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## Harm Means Harm: Babbitt v. Sweet Home Chapter of Communities for a Great Oregon

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## Harm Means Harm: *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*

### I. INTRODUCTION

Somewhere deep in the forests of Oregon, the red-cockaded woodpecker and the northern spotted owl are nesting in the precious trees that are their home. Thousands of miles away, in this country's highest court, a long and fierce battle with these two species at its heart seemingly has come to an end.<sup>1</sup> Loggers who wished to clear-cut timber where these rare birds live ran full force into some of the strongest federal legislation ever passed, the Endangered Species Act (ESA).<sup>2</sup>

Congress enacted the ESA in 1973 as a means of protecting animals that were on the brink of extinction,<sup>3</sup> or perilously close to that brink.<sup>4</sup> While ESA protects species, a primary goal is also to protect the habitat,<sup>5</sup> for the destruction of habitat has been the most critical factor in species loss.<sup>6</sup> In a strong show of support for the ESA as it was enacted and has been interpreted, the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*<sup>7</sup> upheld the Secretary of the Interior's definition of "harm,"<sup>8</sup> a term not specifically de-

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1. See *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995).

2. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994).

3. See *id.* § 1533(a)(2)(A)(i).

4. See *id.* § 1533(a)(2)(A)(ii).

5. See *id.* § 1531(b).

6. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978) (citing S. REP. NO. 307, 93d Cong., 1st Sess. 2 (1973), reprinted in 1973 U.S.C.C.A.N. 2889, 2990). See generally Steven G. Davison, *Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155 (1995) (noting the important relationship between survival of endangered species and maintenance of critical habitat).

7. 115 S. Ct. 2407 (1995).

8. *Id.* at 2416. The Secretary of the Interior, Bruce Babbitt, through the Director of the Fish and Wildlife Service, promulgated the following definition: "Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (1994).

fined in the Act, thus prohibiting any significant modification or degradation of habitat occupied by endangered species.<sup>9</sup>

The purpose of this Note is to analyze the status of ESA in light of the recent Supreme Court decision and to explore the impact the decision will have both in the courts and in Congress. Part II of this Note focuses on the historical background of ESA and the relevant court decisions leading up to *Sweet Home*.<sup>10</sup> Part III summarizes the facts and procedural history of the case.<sup>11</sup> Part IV closely examines the majority, concurring, and dissenting opinions in *Sweet Home*.<sup>12</sup> Part V explores the implications of the Supreme Court's decision and the possible ramifications as Congress prepares to reauthorize the ESA.<sup>13</sup> Part VI concludes by recognizing the importance of biological diversity and the need for habitat protection as currently embodied in the Endangered Species Act.<sup>14</sup>

## II. HISTORICAL BACKGROUND

### A. *The Endangered Species Act*

The Endangered Species Act defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range."<sup>15</sup> The Act provides 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."<sup>16</sup> "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>17</sup> While there is no definition of "harm" in the Act, the Secretary of the Interior in 1981 put forth the following regulation defining the term: "Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."<sup>18</sup>

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9. *Sweet Home*, 115 S. Ct. at 2409-18.

10. See *infra* notes 15-77 and accompanying text.

11. See *infra* notes 78-85 and accompanying text.

12. See *infra* notes 86-186 and accompanying text.

13. See *infra* notes 187-207 and accompanying text.

14. See *infra* notes 208-09 and accompanying text.

15. 16 U.S.C. § 1532(6) (1994).

16. *Id.* § 1538(a)(1).

17. *Id.* § 1532(19).

18. 50 C.F.R. § 17.3 (1994).

The most significant provisions of the Act are contained in section 2, which defines the goals of the Act;<sup>19</sup> section 5, which authorizes the Secretary of the Interior to acquire land that is, or may become, a critical habitat for a listed species;<sup>20</sup> section 7, known as "the jeopardy provision," which requires federal agencies to consult with the Secretary prior to taking state action and proscribes any government agency action that will jeopardize endangered or threatened species or their habitat;<sup>21</sup> and section 9, which prohibits companies, individuals, and government agencies from "taking" any listed species.<sup>22</sup>

As written, the Act is an uncompromising piece of legislation. The Supreme Court signaled that its interpretation of the Act would be just as unyielding in the landmark case *Tennessee Valley Authority v. Hill* (TVA).<sup>23</sup>

### B. Tennessee Valley Authority v. Hill

In TVA, construction of the Tellico Dam had essentially been completed, with the aid of more than \$100 million in funds appropriated by Congress, when a new and endangered breed of perch known as the snail darter was discovered in the waters of the Little Tennessee River.<sup>24</sup> Environmental groups sought a permanent injunction under the Endangered Species Act, but were denied at the district court level.<sup>25</sup>

19. 16 U.S.C. § 1531 (1994). Noting the decline in species due to economic growth and development, the Act's purpose is to conserve those species facing extinction and the ecosystems which are vital to their survival. *Id.* See generally David P. Berschauer, *Is the "Endangered Species Act" Endangered?*, 21 SW. U. L. REV. 991 (1992) (discussing the goals behind the Act).

20. 16 U.S.C. § 1534 (1994).

21. *Id.* § 1536. See generally Eric Pearson & J. David Aiken, *Protecting Public Values in the Platte River*, 20 CREIGHTON L. REV. 361 (1986) (analyzing the jeopardy provision).

22. 16 U.S.C. 1538 (1994). See generally Oliver A. Houck, *Endangered Species Act and its Implementation by the U.S. Department of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993) (providing an in-depth examination of ESA and highlighting the "taking" prohibition).

23. 437 U.S. 153 (1978).

24. *Id.* at 157-59.

25. *Id.* at 165-66; see *Hill v. Tennessee Valley Auth.*, 419 F. Supp. 753 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978). Prior to this action, completion of the dam had been tied up from 1972 until late 1973 with an injunction for violations of the National Environmental Policy Act of 1969. See *Environmental Defense Fund v. Tennessee Valley Auth.*, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

On appeal, the court of appeals reversed and remanded, finding a prima facie violation of the jeopardy provision because TVA's actions would clearly jeopardize both the snail darter and its habitat.<sup>26</sup> In order to review the court of appeals' judgment, the Supreme Court granted certiorari.<sup>27</sup>

Chief Justice Burger delivered the opinion of the Court, which affirmed in a six-to-three decision.<sup>28</sup> Addressing the issue of whether the Tellico Dam Project would jeopardize the endangered snail darter and its critical habitat, the Court concluded that the plain meaning of the text of the Act mandated halting the project.<sup>29</sup> Examining the legislative history accompanying the Act, the Court determined that "Congress intended endangered species to be afforded the highest of priorities," thus supporting the Court's holding.<sup>30</sup> Noting the clear intention of Congress to reverse the trend of species loss, the majority stressed the high regard that Congress had for biodiversity, recognizing that "Congress viewed the value of endangered species as 'incalculable.'"<sup>31</sup>

In light of the determination that the Tellico Dam Project would violate the Endangered Species Act, the Court rejected the argument that because an injunction was sought the Court should exercise its equitable discretion in favor of TVA.<sup>32</sup> Instead the Court upheld its duty to enforce the Act<sup>33</sup> and affirmed the court of appeals' decision.<sup>34</sup>

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26. *Hill*, 549 F.2d at 1070.

