and afterwards, in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity, to assert that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance.

Id.

Indeed, if anything, the lack of debate evinces an understanding on the part of the Senate that "harm" was *not* intended to include the vastly broader conduct involved with "habitat modification." In fact, as one ESA historian has noted, Senator Tunney offered the "harm" amendment to the ESA on the *same day* that he had explained to his colleagues that land acquisition with compensation under Section 5 of the Act was the Act's answer to the habitat concerns of listed species. Thus, "it seems unlikely that he meant to prohibit habitat modification" by private landowners. Ike C. Sugg, *Defining 'Harm' to Wildlife*, 16 NAT'L L.J., June 20, 1994, at C1, C2. This interpretation is buttressed by the fact that "[w]hat 'harm' meant was not even discussed at the time, nor was it debated or defined until well after the ESA was enacted."
Id.

206. *Sweet Home*, 115 S. Ct. at 2412.

207. *See, e.g.*, sources cited *supra* note 166.

208. *Sweet Home*, 115 S.Ct. at 2412. This representation by the Court is particularly egregious. The Court ignores the fact that respondents had been threatened with criminal prosecution under the ESA for violating the FWS' guidelines with *no mention of foreseeable harm to listed species*. Moreover, the Court's implication that none of the landowners' amici had put the Court on notice of the FWS's misuse of the Act is demonstrably inaccurate. *See, e.g.*, Amicus Curiae Brief of The Competitive Enterprise Institute in Support of Respondents, *Sweet Home*, 115 S. Ct. 2407 (1995) (No. 94-859) (providing extensive accounts of how the FWS

to its logical conclusion, the Court's opinion seems to sanction unconstitutional criminal prosecutions provided they are not conducted "with any frequency." Similarly, the Court's position that "the broad purpose of the ESA supports the Secretary's" interpretation of "harm" as including "significant habitat modification" seems to imply that any unconstitutional transgressions occasioned by the regulation are justified so long as the ESA's broad goals are arguably furthered.²⁰⁹

A surprisingly ambitious—and ultimately more sticky—attempt to manipulate the Act to comport with the Secretary's definition came from Justice O'Connor in her concurring opinion. Faced with a statement by the Secretary that "harm" is not limited to "direct physical injury to an individual member of the wildlife species"²¹⁰ in direct contradiction of Section 9's prohibitive prescription against the "taking" of *individual* species, O'Connor noted that "one could just as easily emphasize the word 'direct' in this sentence as the word 'individual.'"²¹¹ Indeed, as Justice Scalia noted, one very well could.²¹² Yet, while placing such an emphasis on *direct*, rather than *individual* solves the problem of the definition's apparent attempt to expand the scope of Section 9's protections to *populations* of species, it simultaneously removes any semblance of a causation requirement from the triggering of Section 9.²¹³ In other words, any reading of the Secretary's regulation and its accompanying comments, when considered against the rest of the ESA, is obviously inconsistent with the ESA and thus invalid.²¹⁴

The Court's opinion demonstrates an alarming proclivity for making conclusions wholly unsupported by either the facts of the case, by ESA caselaw, or by legislative guidance. For example, the landowners challenging the Secretary's definition argued that the lack of debate accompanying the amendment that added "harm" should compel a narrow interpretation of the term.²¹⁵ The Court responded that an "obviously broad word that the

routinely misuses the Act against private landowners).

209. *Sweet Home*, 115 S. Ct. at 2413 n.19. To the Court's "broad purpose" argument, Scalia responds plainly (and persuasively) "I thought we had renounced the vice of 'simplistically assum[ing] that whatever furthers the statute's primary objective must be the law.'" *Id.* at 2426 (Scalia, J., dissenting) (citing *Rodriguez v. United States*, 480 U.S. 522, 526 (1987)).

210. 46 Fed. Reg. 54,748 (1981).

211. *Sweet Home*, 115 S. Ct. at 2419 (O'Connor, J., concurring).

212. *Id.* at 2430 n.5 (Scalia, J., dissenting).

213. *Id.*

214. As for O'Connor's willingness to simultaneously argue contrary interpretations, as well as the majority's apparent refusal to acknowledge that the Secretary's definition of "harm" protects *populations* of listed species, Scalia replied: "since the Court is reading the regulation and the statute incorrectly in other respects, it may as well introduce this novelty as well—law a la carte." *Id.* at 2431.

215. Brief for Respondents at 29-30, *Sweet Home*, 115 S. Ct. 2407 (1995) (No. 94-859) (quoting *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) ("The Court ought not interpret 'vague' language to 'effect a major change' . . . without 'at least some discussion in the legislative history.'")).

Senate went out of its way to add to an important statutory definition” was “precisely the sort of provision that deserves a respectful reading.”²¹⁶

C. Revisionist History of the ESA

Few conclusions drawn by the Court in its *Sweet Home* decision fall further from their mark than its finding that the permissibility of the Secretary’s definition “gains further support from the legislative history of the statute.”²¹⁷ In fact, a review of the true history of the ESA reveals remarkably little insight into the intentions of its creators. As Charles C. Mann and Mark L. Plummer have demonstrated in their book *Noah’s Choice*, a fair and accurate reading of the Act’s true legislative history reveals that “few members of Congress had the ‘foggiest idea’ of what they were doing” when they passed the ESA.²¹⁸ In fact, the ESA that exists today represents less a conscious effort on the part of Congress to conserve imperiled species than a calculated effort by two Washington insiders to derail what, by all accounts, was thought to be a simple piece of “feel-good” legislation that “would let everyone in Washington, D.C., the President included, stand up for bald eagles and whooping cranes without any practical downside.”²¹⁹

Frank Potter and Lee Talbot took full advantage of the fact that Congress was distracted by fall elections when the ESA was initially being debated. As the ESA bills marched inconspicuously through committee hearings and back to their respective chambers for a vote, Potter and Talbot silently “worked them over,” targeting what they perceived as weaknesses in the law.²²⁰ The two managed to manipulate not only the Act’s substantive provisions, but the preamble of the bills as well.²²¹ Accordingly, by the

216. *Sweet Home*, 115 S. Ct. at 2416-17.

217. *Id.* at 2416

218. MANN & PLUMMER, *supra* note 15, at 161 (quoting Paul Lenzini, then the chief counsel for the trade associations of the state fish and wildlife agencies). Lenzini further commented that “[t]here was no idea that their ox was being gored so they all voted for it.” *Id.*

219. *Id.* at 157 (citing John D. Ehrlichman, then the presidential assistant for domestic affairs). The two culprits in this legislative sabotage were Frank M. Potter, Jr., then counsel for the Merchant Marine and Fisheries Committee, and Lee M. Talbot, then senior scientist at the newly formed Council on Environmental Quality (CEQ). Together, Potter and Talbot “intended to slip some surprises into the legislation.” *Id.* at 158. Indeed, Potter, who believed that it was “too easy to say ‘We’d like to do this but we can’t right now,’” decided to change what he saw as a “business as usual” mentality by teaming with Talbot “to make the mesh in the net as fine as we could get away with.” *Id.*

220. *Id.* at 159 (“I had targeted everything that was too weak and Frank had picked up things I hadn’t, so what we did from our two branches was work out a step-by-step process to dill off those things.”). To Talbot, working inside the Nixon administration, and Potter, working on Capital Hill, “[t]he most important task was to get rid of all vestiges of the word *practicable*” because without any appeal to practicability, federal agencies would no longer have an exit. *Id.*

221. *Id.* With Potter and Talbot’s revisions, the goal of the Act became to protect “the ecosystems upon which endangered and threatened species of wildlife depend.” By altering the purpose of the Act to cover “ecosystems,” the preamble “in effect committed the entire federal government to a mandatory program of habitat protection.” *Id.* at 160. Boasted Potter: “That’s where we really stuck it to them.” *Id.* The actions of Potter and Talbot with regard to

time the bill passed through the Hill and other agencies and reached the Office of Management and Budget (OMB), the bill had evolved to the point that its original drafter commented “there were probably not more than four of us who understood its ramifications.”²²²

Potter and Talbot’s scheme worked exactly as planned. When the House and Senate met to forge a single mutually acceptable version of what would become the Endangered Species Act of 1973, the changes made by Potter and Talbot easily managed to “escape attention from the kingpins of ‘business as usual.’”²²³

Considered in its proper historical context, the “legislative history” of the ESA—replete with histrionic statements by legislators, all striving to best their contemporaries in voicing their fervent support for species conservation—reveals much about behind-the-scenes political maneuvering but little about the intent of Congress in enacting the ESA. More importantly, the true history of the ESA offers none of the support claimed by the Court in its *Sweet Home* opinion. Instead, it further demonstrates what one ESA commentator has observed: “Defenders of the ESA are rewriting history so as to avoid rewriting the law.”²²⁴

D. Incidental “Take” Permits—Where’s the Carrot?

In concluding that the Secretary’s challenged regulation was a permissible construction of Congressional intent, the Court noted that Congress in 1982 authorized the Secretary to issue permits for takings that would otherwise be prohibited by Section 9.²²⁵ Because such permits could only be granted upon a finding by the Secretary that “such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,”²²⁶ the Court

surreptitiously inserting “ecosystems” clears up the confusion expressed by one ESA expert who observed that, in light of the presence of the word “ecosystems” in the Act: “It is curious, therefore, that Congress paid so little attention to the ecosystem side of the equation in the basic structure of the law.” Ruhl, *supra* note 101, at 580.

222. MANN & PLUMMER, *supra* note 15, at 160. The original drafter, Charles E. “Chip” Bohlen, explained further that “[i]t was only sometime after its passage that people realized its implications. We certainly didn’t advertise it. Why should we have? It was not our intent to ring alarm bells.” *Id.*

223. *Id.* Thus, “[w]hile everyone was swooning over the idea of protecting endangered species, few members of Congress paid attention to the text of the legislation they extolled. . . .” *Id.* at 158.

224. Ike C. Sugg, *Rats, Lies, And The GAO; A Critique of the General Accounting Office Report on the Role of the Endangered Species Act in the California Fires of 1993*, CEI PRESS RELEASE (Competitive Enters. Inst., Wash. D.C.) Aug. 1994, at 14.

225. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2414 (1995).

226. 16 U.S.C. § 1539(a) (1) (B).

reasoned that Congress understood Section 9 to prohibit indirect as well as deliberate takings.²²⁷

Amendment of the ESA to include an exemption process for private property landowners followed closely on the heels of the *Palila* decisions and grew out of a multi-year conflict between a proposed development project and two species of endangered butterflies.²²⁸ Rather than legislatively overruling the Ninth Circuit Court of Appeals' overbroad interpretation of Section 9, Congress instead added Section 10(a) which was intended to address "the concerns of private landowners who are faced with having otherwise lawful actions . . . prevented by the Section 9 prohibitions against taking."²²⁹ Pursuant to Section 10(a), private landowners who wish to develop their land must first petition for an incidental take permit by submitting to the Secretary a habitat conservation plan (HCP) listing the effects such development will have, and what steps the landowner will take to mitigate those effects.²³⁰ If the Secretary makes a series of findings indicating that the proposed taking will be incidental to an otherwise lawful activity and that the taking will not

227. *Sweet Home*, 115 S. Ct. at 2414. *But see supra* notes 195-196 and accompanying text (detailing Scalia's explanation for the majority's misinterpretation). *See also supra* note 81 (explaining that the amendment was due to a reluctance on the part of Congress to endure the political fallout which would result from clearing up an obviously overbroad interpretation, rather than to a conscious decision by Congress to adopt the *Palila* decisions).

228. *See Thornton, supra* note 165, at 605. Section 10(a) was modeled on the San Bruno Mountain Conservation Plan, which involved development at San Bruno Mountain on the San Francisco Peninsula in Northern California. *Id.* at 621. Two weeks after the local board of supervisors required the landowner the landowners to dedicate two-thirds of the mountain as a park, the "FWS proposed to list the calliope silverspot butterfly as an endangered species and to designate critical habitat on the mountain, which overlapped all of the remaining areas on the mountain designated for development." *Id.* at 621-22. After two years of intensive negotiation, the landowners were finally persuaded into accepting and financing a habitat conservation plan for the entire mountain to protect approximately 90 percent of the habitat of the Mission Blue and Calliope Silverspot butterflies. *Id.* at 622.

229. 16 U.S.C. § 1539(a) (1988); H.R. REP. NO. 567, pt. 1, 97th Cong., 2d Sess. 31 (1982).

230. 16 U.S.C. § 1539(a) (2) (A) (i)-(iv). Such plan must specify:

- (i) the impact which will likely result from such taking;
- (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
- (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan. *Id.*

appreciably reduce a specie's chances for survival,²³¹ a permit may be issued.²³²

Predictably lauded by ESA proponents as a "way of telling the private property owner that protection of the landscape can be arranged in a way that makes sense,"²³³ Section 10(a) incidental permits have utterly failed to mitigate the ESA's onerous impact on private property owners.²³⁴ As of the beginning of 1994, pitifully few HCPs had been completed and only twenty-one incidental take permits had been issued in Section 10(a)'s first twelve years of existence.²³⁵ In the few cases where HCPs have been successfully implemented, they have done so only at exorbitant cost to the private property owners charged with the duty of developing the plans.²³⁶

In areas where HCPs have ultimately failed to realize completion, the experience has left the landowners involved with a bitter taste in their mouths. In Austin, Texas, for example, the Balcones Canyonlands Conservation Plan (BCCP), once heralded by Secretary Babbitt as the "flagship" of the Clinton administration's efforts to reconcile the concerns of the environmental

231. 16 U.S.C. § 1539(a) (2) (B) (i)-(v). Before the Secretary may issue a permit, he must make the following five findings:

- (i) the taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will ensure that adequate funding for the project will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (v) the measures, if any required by the Secretary will be met.

If the Secretary finds all of the aforementioned facts to exist, and if "he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit." *Id.*

232. More likely than not, however, the permit will never be issued, but will instead founder in the "negotiations" which seldom produce agreement. *See infra* notes 234-38 and accompanying text.

233. Babbitt, *supra* note 5, at 363.

234. Notably, and perhaps expectedly, the government does not have nearly the trouble obtaining an exemption from the ESA. For while "[u]nder section 10 it is the applicant's duty to create an acceptable habitat conservation plan, *however long it takes*," the burden under Section 7(o) permits is "shifted to the authorizing agency and the FWS, and they must normally conclude formal consultations within 90 days" with "no provision for public participation in the Section 7 assessment process." Farrier, *supra* note 103, at 378 (emphasis added). Thus, private property owners, subject only to the "take" provisions of Section 9, find it infinitely more difficult to obtain incidental take permits than federal agencies, who are charged with the affirmative obligation to ensure that none of their activities are likely to "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . ." under Section 7. 16 U.S.C. § 1536(a) (2). As one critic has noted: "Why should the federal government have a process available for its activities that is not afforded to individuals and entities with purely private needs? It should not." Somach, *supra* note 21, at 804.

235. Farrier, *supra* note 103, at 376.

236. Under the Coachella Valley RHCP, for example, approximately 15% of the remaining habitat for the Coachella Valley fringe-toed lizard was set aside in the form of three lizard preserves in Riverside County, California. The three preserves were purchased at a cost of \$25 million, which was primarily funded by "development mitigation fees" assessed against landowners. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal Limits of Species Protection*, 44 Sw. L.J. 1393, 1405 (1991).

and development communities, ended in failure at the hands of voters unwilling to shoulder their share of the \$130 million price tag.²³⁷ Along the way, the process managed to stir up plenty of anger and distrust among the Texas citizenry.²³⁸

Similarly, efforts in San Diego, California to implement a Multiple Species Conservation Program (MSCP) have engendered fierce opposition from landowners who liken their cause to the American Revolution.²³⁹ The MSCP, an ambitious plan which aims to preserve more than 164,000 acres of habitat in San Diego County, is one of the nation's first attempts to shift habitat conservation planning to the regional, rather than species-by-species level.²⁴⁰ Based largely upon the "ecosystem management" concept of species conservation long-touted by Secretary Babbitt,²⁴¹ the MSCP, and programs like it, seek to "preserve open space that supports an array of species before they reach the critical list."²⁴² Whatever its objective, the

237. See MANN & PLUMMER, *supra* note 15, at 202-03. As a result of the BCCP's failure at the hands of voters in Travis County, Texas, the BCCP dissolved into a fragmented preserve system with funds collected under a successful bond election in Austin. *Id.*

238. One angry rancher named Bobby Curry proclaimed: "If the bird wants to come here, fine. But I don't need the federal government to tell me how to run my ranch . . . These government people want to dictate to us. It's all about control. It's communism." Scott Harper, *Endangered: Species or Rights? Battle Lines are Being Drawn in the Debate Over the Endangered Species Act*, THE HOUSTON POST, Aug. 28, 1994, at A1.

239. Explains Poway property owner John Pavin: "There's no difference between us standing up today for our property and the colonists in 1776 standing up to the king." Lori Weisberg, *This Land is My Land! Cry of Property Rights Fuels Rural Fight*, SAN DIEGO UNION-TRIB., October 15, 1995, at A1. The MSCP is but one of three programs being developed in San Diego which will combine to cover nearly 1 million acres. LaRue et al., *supra* note 13, at A27. Of the more than 160,000 acres targeted by the San Diego MSCP, which will seek to protect nearly 100 "sensitive" species, including the threatened California gnatcatcher, "about half of them [are] already in public ownership." *Id.* Much as he did with the failed attempt in Texas, Babbitt touts the San Diego MSCP as a "national model." *Id.*

240. Emmet Pierce, *Many Fight to Preserve Land Rights: Rural property Owners Gain Clout Against Plan*, SAN DIEGO UNION-TRIB., July 23, 1995, at B1. Observed San Diego Mayor Susan Golding: "This is the first time this has ever been done in the country. . . . *Id.* It's important that it be done the right way because if it fails I doubt that it will be attempted elsewhere."