27. 434 U.S. 954 (1977).

28. *TVA*, 437 U.S. at 155. Justice Powell wrote a dissenting opinion in which Justice Blackmun joined. *Id.* at 195-210 (Powell, J., dissenting). Justice Rehnquist also wrote a dissenting opinion. *Id.* at 211-13 (Rehnquist, J., dissenting).

29. *Id.* at 172-74. Chief Justice Burger noted the irony of its finding in light of "the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter." *Id.* at 172; *see also id.* at 157-71 (documenting numerous times Congress and the President authorized funding for the project in spite of the litigious battles being waged); *infra* notes 200-01 and accompanying text (discussing subsequent legislation passed after the Supreme Court handed down its decision in *TVA* to authorize operation of the dam).

30. *TVA*, 437 U.S. at 174.

31. *Id.* at 187.

32. *Id.* at 195-96.

33. *Id.* at 193-94 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")).

34. *Id.* at 195. Justice Powell, joined by Justice Blackmun, dissented, arguing that the statute and its accompanying legislative history could be interpreted to reach a result which contained a "modicum of common sense." *Id.* at 196 (Powell, J., dissenting). Justice Rehnquist based his dissent on his belief that the Court should have addressed whether the district court abused its discretion in granting an injunction, and finding no such abuse, Justice Rehnquist would have reversed the court of appeals. *Id.* at 211-13 (Rehnquist, J., dissenting).

Because *TVA* was brought under section 7 of ESA, destruction or adverse modification of critical habitat of the endangered snail darter was clearly prohibited.<sup>35</sup> Alteration or loss of critical habitat, however, is not expressly prohibited in section 9 of the Act.<sup>36</sup> The issue thus arose whether a "taking" as prohibited by section 9 includes harm in the form of habitat degradation or loss. Relying on the strong support the Supreme Court gave ESA in *TVA*, the Ninth Circuit first decided the issue in *Palila v. Hawaii Department of Land & Natural Resources (Palila I)*.<sup>37</sup>

### C. Palila I

In *Palila I*, the defendants, Hawaii Department of Land and Natural Resources, were maintaining herds of feral sheep and feral goats that were destroying habitat critical to the endangered Palila bird.<sup>38</sup> Environmental groups brought suit on behalf of the Palila after the defendants adopted a plan that allowed the sheep and goats to remain in the mamane-naio forest and provided for a fencing in of only one-fourth of the forest to prevent habitat destruction.<sup>39</sup> The district court granted plaintiffs' motion for summary judgment, ordering the complete removal of the game animals from the forest.<sup>40</sup> The defendants appealed on the grounds that certain disputed material facts made summary judgment inappropriate, and the defendants' actions should not have been ruled a "taking."<sup>41</sup>

In addressing the issue of dispute as to material facts, Judge Skopil summarily noted that "[t]he only facts material to this case are those relating to the questions whether the Palila is an endangered species and, if so, whether the defendants' actions amounted to a taking."<sup>42</sup> The court responded to the first issue by determining the Palila was

35. 16 U.S.C. § 1536(a)(2) (1994).

36. *See id.* § 1538.

37. 639 F.2d 495 (9th Cir. 1981).

38. *Id.* at 496. For a discussion of the damage to the mamane forest, its effect on the Palila, and deforestation in general, see A. Kent MacDougall, *Damage Can Be Irreversible; Drought, Floods, Erosion Add to Impact of Tree Loss; Series: The Vanishing Forests*, L.A. TIMES, June 19, 1987, at 1.

39. *Palila I*, 639 F.2d at 496. The plan was adopted despite recommendations by members of the Board that the feral animals be entirely removed. *Id.*

40. *Id.* at 496-97.

41. *Id.* at 496.

42. *Id.* at 497.

still endangered.<sup>43</sup> As for the “takings” issue, the defendants failed to put forth any of their own evidence on the survivability of the Palila either outside the forest or in the same forest once it was rehabilitated.<sup>44</sup> Without any facts of their own to dispute the plaintiffs’ contentions, defendants’ opposition to the motion had to fail for a lack of a “genuine factual issue.”<sup>45</sup>

The court then addressed whether the defendants’ actions constituted a “taking” pursuant to the Act.<sup>46</sup> At that time, the statutory construction of “taking” included any harassment or harm.<sup>47</sup> Harm was interpreted as “activity that results in significant environmental modification or degradation of the endangered animal’s habitat.”<sup>48</sup> Noting the deferential treatment accorded to listed species,<sup>49</sup> the Ninth Circuit construed the requirement of “some prohibited impact on an endangered species” under the Act to constitute an infraction.<sup>50</sup> The court determined that the defendants failed to rebut the evidence offered by the plaintiffs indicating that only a complete removal of the goats and sheep would protect the Palila from further harm.<sup>51</sup> Thus, the court concluded that to allow the feral animals to remain would result in a continued “taking” of the endangered Palila, and the Ninth Circuit accordingly affirmed the injunction.<sup>52</sup>

Despite the Ninth Circuit’s holding, the plight of the Palila remained unsure. In 1981, the Secretary redefined the term harm,<sup>53</sup> and *Palila v.*

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43. *Id.* Judge Skopil discounted any reference to recent changes in the bird’s existence as “immaterial.” *Id.*

44. *Id.*

45. *Id.* (citing *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)).

46. *Id.*

47. *Id.* (citing 50 C.F.R. § 17.31(c) (1981)).

48. *Id.*

49. *Id.* (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1979)).

50. *Id.* (citing *Barcelo v. Brown*, 478 F. Supp. 646 (D.P.R. 1979), *aff’d in part and vacated in part*, 643 F.2d 835 (1st Cir. 1981)).

51. *Id.* at 498.

52. *Id.*

53. Harm was originally defined by the Secretary as follows:

“Harm’ in the definition of ‘take’ in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential 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.’”

649 F. Supp. 1070, 1076 (D. Haw. 1986) (quoting 50 C.F.R. § 17.3 (1981)). The definition of harm was rewritten in 1981 by the Secretary to read as follows: “Harm’ in the definition of ‘take’ . . . means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding,

*Hawaii Department of Land & Natural Resources (Palila II)*<sup>54</sup> ensued.