241. Babbitt's fondness for "ecosystem management" is understandable. Explains one species proponent, "[a]nyone [in the environmental community] who's critical of this program should think twice, because *this is a way to get de facto protection for unlisted species in an anti-environmental political atmosphere.*" Deborah Schoch, *Hammering Out a Truce in Orange County's Gnatcatcher Wars: Wildlife Activists, Developers Work Together on a Plan That Could Set Aside 39,000 Acres*, L.A. TIMES, Oct. 16, 1995, at A1 (quoting Dennis Murphy, director of Stanford University's Center for Conservation Biology and a designer of the project's approach) (emphasis added).

242. La Rue et al., *supra* note 13, at A27. For a criticism of Babbitt's "ecosystem management" policy and the fallacies upon which it is based, see Ike C. Sugg, *Property Wrongs*, CEI UPDATE (Competitive Enters. Inst., Wash. D.C.) Nov. 1993, at 1 ("Defenders of property rights be forewarned, ecosystem management is the new rhetoric for regulating everything."). For a contrary view, see James Drozdowski, *Saving the Endangered Species Act: The Case for a Biodiversity Approach to ESA Conservation Efforts*, 45 CASE W. RES. 553, 554 (1995) (arguing that "[c]onservation should concentrate on ecosystems and biodiversity as a whole, and . . . the current piecemeal approach to conservation should be abandoned). Note that the title of Mr. Drozdowski's article, which focuses on saving *the Act* rather than species, seems to support the observation of Ike Sugg that: "It has become all too obvious. Some people are more interested

MSCP process promises to meet the same dismal fate as its more limited HCP relative: death at the hands of its land-owning victims.

The potential impact of the *Sweet Home* decision on the San Diego MSCP has not been lost on ESA proponents, who see the decision for what it is: judicial carte blanche to engage in national land use planning.²⁴³ Nor has the decision escaped the notice of San Diego property owners,²⁴⁴ who now face the unsavory prospect of providing shelter for the public's wildlife free of charge.²⁴⁵

The failure of habitat conservation planning, whether directed at individual species or ecosystems, is the predictable result of a fundamentally unfair process that "forces a false choice between economic activity and the preservation of biodiversity."²⁴⁶ Indeed, Babbitt's contentions notwithstanding,²⁴⁷ the incidental take permit process of Section 10(a) of the Act all too often leaves landowners feeling that the "government . . . seems like they are after us instead of for us."²⁴⁸ It is a process woefully devoid of carrots but

in saving the Endangered Species Act than they are in saving endangered species." Ike Sugg, *Specious Claims of Species Statute?*, WASH. TIMES, Apr. 5, 1993, at E4.

243. Indeed, Jim Whalen, co-chairman of the Alliance for Habitat Conservation, noted that the decision "suggests that the amount of land that is going to be needed to make conservation programs such as the MSCP work *is going to be bigger.*" La Rue et al., *supra* note 13, at A27 (emphasis added). For readers who may wonder why the Supreme Court's decision—which merely examined the propriety of the Secretary's definition of harm—even impliedly means that the amount of land required for the conservation of endangered species will increase, the answer is simply that, under the Court's apparent carte blanche of authority to regulate private land for the benefit of endangered species, all apparent checks on the authority of land use planners have been removed.

244. "I just have a deep sense of hopelessness. . . . I invested my after-tax dollars in this property, hoping I could do something with it someday, and that's not going to happen. I'm just wondering where private property rights fit in with [the *Sweet Home*] decision." La Rue, et al., *supra* note 13, at A27 (quoting Jerry McCaw, a small landowner in San Diego's North County).

245. See Sugg, *supra* note 6. Sugg notes that habitat conservation plans are primarily funded by the very property owners who are harmed by them, and concludes that "[t]hus, private property owners are forced to pay for the public's interest in endangered species." *Id.* at 38.

246. Craig Manson, *Natural Communities Conservation Planning: California's New Ecosystem Approach to Biodiversity*, 24 ENVTL. L. 603, 604 (1994).

247. See, e.g., Babbitt, *supra* note 5.

248. Pierce, *supra* note 240, at B2 (quoting Sharon Berg, a Ramona-area beekeeper). In the same article, East County Supervisor Dianne Jacob admits that opposition to the MSCP, which has rendered the plan "up in the air," stemmed from the failure of planners to seek the opinions of the small landowners whose lands were affected by the plan. "The little landowners were never part of the equation." *Id.* Similarly, Mann and Plummer explain the failure of the Balcones Canyonlands Conservation Plan (BCCP):

In laying out the means for saving all the species in Austin's backyard, the scientists, as required by law, paid no attention to the practicability of following their recommendations. In other words, all the ecological fieldwork, computer simulations, and geographic information systems behind the Austin plan ignored the values of the people whose lives it would change. It fundered for that very reason.

MANN & PLUMMER, *supra* note 15, at 177.

armed to the teeth with a vast array of sticks.²⁴⁹ Considering how “the most critical actors on the stage of conservation”²⁵⁰ are treated under the Section 10(a) permit process, the paucity of successful HCP programs comes as little surprise. In fact, it is a wonder that any HCP anywhere has ever been implemented.²⁵¹ Yet, this section of the ESA—a section that Congress chose merely as a politically palatable alternative to restoring common sense and original intent to the Act²⁵²—became a “pillar” upon which the Supreme Court saw fit to rest its *Sweet Home* decision.

E. Shoot, Shovel & Shut Up

One of the most tragic consequences of the Supreme Court’s decision in *Babbitt v. Sweet Home* will be to further pit private property owners against the threatened and endangered species “protected” by the ESA. Indeed, the decision is likely to provide private property owners with even more incentive to ensure that endangered species are never found on their property.²⁵³ Dubbed the “Shoot, Shovel & Shut Up” solution by landowners in the Pacific Northwest,²⁵⁴ the perverse incentives of the ESA promise to dramatically worsen under the Court’s holding in *Sweet Home*. By saddling private

249. See Farrier, *supra* note 103, at 309 (“Effective biodiversity conservation policy requires a combination of carrots and sticks. Regulations must set appropriate landuse contours. At the same time, incentives should be delivered to landholders in the form of stewardship payments for positive land management that would be sensitive to the conservation of biodiversity . . .”). See also John C. Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 574-78 (1994) (suggesting a number of ways species conservation could be accomplished more effectively under an incentive-based system rather than the ESA’s command-and-control mechanisms). In fact, the only “carrot” under the ESA is an agreement by the Secretary not to beat the landowner with the ESA’s painful assortment of sticks! This fact stands in stark contrast to the admonition of one ESA proponent who notes “[i]f you look at any environmental legislation, you have to have both the carrot and the stick.” Hugh Dellios, *Nature vs. Human Nature: Incentives May Be Solution*, CHIC. TRIB., June 26, 1995, at 1.

250. Manson, *supra* note 246, at 604. Indeed, not only does the Section 10(a) process ignore the property rights of the landowners upon whose land the species exist, but it actually requires those same landowners to forfeit all such rights.

251. Or, perhaps it is to be expected. For, although Thornton points out that “the development community is growing increasingly frustrated with the length of time required to resolve the endangered species conflicts through the HCP process and . . . the growing acknowledgment of the inequity of imposing the cost of endangered species conservation largely on the shoulders of development interests and their customers,” the regulatory reach of the ESA, particularly under the Court’s *Sweet Home* decision, affords them no other choice. Thornton, *supra* note 165, at 607.

252. See sources cited *supra* note 81.

253. See sources cited *supra* note 12.

254. See, e.g., Vivoli, *supra* note 12, at F1. Ike Sugg credits environmental scholar R.J. Smith as being “largely responsible for having brought the negative incentive phenomenon to light.” Sugg, *supra* note 6, at 45 (citing Robert J. Smith, *The Endangered Species Act: Saving Species or Stopping Growth?*, REG., Winter 1992, at 83). Whatever its origins, the negative incentives of the ESA have engendered hostility towards not only listed species, but against ESA supporters as well. At a public hearing to address the property rights concerns of landowners in Stockton, California, a teacher, Laurette Rodgers, and her fourth-grade class were “booed and heckled” when they attempted to talk about their award-winning project to protect freshwater shrimp. Loftis, *supra* note 197, at A1.

property owners with the duty to manage their land for the benefit of listed species without compensation, courts and FWS agency personnel have managed to engender sentiments on the part of landowners which one critic likens to those of the colonists who were forced to quarter English soldiers before the American Revolution.²⁵⁵

Since long before the *Sweet Home* decision, the Fish and Wildlife Service has consistently implemented the Act in a manner that creates enemies of conservation instead of conservationists. A well known example of the Act's onerous impact on private property owners is the story of Benjamin Cone of Greensboro, North Carolina. Formerly a conservation-minded landowner, Cone used to manage his property primarily for the benefit of wildlife.²⁵⁶ His conservation efforts, which included controlled burns and preservation of old-growth, were apparently appreciated by his intended beneficiaries; by 1991, his property sheltered twenty-nine endangered red cockaded woodpeckers.²⁵⁷ For his efforts, the Fish and Wildlife Service prohibited Cone from modifying his property within a half mile radius of each bird colony.²⁵⁸ Mr. Cone, a Harvard MBA, quickly learned his lesson and began massive clear-cutting in areas where the woodpeckers had not yet "taken over."²⁵⁹

Another enemy of FWS "conservation" practices is Cindy Domenigoni of Riverside County, California. After purposely leaving her fields fallow every four years, Domenigoni's land became attractive habitat for meadowlarks and sparrows.²⁶⁰ Unfortunately, the field also attracted the Stephens' kangaroo rat; a listed species. Because of the rat's presence, Domenigoni was precluded from ploughing the section of her land which she had allowed to go fallow.²⁶¹ The rat's presence, which was due to Domenigoni's responsible stewardship, ended up costing her \$400,000 in lost income and direct

255. See Tom Bethell, *Species Logic: How Enviros Kill Endangered Species*, THE AM. SPECTATOR, Aug. 1995, at 20. Richard Stroup of the Political Economy Research Center in Montana notes that if the army today had the power to billet soldiers that Fish and Wildlife has to billet animals, "we could expect to see soldiers feared, despised and perhaps even ambushed, as listed species reportedly are today." Indeed, as Ike Sugg has explained, "If urban residents were required to house the homeless the way rural residents have been required to house endangered species, perhaps they would better understand the moral and economic outrage that has catalyzed the property rights movement." *Home, Sweet Home*, WASH. TIMES, Apr. 17, 1995, at A18. Apparently, even some FWS personnel would agree that Sugg's analogy lends itself well to the ESA. Notes Assistant Interior Secretary for the Fish and Wildlife Service: "Like people, wildlife need a home and shelter and a place to rear their young." Adrienne Flynn and Steve Yozwiak, *Landmark Ruling Ends Term; Landowners Lose in Habitat Fight*, ARIZ. REPUBLIC, June 30, 1995, at A1.

256. Bethell, *supra* note 255.

257. *Id.*

258. *Id.* The circle has since been reduced to a quarter mile. *Id.* FWS no doubt "gave him back" his own property to demonstrate how "flexible" and "user-friendly" the ESA is.

259. *Id.*

260. *Id.*

261. *Id.*

expenses.²⁶² The rodent nearly cost her a lot more than that. Despite a steadfast insistence to the contrary by government officials and ESA supporters,²⁶³ the ESA nearly cost the Domenigoni family—as well as their neighbors—their very lives.

At 11:30 p.m. on October 26, 1993, high winds downed a powerline in Riverside County, California.²⁶⁴ Sparks from the downing caused a fire and 25,000 acres and 29 homes were subsequently consumed by the flames.²⁶⁵ Not coincidentally, 19 of the 29 homes which were destroyed were in habitat designated as “preserve study areas” for the Stephans’ kangaroo rat.²⁶⁶ Unfortunately for those 19 homeowners, the federal government had prohibited the “disking” of soil to clear firebreaks in preserve study areas, as well as virtually all other forms of land use.²⁶⁷ As a result, the fires swept through the landscape, free from any man-made barriers.

Not all of the landowners in Riverside County suffered the loss of their homes. When the fire came raging over a nearby hilltop on the Domenigoni’s property around 1 a.m., her neighbor Michael Rowe “cut through the Domenigoni’s fence, jumped on his tractor and *disked* a firebreak to protect his property.”²⁶⁸ As a result, Rowe saved his property as his neighbors’ burned. Though the General Accounting Office has since claimed that a “shift in the direction of the wind,” and not Mr. Rowe’s disking saved his property, Rowe categorically denies the allegation.²⁶⁹

262. Despite the fact that the Fish and Wildlife Service threatened the Domenigonis with a \$50,000 fine and/or a year in prison for each rat disturbed, her taxes on the property were not abated. *Id.*

263. Sharon L. Newsome, Vice President of Resources Conservation at the National Wildlife Federation, claimed that “[t]he Endangered Species Act did not cause the fire, did not cause the destruction of those 29 homes and did not prevent citizens, acting in good faith, from doing whatever it took to save their property.” Sharon L. Newsome, *Scapegoating the Endangered Species Act*, WASH. POST, Aug. 18, 1994, at A20.

264. Sugg, *supra* note 224, at 1.

265. *Id.*

266. *Id.* The “k-rat,” as it is commonly called, was listed as an endangered species in 1988, even though it is only one of three other species in the same genus (with 56 subspecies) in California, and 22 closely related species with hundreds of subspecies elsewhere in the U.S. *Id.* at n.4.

267. “Disking,” a mechanical process whereby an implement usually pulled and powered by a tractor cuts into and overturns the soil, is widely believed by fire experts to be the most effective means of fire prevention. Noted Richard Wilson, Director of the California Department of Forestry and Fire Protection, in an interview with Sugg, “disking is the best tool . . . it’s just a simple fact. If you mineralize the soil you eliminate the carrier of the fire . . . mowing doesn’t work.” *Id.* at 11.

268. *Id.* at 7 (emphasis in original).

269. Notes Rowe, “the wind was blowing right at me.” *Id.* Notably, the FWS has never pursued any ESA violations against Rowe for the disking he did in violation of FWS policy. The government could hardly excuse his actions as being in defense of life if they truly believe that the wind had shifted the fire away from his property. It would not be the first time a landowner faced prosecution under the ESA for protecting his life. *See, e.g., Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (rancher who shot grizzly bear was precluded from arguing defense of own life where rancher put self in danger to protect livestock).

Not surprisingly, supporters of the ESA deny that the Act played any role in the Southern California fires. As Sharon Newsome of the National Wildlife Federation has argued, “residents of Riverside County were not ‘prohibited’ from clearing firebreaks in the Stephan’s kangaroo rat habitat” and “it is not true . . . that the service threatened to sanction the Riverside County fire department if it recommended clearing flammable brush.”²⁷⁰ Unfortunately for Ms. Newsome, and others who would deny the Act’s contribution to the tragedy, both the Riverside County fire department and citizens of Riverside County have produced letters from the FWS stating otherwise.²⁷¹

The citizens of Riverside are not the only people to have lost their homes in the interest of protecting species; nor did they suffer the gravest of injuries. The Malibu firestorm in 1993, which claimed the lives of 3 people and injured 111 others, was reportedly exacerbated by a lack of prescribed burns in the area in order to protect the coast horned lizard.²⁷² As one commentator noted about the incident, “[t]hose who put lizards first are not alone. While most environmentalists advance the laudable goals of fighting pollution and preserving unique natural habitats, some ecofreaks and animal rights advocates jeopardize human health and safety to ensure the comfort and well-being of flora and fauna.”²⁷³

It would appear as though the ESA has come a long way from the days when it merely pitted landowners against species for their property rights. Today the act pits them against species for their very lives and the lives of their families. As the foregoing examples amply demonstrate, the ESA not only fails to encourage wise species stewardship on private lands, it threatens the very lives of the landowners upon whose lands house endangered species choose to live with a punishment banned in several states: the death penalty. The predictable result for landowners like Domenigoni is that “[w]e are no

270. Newsome, *supra* note 263, at A20.

271. Sugg, *supra* note 224, Appendix III and V. One letter, from Brooks Harper, Office Supervisor for Southern California Field Station of the FWS to Paul Smith, Fire Captain Specialist of the Riverside County Fire Department notes that “the Service would like to emphasize that the County could be considered a responsible party if any Stephan’s kangaroo rat (*Dipodomys stehpensi*) was taken subsequently to issuance of a public weed abatement notice.” The letter goes on to threaten that “any disking within the historic range and in potential habitat of this species puts the County and land owner at risk of violating Section 9 of the Endangered Species Act. Section 9 prohibits the ‘taking’ of a listed species without necessary authorization. Civil and criminal penalties can be levied against responsible parties.” *Id.* at Appendix III. Similarly, Michael Rowe received a letter from the same office cautioning him that the presence of species listed under the ESA and Migratory Bird Treaty Act meant that “should you take endangered species or migratory birds you are liable for both State and Federal prosecution.” As an added threat, the letter cautioned that “[t]he Service is forwarding this information to other appropriate agencies for their information and review.” *Id.* at Appendix V.

272. Derooy Murdock, *Fires, the Horned Lizard and Hindsight*, SAN DIEGO UNION-TRIB., Nov. 12, 1993, at B7. See also Betsy Carpenter, *This Land is My Land*, U.S. NEWS & WORLD REP., Mar. 14, 1994, at 67 (quoting Yshmael Garcia of California, whose house burned after the FWS precluded him from clearing a fire break on his property: “Now, I’m homeless, thanks to a bunch of bureaucrats and so-called environmentalists.”).