#### D. Palila II

The Ninth Circuit revisited the endangered Palila in 1984 when environmental groups amended the complaint from *Palila I* to include requiring the removal of mouflon sheep from the mamane forests, and the defendants argued the Secretary's new definition of harm was given too sweeping an interpretation by the district court.<sup>55</sup> The mouflon sheep, imported by the defendants Hawaii Department of Land and Natural Resources for the purpose of hunting, depend on the mamane trees as their food source.<sup>56</sup> As a result, they posed a direct threat to the survival of the Palila.<sup>57</sup> The district court, in siding with the plaintiffs, determined that under the new definition of harm, which included impairment of feeding grounds, the Palila was being harmed in two distinct ways by the mouflon sheep.<sup>58</sup> First, the mouflon sheep's consumption of the Palila's habitat could result in sufficient degradation of the forest to cause extinction.<sup>59</sup> Second, the reliance of the mouflon sheep on the mamane trees for sustenance would inhibit regeneration of the forest, depriving the Palila of an increased habitat which could foster a comeback of the bird sufficient to erase its endangered status.<sup>60</sup>

The Ninth Circuit first addressed the defendants' argument that the district court's interpretation of harm was overbroad.<sup>61</sup> Writing for the majority, Judge O'Scannlain rejected the defendants' contention that harm had to be the "actual" destruction<sup>62</sup> of the pods of the mamane tree upon which the Palila depends for its diet,<sup>63</sup> rather than the "potential" harm that degradation of the mamane forest would bring the Palila beyond the brink of extinction.<sup>64</sup> Noting the Secretary's revision

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feeding or sheltering." 50 C.F.R. § 17.3 (1981).

54. 852 F.2d 1106 (9th Cir. 1988).

55. *Id.* at 1107.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1107-08.

61. *Id.*

62. *Id.* at 1108.

63. *Id.* at 1107 n.2.

64. *Id.* at 1108.



of harm to include hindrance of "essential behavior patterns via habitat modification,"<sup>65</sup> the majority concluded that the potential for the Palila to be wiped out of existence by depletion of the mamane trees was the type of harm the Secretary intended to preclude.<sup>66</sup> The majority also relied upon legislative history to support its decision, significantly noting that if bird-watching could be interpreted as a "taking" in the form of harassment, then the more direct impact of "mouflon sheep preventing any mamane from growing to maturity" should constitute a "taking" in the form of harm.<sup>67</sup>

The Ninth Circuit then considered the defendants' two-pronged argument that no "taking" had occurred.<sup>68</sup> First, the defendants argued that a small herd of the mouflon sheep could coexist with the Palila without harming the endangered bird.<sup>69</sup> Second, the defendants argued that the floundering Palila population was a result of the lingering effects of feral sheep and goats, which had only recently been eradicated, rather than any harm caused by the mouflon sheep.<sup>70</sup> Regarding the defendants' first point, the court rejected the evidence put forth by the defendants showing that regeneration of the mamane forest would be sufficient to support both the mouflon sheep and the Palila.<sup>71</sup> Instead, the court accepted the testimony offered by the plaintiffs, that the Palila's survival depended on the habitat that the mouflon would necessarily destroy in their own existence. Therefore, the court concluded that the lower court's decision was not clearly erroneous.<sup>72</sup> As for the defendants' second contention, the court accepted as reasonable plaintiffs' testimony that "noticeable regeneration ha[d] occurred only where the feral animals ha[d] been removed and no mouflon sheep ha[d] appeared," noting an absence of any contradictory evidence prof-

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65. *Id.*; see *supra* note 53 (defining "harm").

66. *Palila II*, 852 F.2d at 1108.

67. *Id.* at 1108-09. The majority referred to a House Report suggesting that the Secretary could regulate bird-watching activities as a harassment if the presence of the audubons would inhibit the birds in their essential behavioral patterns. *Id.*; see H.R. REP. NO. 412, 93d Cong., 1st Sess. 11 (1973).

68. *Palila II*, 852 F.2d at 1109.

69. *Id.*

70. *Id.*

71. *Id.* The plaintiffs countered defendants' contention that the forest would regenerate without the feral sheep and goats by emphasizing that during the early stages of regeneration the sheep could eat the precious seedlings and prevent them from reaching maturity. *Id.* The plaintiffs rejected defendants' proposed alternative plans for regeneration as ineffective. *Id.* The defendants' contention that the department could control the mouflon sheep so as to prevent the mamane trees from deteriorating was not accepted by plaintiffs. *Id.* Finally, the plaintiffs disproved the defendants' claims that the Palila was recovering, noting that over the long term the population had remained constant. *Id.*

72. *Id.* at 1109-10.

ferred by the defendants on this point.<sup>73</sup> The Ninth Circuit therefore affirmed the lower court's decision, upholding defendants' allowing mouflon sheep in to the mamane woodlands as "a 'taking' of the Palila's habitat."<sup>74</sup>

#### E. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt

Not long after the Ninth Circuit upheld the Secretary's interpretation of harm in *Palila II*, loggers and landowners in Oregon sued the Secretary of the Interior, arguing that the Secretary's definition of harm that considered habitat modification a "taking" caused them economic injury by preventing them from clear-cutting their own land.<sup>75</sup> The Court of Appeals for the District of Columbia found the Secretary's regulation to be impermissible,<sup>76</sup> thereby conflicting with the Ninth Circuit's holdings in the *Palila* cases.<sup>77</sup> The Circuits, now split, thus paved the way for *Sweet Home*.

### III. SUMMARY OF THE CASE AND PROCEDURAL HISTORY

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>78</sup> the respondents, comprised of various persons and organizations associated with the logging industry in the Pacific Northwest and the Southeast,<sup>79</sup> brought a facial challenge to the Secretary's regulation defining "harm."<sup>80</sup> As defined, the regulation prohibited logging in the region due to the presence of the red-cockaded woodpecker, an endan-

73. *Id.* at 1110.

74. *Id.* The Ninth Circuit declined to consider defendants' third ground for appeal, that harm should not be interpreted to encompass destruction of habitat which hinders an endangered species' recovery, noting that harm resulting from the destruction of the mamane woodlands that could lead to the extinction of the Palila was sufficient grounds for sustaining the lower court's order to relocate the mouflon sheep. *Id.*

75. *Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 806 F. Supp. 279 (1992), *rev'd*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 115 S. Ct. 2407 (1995).

76. *Sweet Home*, 17 F.3d at 1472.

77. *See supra* notes 38-74 and accompanying text (discussing the *Palila* cases).

78. 115 S. Ct. 2407 (1995).