273. Murdock, *supra* note 272, at B7.

longer pleased to see an eagle, or a hawk or a previously unnoticed flower on our land. Sights like these now cause us great concern that our livelihood and our heritage will be stripped away from us."²⁷⁴

The Court's resolution of *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, which now places upon the unwitting landowner an affirmative obligation to provide habitat for the public's wildlife free of charge, will drastically worsen the already untenable relationship between man and beast under the current ESA. For, as one ESA commentator has noted, it is one thing to require some landowners to bear the burden of providing such public goods; "it is a very different thing when people can be incarcerated for *not* providing that habitat."²⁷⁵ Likewise, it is one thing to force landowners to choose between species conservation and their property rights; it is quite another to force them to choose between species and their lives. Indeed, such an ultimatum is no choice at all.

VI. PROSPECTS FOR THE FUTURE

Without a doubt, the most severe, and indeed ironic consequence of the Court's *Sweet Home* decision is the dramatic backlash it has caused against the ESA itself.²⁷⁶ A piece of legislation once believed to be impervious to legislative challenge,²⁷⁷ the ESA has itself become endangered as citizens and legislators alike call for an end to its twenty-plus year reign. Perhaps the Court's decision, and the severity of its impact, have finally provided the "point of leverage" Donald Barry predicted would be necessary for moving the "immovable object" the Act had become.²⁷⁸ If recent developments in Congress and the statements flowing therefrom are any indication of the fate of the ESA, supporters of the Act are in for a big disappointment. On the other hand, if there is anything to the wishful thoughts of Secretary of the Interior Bruce Babbitt, perhaps the ESA will emerge from the *Sweet Home* controversy substantially unscathed. At present, there appears to be three possible courses for the ESA to follow; legislative repeal of the *Sweet Home* decision, drastic modification of the way the Act is administered, or a move in the right direction—a market-driven system of incentives for successful species conservation.

A. Legislative Repeal?

Shortly before the court handed down its *Sweet Home* decision, Senator Slade Gorton, R-Wash, chairman of the Senate Appropriations subcommittee

274. Bethell, *supra* note 255, at 20.

275. Sugg, *supra* note 6, at 16.

276. *See* sources cited *supra* note 13.

277. *See, e.g.*, Barry, *supra* note 60, at 590 (describing a legislative attack on the ESA as "a suicidal assault up a vertical cliff, without ropes or pitons.").

278. *Id.* at 598-603.

on Interior and related agencies proposed his ESA-reauthorization bill, S. 768, which ESA supporters immediately decried as “radical.”²⁷⁹ Gorton’s bill, which would give the Secretary of the Interior “almost unlimited power to decide what—if anything—should be done to try and save an endangered species,” has since faltered amongst revelations that the bill was actually authored by two business coalitions.²⁸⁰

With the release of the *Sweet Home* decision, the drive to change the Act has been given new life.²⁸¹ Perhaps the most dramatic and, as of yet, the most successful attempt to change the ESA has been H.R. 2275.²⁸² Sponsored by Don Young, R-Alaska, and introduced on September 7, 1995, H.R. 2275 is the result of Young’s earlier promise to create legislation “designed to make private landowners part of the solution in preserving species.”²⁸³ Recognizing the impact that the ESA has traditionally had on private landowners, Young promised to change the Act to “make private landowners part of the solution in preserving species.”²⁸⁴

H.R. 2275 was immediately opposed by ESA supporters, who claim that, had the bill been passed instead of the ESA in 1973, “the bald eagle and many other species probably would not be with us today.”²⁸⁵ Notwithstand-

279. Jim Waltman, director of the refuges and wildlife program at The Wilderness Society, criticizes Gorton’s “radical” bill as implying that “Congress never intended to protect habitats when it passed ESA.” *High Court Upholds Agency Assessment of ‘Harm’ Under Species Act*, *supra* note 9, at 15. According to Waltman, the Court’s decision means that “Gorton is wrong and the Act does protect habitat.” *Id.*

280. Erin Kelly, *Endangered Species Act May Itself be Endangered*, GANNETT NEWS SERV., May 8, 1995. Under his bill, Gorton explained, “[o]nce a decision is made to declare a species endangered, there won’t be any automatic consequences other than you can’t hunt or trap the animal.” *Id.* According to David Wilcove, a biologist with the Environmental Defense Fund, Gorton’s bill, which gives the Secretary of the Interior broad discretion in implementing the Act, puts far too much control in the hands of one person: “If Bruce Babbitt is the Secretary . . . it’s likely that a lot of species are going to be protected. . . . But if Jim Watt is Secretary, nothing will be protected.” Loftis, *supra* note 147, at 1A. In light of the problems surrounding the controversial drafting of Gorton’s bill, Senator Kempthorne has drafted a similar replacement. See *Senator Kempthorne to Introduce Bill to Gut Endangered Species Act*, U.S. NEWSWIRE, October 25, 1995.

281. Promising that the Court’s decision would not be the last word on the matter, Senate Energy Committee Chairman Frank Murkowski (R-Alaska), proclaimed “[i]t aint over till it’s over.” *High Court Upholds Agency Assessment of ‘Harm’ Under Species Act*, *supra* note 9, at 15. Referring to the door left open by Justice O’Connor in her concurring opinion for Congress to “revisit the issue,” Murkowski stated “[i]t’s my hope Congress will walk through that door with appropriate legislation reforming the [ESA]. We need to make sure property rights are not left out of the equation.” *Id.* See also *supra* notes 9 & 13.

282. H.R. 2275, 104th Cong., 1st Sess. (1995).

283. Don Young, *Some Reforms Are Not ‘Repeals’*, WASH. TIMES, July 27, 1995, at F5. In language that “will be very clear,” which will ensure that “courts will not have to spend any more time worrying about this fundamental issue,” Young promised to amend the ESA to accomplish conservation by “encouraging landowners to protect the habitat that is essential for the recovery of these species.” *Id.*

284. *Id.*

285. *Conservation Leaders From Congress, Interior and Citizen Groups Decry Bill To ‘Repeal’ Endangered Species Act*, U.S. NEWSWIRE, Oct. 11, 1995 (quoting Rodger Schlickeisen, president of Defenders of Wildlife). According to Schlickeisen, H.R. 2275 essentially “repeals the ESA, makes protection on private lands voluntary, and even prohibits protection of

ing such opposition, H.R. 2275, dubbed the "Endangered Species Conservation and Management Act of 1995," managed to withstand the scrutiny of the House Resources Committee, where it passed by a strong bipartisan majority of 27-17.²⁸⁶

Though H.R. 2275 contains several mechanisms designed to make the Act's drastic impacts on private landowners less onerous, there are several aspects of the bill which suggest that its opponents dramatically overstate its effects. Indeed, the bill hardly threatens to "rip away the guts" of the ESA.²⁸⁷ In fact, several provisions of the bill promise to do very little to ease the Act's regulatory burden on private property owners; allowing instead for business-as-usual at the FWS.

For example, Title I of the bill, entitled "Private Property Rights and Voluntary Incentives for Private Property Owners," proffers the not-so-novel idea that "the federal government shall not take an agency action affecting privately owned property or nonfederally owned property under this act which results in diminishment of value of any portion of that property by 20 percent or more unless compensation is offered in accordance with this section."²⁸⁸ Notably, the section fails to explain by whose figures the "20 percent" diminishment of value is to be computed. Given the disingenuous practices of the FWS in the past, one can hardly anticipate any FWS audit revealing a 20 percent reduction in value.²⁸⁹ Moreover, Section D of the same title provides that "the agency may negotiate with that owner to reach agreement

endangered species on public lands where it would interfere with the profits of special interests." *Id.* Rep. Jim Saxton (R-N.J.) accused the Republican leadership of helping "the special interests come in the dark of night to rip away the guts of our environmental laws." *Id.* Jim Jontz, a former member of Congress and current director of the Endangered Species Coalition, a consortium of environmental groups, predicted that the bill "is so extreme that it may sink under its own weight." *Id.*

286. Jim Hansen, *Endangered Species Reform Passes Resources Committee With Key Amendments*, CONG. PRESS RELEASES, Oct. 18, 1995. Among the amendments offered by Hansen was a requirement that listing decisions include an analysis of the economic and social effects a listing may have at the same time a species listing is being considered. *Id.*

287. *Conservation Leaders From Congress, Interior and Citizen Groups Decry Bill To 'Repeal' Endangered Species Act*, *supra* note 285 (quoting Rodger Schlickeisen, President of Defenders of Wildlife).

288. H.R. 2275, *supra* note 282, at Title I, § 101(A).

289. For just one example of the questionable enforcement practices of the FWS, *see* sources cited *supra* note 70. Even if the landowner's figures were used to compute diminutions in value, one can hardly doubt that the FWS would dispute the figures, forcing the landowner to assert his or her rights in court; something painfully few can afford to do. Moreover, Title I, § 101(C) provides that "an owner seeking compensation under this section shall make a written request for compensation to the agency implementing the agency action." H.R. 2275, *supra* note 282, at Title I, § 101(C). Anyone who has had the misfortune of dealing with a federal agency can only imagine the Byzantine array of bureaucratic red tape that will be involved in submitting such a request.

on the amount of the compensation and their terms of any agreement for payment.”²⁹⁰

Other provisions of H.R. 2275 promise to do similarly little to “fix” the ESA. For instance, Title I, § 103 of the bill provides that “the Secretary may . . . provide a grant to a non-federal person . . . for the purpose of conserving preserving, or improving habitat for any species” listed under the ESA.²⁹¹ However, before making any such grants, the Secretary must make a finding that (1) “the property for which the grant is provided contains habitat that significantly contributes to the protection of the population of the species,” that (2) “the property has been managed for species protection for a period of time that has been sufficient to significantly contribute to the protection of the *population of the species*, and (3) the management of the habitat advances the interest of species protection.”²⁹² Just what constitutes “significantly contributing to the protection of populations of species” is left undefined, as is how much time it takes to “sufficiently contribute to that protection.” In short, this language contained in H.R. 2275 offers little more than lip service towards mitigating the Act’s impact on private property owners.