79. *Id.* at 2410. The principal parties to the action included small landowners and families whose livelihood depend upon the logging industry, as well as logging companies. *Id.*

80. *Id.* The respondents took issue with the Secretary's inclusion of "habitat modification and degradation" in the definition of harm. *Id.*

gered species, and the northern spotted owl, a threatened species.<sup>81</sup> Respondents contended that, as applied, the Secretary's definition of harm had caused them economic hardship.<sup>82</sup>

The United States District Court for the District of Columbia held that the regulation was valid as applied.<sup>83</sup> On appeal, the Court of Appeals for the District of Columbia originally affirmed the opinion, but subsequently affirmed in part and reversed in part on petition for rehearing.<sup>84</sup> The United States Supreme Court granted certiorari to resolve the split that developed in the circuits regarding whether the Secretary's interpretation of harm was reasonable.<sup>85</sup>

#### IV. MAJORITY, CONCURRING, AND DISSENTING OPINIONS

##### A. *Majority Opinion by Justice Stevens*

In a six-to-three decision written by Justice Stevens,<sup>86</sup> the Court determined that habitat modification was reasonably included in the Secretary's definition of harm.<sup>87</sup> In announcing the Court's decision, Justice Stevens first focused on the structure of the ESA, delineating the Act's prohibition of a "taking" of any listed species, endangered or threatened,<sup>88</sup> the Act's definition of "take,"<sup>89</sup> and the Secretary's interpretation of "harm."<sup>90</sup>

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81. *Id.*

82. *Id.*

83. *Id.* at 2411.

84. *Id.* The reversal was grounded on application of the canon of statutory construction *noscitur a sociis*, whereby a word is interpreted in the context of its neighboring words. *Id.* (citing *Neal v. Clark*, 95 U.S. 704, 708-09 (1878)). The court of appeals deemed that "harm" should only apply to actions where "the perpetrator's direct application of force [is] against the animal." *Id.* The court also cited *United States v. Hayashi*, 5 F.3d 1278, 1282 (1993), which counseled a narrow interpretation of "harass" in the Marine Mammal Protection Act, 16 U.S.C. § 1372(a)(2)(A) (1988), and ESA's legislative history to support its position that harm should not be extended to include habitat modification. *Sweet Home*, 115 S. Ct. at 2411.

85. 115 S. Ct. 714 (1995).

86. *Sweet Home*, 115 S. Ct. at 2409. Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined in Justice Stevens's opinion. Justice O'Connor filed a separate concurring opinion. *Id.* at 2418-21 (O'Connor, J., concurring); see *infra* notes 131-46 and accompanying text (discussing the concurrence). Justice Scalia filed a dissenting opinion that was joined by Chief Justice Rehnquist and Justice Thomas. *Id.* at 2421-31 (Scalia, J., dissenting); see *infra* notes 147-86 and accompanying text (analyzing the dissenting opinion).

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

88. *Id.* at 2409.

89. *Id.* at 2409-10; see *supra* note 17 and accompanying text.

90. *Sweet Home*, 115 S. Ct. at 2410; see *supra* notes 8, 53 and accompanying text (stating the Secretary's definition). Justice Stevens also noted Congress's 1982

After a brief recitation of the facts,<sup>91</sup> Justice Stevens addressed the procedural history of the case<sup>92</sup> before making two important assumptions:<sup>93</sup> first, that any loss of the spotted owl or red-cockaded woodpecker would be incurred as incident to the logging rather than the result of any ill will respondents bore toward the endangered species;<sup>94</sup> and second, that resumption of the logging activities would necessarily result in degradation of critical habitat and thus loss of species.<sup>95</sup>

In the Court's first line of analysis, under application of the two-prong *Chevron* test,<sup>96</sup> Justice Stevens looked to the text of the ESA to provide three reasons for finding the Secretary's definition reasonable.<sup>97</sup> First, taken in context with the Act, the term harm "naturally

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amendment to § 10(a)(1)(B), which restricts the takings proscribed under § 9 by allowing the Secretary "to grant a permit for any taking otherwise prohibited by § 9(a)(1)(B) 'if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.'" *Sweet Home*, 115 S. Ct. at 2410 (citing 16 U.S.C. § 1539(a)(1)(B) (1994)). Other safeguards afforded endangered species were observed by the Court, including § 4, which requires the Secretary to identify those species bordering on extinction and to periodically update lists of endangered and threatened species; § 5, which allows the Secretary to purchase lands on which survival of an endangered or threatened species depends; and § 7's jeopardy provision, which prohibits any federal action that, after consultation with the Secretary, would be likely to further endanger a listed species or to have a negative impact on habitat critical to such species' survival. *Id.*

91. *Sweet Home*, 115 S. Ct. at 2410; see *supra* notes 75-82 and accompanying text.

92. *Sweet Home*, 115 S. Ct. at 2410-12; see *supra* notes 83-85 and accompanying text (delineating the procedural history).

93. *Sweet Home*, 115 S. Ct. at 2412. Due to the motions for summary judgment that brought the case before the bench, the posture of the case necessitated "certain factual assumptions" in order to proceed to a decision. *Id.*

94. *Id.*

95. *Id.* Justice Stevens rejected respondents' contention that the Secretary was restricted to protecting the critical habitat from adverse modification by means of a § 5 purchase only, and instead agreed with the Secretary's submission that, under the harm provision, respondents have a "duty to avoid harm that habitat alteration will cause the birds unless respondents first obtain a permit pursuant to § 10." *Id.*

96. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (establishing a two-prong system of judicial review to determine if agency interpretations are permissible). Under *Chevron*, the first prong of the test is to determine whether the intent of Congress is clear, and if it is, then the court should follow it. *Id.* at 842-43. If the intent of Congress is absent or ambiguous, applying the second prong of the test, the court should then determine whether the agency's interpretation is reasonable. *Id.* at 843. If the interpretation is deemed to be reasonable, then it should be followed. *Id.* at 843-44.

97. *Sweet Home*, 115 S. Ct. at 2409.

encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.<sup>98</sup> Justice Stevens rejected respondents' contention that harm should pertain only to "direct applications of force against protected species,"<sup>99</sup> relying upon the normal meaning ascribed to harm, which by definition does not require "direct or willful action."<sup>100</sup> As an additional rationale for this position, Justice Stevens indicated that the interpretation of harm as urged by the respondents would give the word no independent meaning with respect to terms used to define "take" in the applicable section.<sup>101</sup> Thus, a "reluctance to treat statutory terms as surplusage support[ed] the reasonableness of the Secretary's interpretation."<sup>102</sup>

Second, Justice Stevens stated that in light of the "broad purpose" of the Act, the Secretary's interpretation of harm to include habitat modification was consistent with Congress's intent.<sup>103</sup> Noting that protection of habitat to encourage conservation of listed species was at the heart of the Act,<sup>104</sup> Justice Stevens looked to the Court's opinion in *Tennessee Valley Authority v. Hill*<sup>105</sup> to demonstrate the deference the Court gave to "the importance of the statutory policy."<sup>106</sup> In *TVA*, the Court refused to allow the completion of a dam in light of the section 9 prohibition on "takings," finding that such habitat modification would result in harm to the endangered snail darter.<sup>107</sup> Based upon the Court's decision in *TVA* and Congress's clear intent to protect both ecosystems and endangered or threatened species, Justice Stevens found the Secretary's interpretation of harm acceptable.<sup>108</sup>

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98. *Id.* at 2412-13. Justice Stevens pointed out that the definition of harm means "to cause hurt or damage to: injure." *Id.* at 2412 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1966)).