H.R. 2275 also promises to improve the “scientific integrity of listing decisions and procedures.”²⁹³ Among other groundbreaking proposals, this section of the bill promises to “improve the validity and credibility of decisions” by basing listings on, of all things, “credible science.”²⁹⁴ This section also plans to add such procedural “safeguards” as “peer review,” “greater state involvement” and the “monitoring of species.”²⁹⁵ How these largely cosmetic alterations will mend a clearly ineffective Act is left to the imagination of readers.

For all of H.R. 2275’s controversy, and its “new” methods of incorporating “economic incentives” for landowners, few have bothered to note that the *current* ESA *already has* a provision for funding habitat conservation in a manner that comports with the Constitution’s 5th Amendment takings prohibition. Indeed, compliance with the Constitution was the express intent

290. H.R. 2275, *supra* note 282, at Title I, § 101(D). Given the nature of the conduct of the FWS discussed *infra*, it hardly seems necessary to expound on the potential for abuse contained within this particular provision. It is sufficient to note that the concept of “good faith” efforts to negotiate are often remarkably different when dealing with an agency the likes of the FWS. Indeed, H.R. 2275 promises to promote new lows in agency negotiation by providing that “any payment made under this section to an owner” is to be “made from the annual appropriation of the agency that took the agency action.” *Id.* at Title I, § 101(H). Thus, an owner seeking compensation for deleterious agency action will be in the unenviable position of having to wrestle his money out of the agency’s own pocket. Given the inherent conflicts of interest that would likely result under the “new” ESA, H.R. 2275, Title VIII’s “Funding of Conservation Measures” amounts to little more than shallow mockery.

291. *Id.* at Title I, § 103(11) (A).

292. *Id.* at Title I, § 103 (emphasis added).

293. *Id.* at Title III.

294. *Id.* at Title III, § 301(a).

295. *Id.* at Title III, §§ 302, 305 and 306, respectively.

of Congress when it created the land acquisition measures embodied in Section 5 of the Act.²⁹⁶ Thus, the problem has not been that the Act fails to offer a constitutionally palatable method of conserving species. Rather, the problem has been that federal agencies have declined to use it; choosing instead to foist the costs of conserving species upon the backs of landowners through the misuse of Section 9's "take" prohibition.

Notably, H.R. 2275 does provide for a "redefinition" of "take" under the ESA.²⁹⁷ However, the "new" definition leaves the "old" one largely intact and represents anything but a legislative repeal of the *Sweet Home* definition. Deceptively entitled "Removing Punitive Disincentives," Section 203(b) would "redefine" "harm" as follows: "the term 'harm' means to take a direct action against any member of an endangered species of fish or wildlife that actually injures or kills a member of the species."²⁹⁸

As should be obvious to readers, the "redefinition of 'harm'" offered by H.R. 2275 leaves the definition debated in *Sweet Home* largely intact. There is still no reference in the definition to any "intent" required on the part of the person who would be accused of "taking" a listed species. Nor does the "new" definition correct the *Sweet Home* definition's incorrect applicability to "populations" of listed species by expressly stating that only "individual" species are protected by the Section 9 "anti-take" provision. Thus, under H.R. 2275, the Court's misinterpretation of "take" would remain largely unaffected, in a seemingly after-the-fact ratification of previous judicial interpretations.

Given the remarkably benign effect that H.R. 2275 would have on the current ESA, one wonders whether all of the chest-beating by its proponents is not more than a little disingenuous.²⁹⁹

Perhaps the most revealing provision of H.R. 2275 is its amendment of the ESA to provide that "nothing in the Act shall be construed to limit any right to compensation that exists under the constitution."³⁰⁰ That Congress actually saw the need to *amend* the ESA to comport with the Constitution demonstrates that the Act's power has become such that the only way out of its regulatory reach is to pull the plug on this regulatory behemoth.

296. 16 U.S.C. § 1534(a)&(b).

297. H.R. 2275, *supra* note 282, at Title II, § 202.

298. *Id.* at Title II, § 202(B).

299. In fact, H.R. 2275 offers a panoply of caveats and loopholes for the creative environmental litigator. Given their ingenious history, it should take them all of a year to eviscerate the token homage paid to landowners in H.R. 2275 through environmental litigation.

300. *Id.* at Title I, § 101(K) (1). Note, however, that no court has ever awarded compensation to any person whose land was "taken" under the Endangered Species Act. Thus, this provision of the bill effectively says "nothing in this act shall be construed to limit that which does not exist!"

B. A Kinder, Gentler Act?

With citizens and legislators alike calling for either dramatic amendment or outright repeal of the ESA, Bruce Babbitt, one of the Act's most ardent apologists is striving to convince anyone who will listen that the Act is not, in fact, broken. Moreover, according to Secretary Babbitt, "[t]here isn't the slightest bit of evidence the federal Endangered Species Act will be repealed."³⁰¹

Secretary Babbitt has made no secret of the high regard in which he holds the Endangered Species Act. A self-described religious person who sees "in the landscape the handiwork of God," Babbitt has been the Act's most tireless defender.³⁰² In his efforts to save the current ESA, Babbitt has sought to draw attention to the Clinton administration's decision to exempt small property owners from the Act's strictures.³⁰³ He has also traveled across the country applauding efforts by local agencies and individuals to engage in cooperative arrangements which provide for environmental conservation, proclaiming that such "success stories" should mitigate against substantial revision of the ESA.³⁰⁴ Interestingly, it appears

301. Bruce Babbitt, *Q&A With Members of the San Diego Union-Tribune's editorial board*, SAN DIEGO UNION-TRIB., Nov. 5, 1995, at G5. If Secretary Babbitt truly believes this assertion, one wonders why he saw it necessary to take to the pages of the Washington Post, where he accused Republicans of conspiring to "strangle the Endangered Species Act." Bruce Babbitt, *Springtime for Polluters; Behind Closed Doors, the Republicans Are Trashing the Environment*, WASH. POST, Oct. 22, 1995, at C2. There, he accused the Republicans of surreptitiously using appropriations riders and the like to bury environmental laws. If that is their goal, Babbitt wrote, "the least they could do is work in the open, using the constitutional process that we all learned about in high school civics: Draft a bill, hold hearings, issue statements on what you have done, argue it out in the media, engage in open floor debate and hold a distinct vote on the agenda for which they may be held accountable." *Id.* Interestingly, Secretary Babbitt did not offer Frank Potter and Lee Talbot as models of how to "work out in the open."

302. Lofis, *supra* note 197, at 1A.

303. *White House Eases Impact of Species Act on Small Property Owners*, INSIDE ENERGY WITH FEDERAL LANDS, July 17, 1995, at 16. The day after the White House announcement, Babbitt appeared before the Senate Environment subcommittee on drinking water, fisheries and wildlife to plead for consideration by the committee of the efforts of the White House to lessen the Act's impacts in the hope that such efforts would stymie the efforts of lawmakers to change the laws.

304. *See, e.g., Interior Secretary Babbitt and Potlach Chairman Richards Announce Conservation Plan for Endangered Species*, BUSINESS WIRE, October 26, 1995. Proclaimed Babbitt, "[i]n this time of passionate discussion about the future of the Endangered Species Act, [the Potlach plan to set-aside habitat for the red cockaded woodpecker] is a true success story of a public-private partnership forged to achieve compatible goals." Calling the agreement with Potlach a "welcome partnership which sets a precedent for the protection and management of this endangered species," Babbitt championed the efforts of Potlach, which, he claimed, went "beyond what others have done to address the needs and survival of the red-cockaded woodpecker." *Id.* According to U.S. FWS Southeast Regional director Noreen K. Clough, the Potlach agreement demonstrates that "HCPs are a win-win proposition for people and for wildlife." *Id.* above. Notably, the agreement has not yet resulted in the actual issuance of an "incidental take permit" and the plan has yet to complete the public comment period and FWS approval. *See also* Peter Raffle, *Clinton Administration announces Salmon Recovery Agreement; Columbia River Restoration Funding Will Not Be Capped*, U.S. NEWSWIRE, October 24, 1995 (agreeing to increase funding for salmon restoration in the Columbia River without incorporating provisions that would have waived important sections of the Northwest Power Act and the Endangered

that Babbitt has again resorted to one of his favorite tactics for saving the Act; the strategic delisting of species to show that the “Act works.”³⁰⁵

Secretary Babbitt has remained steadfast in his insistence that “the ESA is not the problem.”³⁰⁶ Rather, Babbitt contends that the failures of the ESA thus far stem from the fact that “the people who have been charged with administering the ESA have not explored imaginative and creative ways to arrange possibilities to give effect to a wonderful, expansive Act.”³⁰⁷ Thus, Babbitt maintains that “innovation within the terms of the ESA” is a much better approach than a legislative solution to the problems which have plagued this legislative behemoth.³⁰⁸

To achieve this “innovation,” Babbitt has sought to change the Act’s complexion by marching around the nation “heralding” local agencies and individuals who voluntarily place their necks in the ESA’s regulatory noose. By putting a “smiley face” on this true legislative monster, Babbitt hopes to convince the masses that the true secret to conserving endangered species lies within the existing Act, and that only he knows how to unlock its true potential.