99. *Id.* at 2413.

100. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1966)).

101. *Id.*

102. *Id.* (citing *Mackay v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 & n.11 (1988)). Justice Stevens noted that the other terms in § 3 such as "harass," "pursue," "hunt," "shoot," "wound," "kill," "trap," "capture," and "collect" were not duplicative because they referred to direct applications of force, while "harm," in contrast, could result from indirect means such as destruction of critical habitat. *Id.* at 2413 n.11.

103. *Id.* at 2413.

104. *Id.*; see 16 U.S.C. § 1531(b) (1994).

105. 437 U.S. 153 (1978) (holding that building of dam was prohibited by ESA, despite \$100 million spent by Congress on the nearly completed project, in order to protect the endangered snail darter which lived in the waters); see also *supra* notes 24-34 and accompanying text (analyzing the *TVA* decision).

106. *Sweet Home*, 115 S. Ct. at 2413.

107. *TVA*, 437 U.S. at 184 n.30; see also *supra* notes 24-34 and accompanying text (discussing *TVA*).

108. *Sweet Home*, 115 S. Ct. at 2413-14. Justice Stevens dismissed the respondents'

In his third argument based upon the text of ESA, Justice Stevens looked to 1982 amendments to the Act, which allowed permits for incidental takings, as an indication that harm was intended to include indirect takings.<sup>109</sup> According to the majority, since the amendment requires a permit applicant to demonstrate a viable plan which will reduce any impact on listed species, "Congress had in mind foreseeable rather than merely accidental effects on listed species."<sup>110</sup> Justice Stevens denounced respondents' construction of harm, which would require "an 'incidental' take permit to avert . . . liability for direct, deliberate action," concluding that unintentional harm beyond the scope of a section 10 permit brought about by destruction of critical habitat violated the Act.<sup>111</sup>

The majority then focused its attention on the court of appeals' attempt to ascribe "a direct application of force" to harm since the other terms defining "takings" possessed such meaning, but found fault with this reasoning on three grounds.<sup>112</sup> Justice Stevens pointed out that one could "harass," "pursue," "wound," and "kill" without use of "direct applications of force."<sup>113</sup> Moreover, contrary to the court of appeals' interpretation, knowledge of a section 9 taking is sufficient to violate the Act, whether such taking is intentional or not.<sup>114</sup> Finally, Justice Stevens took issue with the lower court's use of the doctrine of *nosci-tur a sociis*, the practice that a word "gathers meaning from the words

facial challenge because to accept such a position would "ask us to invalidate the Secretary's understanding of 'harm' in every circumstance, even when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat." *Id.*

109. *Id.* at 2414. Under § 10 as amended, the Secretary may grant permits for takings outlawed by § 9(a)(1)(b) "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *Id.* (quoting 16 U.S.C. § 1539(a)(1)(B) (1994)).

110. *Id.*

111. *Id.*

112. *Id.* Justice Stevens also disagreed with Justice Scalia's construction of harm, which would require actual force used against the animal. *Id.* at 2414-15 n.15; *see id.* at 2423 (Scalia, J., dissenting). "Under the dissent's interpretation of the Act, a developer could drain a pond, knowing that the act would extinguish an endangered species of turtles, without even proposing a conservation plan or applying for a permit under § 9(a)(1)(B) . . ." *Id.* at 2414-15 n.15; *see id.* at 2424 (Scalia, J., dissenting). If such an action were undertaken with no harm intended at the endangered species, it would not be a violation under the dissent's interpretation, a result which the majority rejected. *Id.* at 2414-15 n.15; *see id.* at 2424 (Scalia, J., dissenting).

113. *Id.* at 2415.

114. *Id.*

around it.”<sup>115</sup> Under the court of appeals’ application of the doctrine, the meaning of harm would be merely duplicative of the other words used to define “take,” whereas the meaning ascribed to harm by the Secretary more accurately allows the word “a character of its own not to be submerged by its association.”<sup>116</sup>

Justice Stevens dispensed with respondents’ final contention that the government was enforcing the section 9 prohibition against takings in an attempt to circumvent its duty to acquire critical habitat under section 5 as a means of protecting listed species.<sup>117</sup> Noting that acquisition of land would probably be more economically efficient than engaging in costly litigation, Justice Stevens also rejected respondents’ argument on the ground that action taken under section 9 required an actual taking to occur.<sup>118</sup> The Secretary could acquire land under section 5 prior to any adverse impact on endangered species habitating there.<sup>119</sup> Highlighting the areas in which sections 5, 7, and 9 overlap and the areas in which they differ, Justice Stevens concluded that “[a]ny overlap . . . simply reflects the broad purpose of the Act.”<sup>120</sup>

Relying on its conclusion of reasonableness of the Secretary’s interpretation of harm under the second prong of the *Chevron* test,<sup>121</sup> Justice Stevens dispensed with any need to address the first prong and turned his attention to the legislative history accompanying the Act to support the Court’s decision.<sup>122</sup> Pointing to both the Committee Reports and the Senate Reports pertaining to the legislative proposals, Justice Stevens noted a clear intent on Congress’s behalf that “take” be construed “broadly to cover indirect as well as purposeful actions.”<sup>123</sup> Additionally, because the Senate amended the proposed legislation spe-

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115. *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

116. *Id.* (quoting *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923)).

117. *Id.* Under § 5, the Secretary is granted authority to purchase lands on which survival of an endangered or threatened species depends. 16 U.S.C. § 1534(a)(2) (1994).

118. *Sweet Home*, 115 S. Ct. at 2415.

119. *Id.*

120. *Id.* at 2415-16.

121. See *supra* note 96 and accompanying text (discussing the *Chevron* two-prong test).

122. *Sweet Home*, 115 S. Ct. at 2416.

123. *Id.*; see S. REP. NO. 9307, 93d Cong. 2d Sess. 7 (1973), reprinted in 1973 U.S.C.C.A.N. 2989, 2995; H.R. REP. NO. 9412, 93d Cong., 2d Sess. 11 (1973) (stating “take” includes “harassment, whether intentional or not”). Justice Stevens focused on a comment in the House Report which indicated that bird-watching could be prohibited if it interfered with the birds’ reproductive activities as evidence that “the term ‘take’ . . . reached far more than the deliberate actions of hunters and trappers,” and noted that “the dissent’s welcome but selective foray into legislative history” did not address such evidence. *Sweet Home*, 115 S. Ct. at 2416; see H.R. REP. NO. 412, 93d Cong., 2d Sess. 11 (1973).

cifically to add "harm" to the definition of "take," the majority concluded that such a revision "deserve[d] a respectful reading."<sup>124</sup> Justice Stevens then minimized the importance of the deleted "'destruction, modification, or curtailment of [the] habitat or range' of fish and wildlife" language from the original definition proposed on the Senate floor, since the regulation as embodied at that time was much broader than the regulation as it was enacted.<sup>125</sup>

Finally, Justice Stevens found additional support for upholding the Secretary's interpretation of harm in the 1982 amendments to the Act, which authorized the Secretary to issue the incidental taking permits under section 10.<sup>126</sup> The majority again repudiated respondents' position that the section 10 permit was limited to accidental killings of listed species by citing legislative history which considered foreseeable, yet incidental, takings.<sup>127</sup> Stating that "Congress had habitat modification directly in mind," Justice Stevens reconciled the 1982 amendment excepting incidental takings where allowed by permit with the meaning ascribed to "harm" by the Secretary.<sup>128</sup>

124. *Sweet Home*, 115 S. Ct. at 2416-17. The fact that the term "harm" was added without discussion on the floor, in the majority's view, did not give merit to respondents' argument that it should thus be construed narrowly. *Id.*

125. *Id.* at 2417. Whereas the Act limits takings to "habitat modifications that actually kill or injure wildlife," Senate Bill 1983 would have related more expansively to any alteration of critical habitat, whether it resulted in takings or not. *Id.* Justice Stevens again dismissed respondents' position that § 5 limited the Secretary's means for protecting critical habitat to acquisition of lands vital to an endangered species' existence, noting that floor statements upon which respondents relied for support of this contention did not indicate that land acquisition was an "exclusive remedy." *Id.* at 2417 n.19; see 119 CONG. REC. 25,669 (1973) ("The Secretary would be empowered to use the land acquisition authority granted to him in certain existing legislation to acquire land for the use of the endangered species programs.") (statement of Sen. Tunney); 119 CONG. REC. 30,162 (1973) ("[T]he principal threat to animals stems from destruction of their habitat . . . H.R. 37 will meet this problem by providing funds for acquisition of critical habitat . . .") (statement of Rep. Sullivan).

126. *Sweet Home*, 115 S. Ct. at 2417; see 16 U.S.C. § 1539(a)(1)(B) (1994); *supra* note 109 (discussing § 10 permits).

127. *Sweet Home*, 115 S. Ct. at 2417-18. "The House Report expressly states that '[b]y use of the word "incidental" the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity.'" *Id.* at 2417 (quoting H.R. REP. NO. 567, 97th Cong., 2d Sess. 31 (1982), *reprinted in* 1982 U.S.C.A.N. 2807, 2831).

128. *Id.* at 2418.



In concluding the majority opinion, Justice Stevens stressed the Secretary's authority to interpret the intricate and detailed complexities of the Endangered Species Act, noting that "[w]hen Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his."<sup>129</sup> Thus, in light of the deference accorded to agency interpretations, and having conducted an extensive analysis of the Act and its legislative history, the Supreme Court reversed the court of appeals, finding "the Secretary reasonably construed the intent of Congress when he defined 'harm' to include 'significant habitat modification or degradation that actually kills or injures wildlife.'"<sup>130</sup>

### B. Justice O'Connor's Concurring Opinion

In a concurring opinion, Justice O'Connor based her support of the Court's decision upon two restrictions in the regulation: application of the regulation to "actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals," and the doctrine of proximate cause.<sup>131</sup> Justice O'Connor used Justice Scalia's dissenting opinion as a sounding board against which she discussed her belief that the Secretary's definition of harm is restricted to actions which result in death or injury to particular animals.<sup>132</sup> Justice O'Connor took issue with Justice Scalia's finding that "[i]mpairment of breeding does not 'injure' living creatures,"<sup>133</sup> arguing that preventing a species from reproducing injures the particular animal by "render[ing] that animal . . . biologically obsolete."<sup>134</sup> Justice O'Connor further noted that behavior patterns necessary for the survival of the species that are circumvented by alteration of a critical habitat result in the prohibited harm under the Act.<sup>135</sup> Justice O'Connor thus accepted the application of "harm" to situations where alteration of critical habitat prevents a listed species from engaging in activities vital to survival such as "breeding, feeding, and sheltering."<sup>136</sup>

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129. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984)); see also *supra* note 96 and accompanying text (discussing the *Chevron* doctrine).

130. *Sweet Home*, 115 S. Ct. at 2418; see 50 C.F.R. § 17.3 (1994) (defining harm to include an act which "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential and behavioral patterns, including breeding, feeding, or sheltering").

131. *Sweet Home*, 115 S. Ct. at 2418 (O'Connor, J., concurring).

132. *Id.* (O'Connor, J., concurring).

133. *Id.* at 2419 (O'Connor, J., concurring) (citing *id.* at 2422 (Scalia, J., dissenting)).

134. *Id.* (O'Connor, J., concurring).

135. *Id.* at 2418 (O'Connor, J., concurring).

136. *Id.* at 2419 (O'Connor, J., concurring). Justice O'Connor disagreed with Justice

Justice O'Connor failed to see any discrepancy between the Secretary's ascribed meaning of "harm" and the legislative history accompanying the 1981 amendment to the Act which codified the "actual death or injury requirement."<sup>137</sup> Whereas Justice Scalia chose to emphasize the word "direct" in the Fish and Wildlife Service's statement that harm could occur beyond "direct physical injury to an individual member of the wildlife species," Justice O'Connor concluded that one could similarly attach significance to the term "individual" and determine that harm is restricted to particularized, listed animals.<sup>138</sup> Justice O'Connor also noted that the corresponding legislative history required more than hypothetical harm, indicating that the purpose of adding the term "actually" was "to bulwark the need for proven injury to a species due to a party's actions."<sup>139</sup>

Justice O'Connor rejected the dissent's position that the doctrine of proximate cause would not be applied to the Secretary's application of the regulation when considered with the liability provision of the Act.<sup>140</sup> Rather, in light of the deliberate inclusion of the term "actually" in the regulation, Justice O'Connor concluded that application of the doctrine was clearly intended.<sup>141</sup> Noting the intricacies of proximate cause and indicating that the lower courts should apply a fact-specific, case-by-case analysis to determine whether causation existed, Justice O'Connor nevertheless argued that the regulation did raise issues of duty and foreseeability.<sup>142</sup>

In concluding her concurring opinion, Justice O'Connor noted that while proximate cause was a component part of the "harm" regulation,

Scalia's interpretation of the Secretary's meaning of harm to include "nonexistent animals," finding the "essential behaviors" of breeding, feeding, and sheltering to be within the scope of the Act. *Id.* (O'Connor, J., concurring).