Fortunately, many have pointed out that Babbitt and other ESA proponents are plainly wrong.³⁰⁹ The failure of the ESA is due not to a lack of funding, nor to a failure in implementation. Rather, as one ESA commentator has noted, “the seeds of regulatory failure are sewn into the very structure of the ESA and cannot be explained away as a failure of implementation.”³¹⁰ In fact, the Endangered Species Act of 1973 fails because it operates under the untenable premise that species conservation is a goal superior to all others, which requires unprecedented—and uncompensated—sacrifice from those whose lands are unfortunate enough to house endangered species.³¹¹ Ironically, it is the ESA’s inherent power and

Species Act). Thus, in addition to declining to utilize the Act’s more stringent provisions, the Clinton administration appears set on bribing local officials into continued compliance with the ESA with federal funds.

305. See, e.g., Tom Kenworthy, ‘A Symbol of Hope’; *Rising Peregrine Population Prompts Move To End Falcon’s Endangered Species Listing*, WASH. POST, July 1, 1995, at A1. Not surprisingly, Secretary Babbitt was on hand to issue an announcement after he visited a nest site atop the Bank of New York. Babbitt took advantage of the opportunity to “demonstrate the virtues of the [Endangered Species Act].” *Id.* See also Sugg, *supra* note 242, at E4 (quoting a spokesman for the national Marine Fisheries Service who, shortly after the delisting of the California gray whale, remarked “we think taking off the whale will allow the Act to continue.”).

306. Babbitt, *supra* note 5, at 366.

307. *Id.*

308. *Id.*

309. See generally Sugg, *supra* note 6; Farrier, *supra* note 103; and Gidari, *supra* note 37.

310. Farrier, *supra* note 103. Even Michael Bean, one of the Act’s more notable supporters, admits that it “is clear to me after close to 20 years of trying to make the [ESA] work is that . . . on private lands at least, we don’t have very much to show for our efforts, other than a lot of political headaches.” *Shoot, shovel, shut up*, WASH. TIMES, June 13, 1995, at A20.

311. Notably, no landowner has ever received compensation for the deleterious effects of ESA-related regulation of her property.

absolutism which will ultimately cause its demise.³¹² In creating the ESA, Congress brought to life a modern day Frankenstein whose power it has been forced to wrestle with ever since its conception.³¹³ As a result, no amount of cheerleading by Secretary Babbitt can justify the ESA in its current form.

C. Market-Driven System of Incentives?

Any meaningful reform of the ESA must come to grips with the role that private property owners invariably play in species conservation. For in the end, "it will be those people who will make a difference. Not laws. Not government policies. And not our wishful thinking."³¹⁴ The Endangered Species Act of 1973 not only fails to incorporate these actors on the stage of conservation, it specifically precludes any such consideration.³¹⁵ This exclusion ignores the fact that "there is a general consensus among conservation biologists that active human management is crucial to successful conservation."³¹⁶ More importantly, it engenders unnecessary hostility between the landowners and species which depend upon the habitat involved.³¹⁷ Thus, the challenge facing ESA reformers is how best to "devise ways to modify the behavior of private landholders."³¹⁸

As this Note has sought to make clear, the traditional method of facilitating species conservation has been through the "command and control" regulatory strictures of the ESA. As one observer has noted, however, "[r]egulation is only effective when used in tandem with incentive-based ongoing management and restoration of ecosystems."³¹⁹ Moreover, while regulation depends on the collateral use of incentives, "it is theoretically possible for countries to achieve their objectives *solely by providing landowners with incentives to manage their land in a way that is sympathetic*

312. See Sugg, *supra* note 6, at 5.

313. "Thus," notes Sugg, "the question at hand is not unlike the question an agnostic might pose to theologians: Is God's omnipotence such that He could create a rock too heavy for Him to lift? Similarly, the environmentalist must wrestle with the possibility that the ESA is too powerful to be upheld." *Id.*

314. Stephan R. Edwards, *Sustainable Conservation By and For the People*, in RICHARD LITTELL, *ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION 18* (1992).

315. Note that *no* section of the ESA provides for any consideration of any other factor other than the interests of species listed under the Act.

316. Farrier, *supra* note 103, at 324.

317. See *supra* notes 254-276 and accompanying text.

318. See Farrier, *supra* note 103, at 326. Encouraging the participation of these landowners is essential, Farrier notes, because "it is inadequate to restrict the process of conserving biodiversity to protected areas of public land, such as national parks and wildlife refuges, which have been set aside for this purpose. Biodiversity must be integrated with private land management." *Id.* at 306.

319. *Id.* at 307.

to biodiversity conservation.”³²⁰ Thus, the challenge should lie in how to facilitate successful species conservation with as little governmental interference as possible.³²¹

One method of facilitating species conservation whose effectiveness has been amply demonstrated is the utilization of markets. For instance, in 1992, Messrs Charles C. Mann and Mark L. Plummer noted the example of the Pacific Yew.³²² Once treated as a weed, the Pacific Yew was traditionally burned and slashed to the ground.³²³ Now, however, the species is flourishing as never before. Another ESA “success story?” Hardly. In fact, the tree was never placed on the endangered species list. If it had, it would likely be extinct today.

The successful comeback of the Pacific Yew owes its remarkable recovery to taxol, a chemical contained within the bark, needles and roots of the tree.³²⁴ When it was discovered that taxol was a potential treatment for ovarian cancer, no bureaucrat from the U.S. Fish and Wildlife Service had to tell people to conserve the plant; people rushed to plant seedlings, and indeed, conducted research into how they could speed the growth of the tree. The end result? More Pacific Yews than you can shake a stick at. In fact, as Messrs Mann and Plummer observed, “the recovery occurred by means so far from the Fish and Wildlife Service that one cannot help wondering if orthodox governmental plans to save biodiversity are asking the right questions, let alone providing the right answers.”³²⁵

Another well documented account of how markets can successfully facilitate the conservation of biodiversity is the plight of the African elephant.

320. *Id.* (emphasis added). Indeed, this situation mirrors the fact that “command and control” mechanisms for regulating the economy are dependent upon a certain degree of freedom in the marketplace while a purely free market can freely exist without any “command and control” mechanisms. The similarity between markets and ecosystems have not gone completely unnoticed by experts. See, e.g., MICHAEL ROTHSCHILD, *ECONOMY AS ECOSYSTEM* (Henry Holt and Co.) (arguing that an economy is like an evolving ecosystem, which should be treated accordingly).

321. This goal of maximizing individual liberty—unlike the regulatory growth-control tradition of the ESA—is infinitely more compatible with the historical value Americans place on individual autonomy. As Professor Bernard H. Siegan has noted, “[a]bsent a vital and pressing justification, growth control lacks equitable or philosophical roots in a legal system essentially dedicated to maximizing liberty.” Bernard H. Siegan, *Conserving and Developing the Land*, 27 *SAN DIEGO L. REV.* 279, 284 (1990). In order to establish that “vital and pressing” problems exist which justify regulation to alleviate environmental problems, Siegan would put the burden of proof where it belongs; on those who would subvert the rights of the individual. It would then be required that such challengers demonstrate that the situation had reached an “unusually adverse level,” requiring the application of growth restrictions. Under the current ESA, the burden of proof has been placed squarely on the individual landowner to demonstrate that their otherwise lawful actions will not threaten an endangered species. As Professor Siegan notes, this situation is diametrically opposed to traditional value Americans place on individual liberty. For species conservation to succeed in a nation whose very existence is predicated upon the liberty interests of the individual, this fundamental flaw under the Act must be addressed.

322. Mann & Plummer, *supra* note 12, at 47.

323. *Id.*

324. *Id.*

325. *Id.*

On October 16, 1989, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) voted to list the African elephant on Appendix I.³²⁶ Listing a species as Appendix I is the functional equivalent of listing a species as "endangered" under the ESA.³²⁷ Once a species is so listed, nations which are parties to CITES are banned from commercially trading in the species.³²⁸

The listing of the African elephant as an Appendix I species came after hundreds of thousands of elephants had been slaughtered in the previous ten years, presumably for their ivory tusks.³²⁹ By prohibiting member nations from trading in elephant products, it was believed, the seemingly insatiable demand for ivory could be eliminated, allowing for successful conservation of the pachyderms.³³⁰ What trade ban advocates—like their American counterparts who created the ESA—failed to anticipate, however, were the real-life consequences of their actions in adversely shaping the relationship between humans and endangered species.