137. *Id.* at 2419 (O'Connor, J., concurring); see 46 Fed. Reg. 54,748 (1981).

138. *Sweet Home*, 115 S. Ct. at 2419 (O'Connor, J., concurring) (citing 46 Fed. Reg. 54,748-49 (1981)).

139. *Id.* (O'Connor, J., concurring) (citing 46 Fed. Reg. 54,749 (1981)). Thus, Justice O'Connor explained that where a tree is felled and consequently no longer is available as a food source or place of habitat, such action fails to meet the "demonstrable effect . . . on actual individual members of the protected species." *Id.* (O'Connor, J., concurring).

140. *Id.* at 2420 (O'Connor, J., concurring); see 16 U.S.C. § 1540(1) (1994) (imposing civil liability for knowing violations of the Act).

141. *Sweet Home*, 115 S. Ct. at 2420 (O'Connor, J., concurring).

142. *Id.* (O'Connor, J., concurring). For a detailed analysis of the elements of proximate cause, see *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (requiring plaintiff to be in the foreseeable zone of danger before a duty arises).

the doctrine had not been appropriately applied in the *Palila II* decision.<sup>143</sup> According to Justice O'Connor, the consumption of a rare plant upon which the endangered Palila bird might have depended for food and shelter "did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently inhabited by actual birds."<sup>144</sup> Yet in light of the procedural posture of *Sweet Home*, Justice O'Connor concluded that the regulation did not exceed the Secretary's scope of authority, and what she deemed to be an erroneous decision in *Palila II* could not alter that.<sup>145</sup> Thus, while noting that both Congress and the Secretary may take action to alter the regulation, Justice O'Connor justified her alliance with the majority decision.<sup>146</sup>

### C. Justice Scalia's Dissenting Opinion

In a lengthy and somewhat stinging dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, initially focused on the text of the ESA in concluding that a regulation which allows for incidental hunting and killing is an improper interpretation.<sup>147</sup> Justice Scalia highlighted three factors of the regulation which he believed rendered it invalid.<sup>148</sup> First, the dissent interpreted the regulation as imposing unlimited liability for any activity which interferes with "essential behavioral patterns" of an endangered species, whether such effects were anticipated or not.<sup>149</sup> Second, under the regulation a violation of ESA could occur as a result of an omission rather than an affirmative action.<sup>150</sup> Third, and most significantly, the dissent objected to application of the regulation in situations where injury occurred to entire populations of an endangered species as opposed to specific, individual animals.<sup>151</sup>

In addressing these three points, the dissent viewed the majority's complete absorption with the term "harm" as erroneous in that the

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143. *Sweet Home*, 115 S. Ct. at 2421 (O'Connor, J., concurring).

144. *Id.* at 2420-21 (O'Connor, J., concurring).

145. *Id.* at 2421 (O'Connor, J., concurring).

146. *Id.* (O'Connor, J., concurring). Justice O'Connor was prophetic in recognizing that Congress would possibly "see fit to revisit the issue." *Id.* (O'Connor, J., concurring). Since the Supreme Court handed down its decision in *Sweet Home*, numerous bills have been introduced into the House and Senate, largely in attempts to scale back the protections afforded by the Act. See *infra* note 202 for a discussion of these bills.

147. *Sweet Home*, 115 S. Ct. at 2421-31 (Scalia, J., dissenting).

148. *Id.* at 2421-22 (Scalia, J., dissenting).

149. *Id.* at 2421 (Scalia, J., dissenting).

150. *Id.* at 2422 (Scalia, J., dissenting).

151. *Id.* (Scalia, J., dissenting).

Court's opinion failed to consider the meaning of "take."<sup>152</sup> While recognizing that "take" had a broader meaning than the common law application, because it included attempted takings and acts which are in furtherance of a taking rather than merely a completed taking, the dissent maintained that focusing only on the definition of "take" rather than the word's own independent meaning was a "fallacy . . . which the Court commit[ted] with abandon."<sup>153</sup> The dissent objected to the interpretation of the word "harm" offered by the majority, finding it "repugnant to its ordinary and traditional sense," especially when taken in context with the other terms used to define "take" in the Act.<sup>154</sup> Noting that the other nine words in the definition of "take" ("harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect")<sup>155</sup> require direct force against some individual animal, under application of the canon *noscitur a sociis*, the dissent argued that harm should therefore be interpreted as applying to "affirmative conduct intentionally directed against a particular animal or animals."<sup>156</sup> The dissent also took issue with the

152. *Id.* (Scalia, J., dissenting). Justice Scalia indicated that if an action was brought under the 16 U.S.C. § 1532(19) definition of "harm," such suit "would be dismissed as defective, for the only operative term in the statute is to 'take.'" *Id.* (Scalia, J., dissenting).

153. *Id.* at 2423 (Scalia, J., dissenting). Justice Scalia pointed to statutory and common law authority to demonstrate that "take" is intended to refer to direct acts purposefully carried out against specific, individual members of an endangered species. *Id.* at 2422-23 (Scalia, J., dissenting).

154. *Id.* at 2423 (Scalia, J., dissenting). The majority's definition would allow for omissions rather than direct acts, whereas Justice Scalia felt a more narrow construction of the word, which required direct acts, was a "more common and preferred usage." *Id.* (Scalia, J., dissenting).

155. *Id.* (Scalia, J., dissenting) (citing 16 U.S.C. § 1532 (1994)).

156. *Id.* at 2423-24 (Scalia, J., dissenting). For a discussion of the doctrine of *noscitur a sociis*, see *supra* notes 115-16 and accompanying text. See generally *Beecham v. United States*, 114 S. Ct. 1669, 1671 (1994) (stating that "several items in a list [that] share an attribute counsels in favor of interpreting the other items as possessing that attribute as well"). Justice Scalia also highlighted the following statement from the Solicitor of the Fish and Wildlife Service in support of his contention that the Secretary had made a "ruthless dilatation" of harm:

"The Act's definition of 'take' contains a list of actions that illustrate the intended scope of the term. . . . With the possible exception of 'harm,' these terms all represent forms of conduct that are directed against and likely to injure or kill *individual* wildlife. Under the principle of statutory construction, *ejusdem generis*, . . . the term 'harm' should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife."