Not all countries in Africa had experienced decreasing numbers of elephants prior to the trade ban in 1989. In fact, between 1970 and 1989, while the population of elephants in Kenya fell from 167,000 to only 16,000, the number of elephants in Zimbabwe actually *increased* from fewer than 40,000 to over 50,000.³³¹ The disparity between these two seemingly similar nations stemmed directly from their respective conservation practices.³³² While Zimbabwe made their elephants valuable resources for their citizens by giving them communal property rights to the elephants, Kenya deprived its citizens of any such benefits by allowing their elephants to remain in "common ownership."³³³ Thus, to citizens of Zimbabwe, elephants became a significant source of revenue through hunting and tourist fees, while Kenyans continued a relationship of mutual fear, as roaming elephants razed crops and trampled citizens.³³⁴

Fortunately for Kenyans, David Western, newly-appointed director of the Kenya Wildlife Service, understands these dynamics. Notes Western, "I have to create an atmosphere in which the Kenya Wildlife Service is seen as the custodian of natural resources but also, when it comes to people's land, as partners in trying to figure out how wildlife can be maintained in the interest

326. Ike Sugg & Urse Kreuter, *Elephants and Ivory: Lessons from the Trade Ban* 14 (1994).

327. *Id.*

328. *Id.*

329. *Id.* at 15.

330. *Id.*

331. *Id.* at 16.

332. See generally *id.*; Randy T. Simmons & Urse P. Kreuter, *Herd Mentality: Banning Ivory Sales is no Way to Save the Elephant*, 50 *POLICY REVIEW* 46-49 (1989).

333. *Id.*

334. Sugg & Krueter, *supra* note 326, at 16-17.

of the landowner.³³⁵ To achieve this atmosphere, Western plans to reintroduce trophy hunting for some species of game, with profits going to the local landowners.³³⁶ Western also plans to combat poaching by encouraging villagers to lead safaris on private lands now outside state-sanctioned reserves.³³⁷ Thus, he reasons, villagers would then “*protect them as an economic investment.*”³³⁸

Much like CITES, the ESA not only deprives endangered species of objective value by precluding their stewards from benefitting from their presence, it effectively turns listed species into costly liabilities for their hosts by depriving landowners of the use of their land. Thus, it should come as little surprise that listing on the endangered species list has become a lifetime appointment.³³⁹ It should also come as no surprise that “more than one tree hugger has inadvertently embraced the corpse of a northern spotted owl staked to the object of his affection.”³⁴⁰ Faced with the dismal fate of being forced to raise the public’s wildlife without compensation, landowners have traditionally had little reason to participate in conserving wildlife. Indeed, even Congress has noted that landowners are “understandably unwilling to . . . [conserve species] at excessive cost to themselves.”³⁴¹

Particularly in the wake of the *Sweet Home* decision, private property owners have unambiguously manifested an unwillingness to continue shouldering the burden of conserving America’s endangered species. Indeed, that the situation has gone on as long as it has is a disturbing commentary on the modern interpretation of the 5th Amendment’s proscription against uncompensated takings, which “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³⁴²

Reformation of the ESA, and conservation of biological diversity as a whole, must incorporate the private property owners whose participation is so critical to successful conservation. The recent success of environmental-

335. David Graham, *Kenya’s Western Partner*, SAN DIEGO UNION-TRIB., July 6, 1994, E1 at E4.

336. *Id.*

337. *Id.*

338. *Id.* (emphasis added). Notably, Western’s appointment as service director followed the tenure of Richard Leakey, whose demand that game *not* be regarded as the property of the villagers engendered hate and distrust among the community. Though Western credits Leakey for drawing needed international attention to the wildlife crisis in Kenya, he criticizes him for only seeing to it that changes occurred “inside the parks and in the headquarters of Nairobi” while “nothing much was changing on the ground” among Africans. *Id.*

339. For an exhaustive discussion of how and why the ESA fails to recover listed species, see Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1 (1993); Sugg, *supra* note 242, at E4; MANN & PLUMMER, *supra* note 15, at 239-47; and Ike C. Sugg, *To Save an Endangered Species, Own One*, WALL ST. J., Aug. 31, 1992, at 1.

340. Vivoli, *supra* note 12, at A20.

341. See Statement of Rep. Sullivan, *supra* note 116.

342. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

minded stores like “The Nature Company” and others³⁴³ suggest both that there is a demand for endangered species and that, given the proper mechanisms, people are willing to pay for their conservation.³⁴⁴ The traditional obstacle to the successful implementation of market mechanisms has been the abhorrence of markets by many in the environmental community³⁴⁵ and their insistence that endangered species remain *res nullius*, or, the property of no one.³⁴⁶ Thus, as Ike Sugg has explained, if wildlife belongs to all citizens in common, then “the presumption is that there is little reason to pay for something that ‘we’ already own.”³⁴⁷

Using positive economic incentives to encourage the active participation of landowners in producing environmental goods is not unprecedented in this country’s political history. Indeed, several such programs are currently under way.³⁴⁸ However, the current state of the federal budget deficit makes it unlikely that an expansion of such incentives will be forthcoming. Moreover, as long as a large percentage of the public continues to maintain the traditionally held belief that species are a public good which private property owners have no “right” to denigrate by developing their habitat, successful endangered species conservation will remain a distant dream, forever out of touch.

Thus, the only way to ensure the continued viability of our Nation’s biodiversity is to get the government out of the endangered species business altogether and allow private landowners to maximize the “incalculable value” of endangered species through the direct realization of the financial benefits of conserving wildlife. Only then, when individuals are permitted to

343. The Wild Nature Emporium in Geneva, Illinois, for example, “has a wide array of toys and gift items for all ages. For instance, in the fossil corner, there are small ones for children priced at \$3 as well as teeth of the prehistoric shark, carcharodon megalodon (\$18-\$40), and ice age bison skulls (\$275) for adults.” S.R. Carroll, *Things from Nature, for Young and Old*, CHIC. TRIB., Oct. 29, 1995, at 5. Also, “sponsorship kits are available for adopting endangered species like humpback whales and wolves.” *Id.*

344. Indeed, the demonstrated willingness of a large number of citizens to contribute millions of dollars towards environmental groups that engage in litigation on species’ behalf tends to mitigate against arguments that the public is *unwilling* to pay for conservation. The problem, more likely, lies in the fact that under the current ESA, they are *unable*, and indeed expressly prohibited from doing so.

345. Explains Ike Sugg: “Unfortunately, the environmental logic of game ranching, and its successes, will not be enough to save it from the wrath of the high priests of preservationism, for whom the commercial utilization of wildlife is heretical. Their antipathy to markets reinforces one’s suspicion that certain preservationists are more anti-capitalism than they are pro-environment.” Sugg, *supra* note 339, at 1. Indeed, noted one economist at the Department of the Interior, “What exasperates me is the reluctance to try [the market] approach *even when it is practical.*” Mann & Plummer, *supra* note 12, at 51.

346. See generally, MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* (1977). Notably, the government has itself subscribed to this proposition to absolve itself from liability for damages done by both its wildlife and its wildlife policies. See, e.g., *Sickman v. United States*, 184 F.2d 616, 618 (7th Cir. 1950).

347. Sugg, *supra* note 6, at 11.

348. See, e.g., Farrier, *supra* note 103, at 324-40 (1995) (the Conservation Reserve Program at pp. 329-34; the Wetlands Reserve Program at pp. 334-37; and the Sodbuster and Swampbuster programs at pp. 337-40).

objectively demonstrate the value of biodiversity, will wildlife become a truly sustainable resource.

CONCLUSION

Contrary to Secretary Babbitt's baseless assertion that the "ESA's not the problem," the overwhelming weight of the evidence suggests otherwise. Indeed, in its first twenty-two years of existence, the ESA has proven an unmitigated failure for all parties concerned. The U.S. Supreme Court's decision, while initially lauded by ESA proponents, appears poised to drastically effect the future of the Act by making explicit what has remained implicit for years. Specifically, the Court's decision demonstrates that read literally, the Endangered Species Act of 1973 is beyond reproach. For, on its face the Act is predicated upon the untenable premise that the *preservation* of threatened and endangered species preempts all other sources of law, including the United States Constitution.

No longer can environmental advocates continue to force unwitting landowners to shoulder the burden of the public's interest in wildlife. Indeed, in a nation uniquely devoted to the maximization of individual liberty, the subversion of such liberties for anything less than the most pressing of health and safety issues is inimical to the fundamental ideals upon which our system of government rests.

Thus, Mr. Babbitt, the ESA very much *is* the problem. As noted above, the "seeds of regulatory failure are sewn into the very structure of the ESA." It is a badly flawed piece of legislation which no amount of legislative tinkering can rehabilitate. Far from saving the ESA, the U.S. Supreme Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* demonstrates that the Endangered Species Act must be repealed, lest we all become involuntary servants of the public's interest in wildlife.

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