*Sweet Home*, 115 S. Ct. at 2424 (Scalia, J., dissenting) (quoting 46 Fed. Reg. 29,490,

Court's premise that application of the doctrine is incorrect when done in a manner which obliterates any "independent meaning" of the term itself, noting that if such were the case, the Court should therefore be required to interpret "trap" to also retain its secondary meaning "to clothe."<sup>157</sup>

As additional support for its interpretation of harm, the dissent looked to the liability provisions of the Act.<sup>158</sup> Justice Scalia noted that under § 1538(a)(1)(B), both criminal and civil penalties could be assessed for a knowing violation, while under § 1540(a)(1) and (b)(1), only civil penalties could be assessed for unknowing violations.<sup>159</sup> As the dissenting Justices applied the Secretary's interpretation of harm, daily activities normally engaged in as part of "farming, . . . ranching, roadbuilding, construction and logging" would be subject to the stricter liability provision even though the acts were not directed at individual members of a species and thus were committed "unknowingly."<sup>160</sup> The dissent rejected this analysis, demonstrating that one could unknowingly yet purposefully "take" a member of a listed species by shooting a protected elk with the belief that it was an unprotected mule deer.<sup>161</sup> Where such an unknowing act would be penalized under the stricter provision, the dissent reasoned that the "more severe penalties provided for a 'knowing' violation" would be "superfluous."<sup>162</sup>

The dissent then compared the contextual relationship of "take" as defined in § 1532(19) with the remaining portions of the Act.<sup>163</sup> Citing various sections of the Act which refer to "takings," the dissent noted that none included any reference to habitat modification, and thus the Secretary's interpretation of "harm" was not consistent with the entire Act and could not be upheld.<sup>164</sup> Furthermore, the dissent argued that because § 1536(a)(2), pertaining to federal agencies, contained an ex-

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29,492 (1981)).

157. *Sweet Home*, 115 S. Ct. at 2424 (Scalia, J., dissenting).

158. *Id.* at 2424-25 (Scalia, J., dissenting).

159. *Id.* at 2424 (Scalia, J., dissenting).

160. *Id.* (Scalia, J., dissenting).

161. *Id.* at 2424-25 (Scalia, J., dissenting).

162. *Id.* at 2424 (Scalia, J., dissenting).

163. *Id.* at 2425-26 (Scalia, J., dissenting).

164. *Id.* at 2425 (Scalia, J., dissenting) (citing *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1066-67 (1995) ("[T]he Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout.")). For example, Justice Scalia suggested that if "taking" were to be interpreted in a broader sense than its common law meaning, then the list requiring loss of "[a]ll guns, traps, nets, and other equipment . . . used to aid the taking" of endangered species under § 1540(e)(4)(B) would have included "plows, bulldozers, and backhoes" as evidence that Congress intended for habitat modification to be part of a taking. *Id.* (Scalia, J., dissenting).

press prohibition against "destruction or adverse modification" of critical habitat, while § 1538(a)(1)(B), which applies to individuals and federal agencies, lacked any similar environmental conservation provision, under general rules of statutory interpretation the prohibition of the former could not be implied in the latter.<sup>165</sup> Noting, however, that § 1536(a)(2) and § 1538(a)(1)(B) both apply to federal agencies, the dissent found that application of the Secretary's "harm" regulation under § 1538 would overlap the Act's own critical habitat definition in § 1536, thus violating another rule of statutory interpretation which requires each provision to have its own unique meaning.<sup>166</sup> The dissent rejected the contention that the sections did not overlap because critical habitat could also refer to land not currently occupied by listed species, thus allowing for agency action which altered such terrain, and instead suggested that such a reading merely reduced the overlap to areas already occupied by listed species.<sup>167</sup>

The dissent then dispensed with the majority's four other arguments.<sup>168</sup> First, the dissent regarded the Court's reliance on the "broad purpose" of the ESA as oversimplified and inaccurate when compared with what the dissent considered a more appropriate approach using the tool of legislative interpretation based upon the text of the statute.<sup>169</sup>

Second, noting his own disdain for legislative history as an interpretive tool, Justice Scalia nevertheless addressed the issue in order to contradict the Court's findings.<sup>170</sup> The dissent concluded that the Court gave too much weight to the Senate's addition of the word "harm" to the definition of "take," while placing too little emphasis on

165. *Id.* (Scalia, J., dissenting) (citing *Keene Corp. v. United States*, 113 S. Ct. 2035, 2040 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russelo v. United States*, 464 U.S. 16, 23 (1983)). Justice Scalia noted that "it would be passing strange for Congress carefully to define 'critical habitat' as used [in one section], but leave it to the Secretary to evaluate, willy-nilly, impermissible 'habitat modification' (under the guise of 'harm') in [another section]." *Id.* at 2425-26 (Scalia, J., dissenting).

166. *Id.* at 2426 (Scalia, J., dissenting).

167. *Id.* (Scalia, J., dissenting).

168. *Id.* at 2426-29 (Scalia, J., dissenting).

169. *Id.* at 2426 (Scalia, J., dissenting). Justice Scalia referred to the Court's approach as a "vice" for "simplistically . . . assum[ing] that whatever furthers the statute's primary objective must be the law." *Id.* (Scalia, J., dissenting) (citing *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam)).

170. *Id.* at 2426-27 (Scalia, J., dissenting).

the eradication of the habitat modification provision from its definition.<sup>171</sup> In the dissent's view, the legislative history expressly indicated that habitat modification and takings were completely separate concepts provided for in their own respective sections of the Act, and thus were not intended to be combined via a regulation which considered alteration of critical habitat to inflict harm upon listed species.<sup>172</sup>

The dissent disagreed with the Court's premise that the 1982 amendment that allowed for incidental takings under a section 10 permit supported the Secretary's interpretation of "harm."<sup>173</sup> While recognizing that legislative history contained in both the Senate Committee Report and House Conference Committee Report indicates that the amendment would "enable the Secretary to permit environmental modification," the dissent maintained that the amendment did not support the Secretary's interpretation of harm because habitat modification was not the exclusive incidental taking to which the permit would apply.<sup>174</sup> Thus, because incidental takings could occur in any number of "otherwise lawful activit[ies]," such as "when fishing for unprotected salmon also takes an endangered species of salmon," the Court's argument that Congress intended indirect takings through habitat modification to be a violation was a convenient but ill-founded rationale.<sup>175</sup>

Finally, the dissent found fault with the Court's decision regarding the procedural posture of the case.<sup>176</sup> The dissent stated that the Court had "eviscerat[ed]" the doctrine of facial challenge by intimating that respondents' challenge must fail regardless of whether the Secretary's interpretation of harm included an element required for liability under the Act, as long as the interpretation could be applied to a fact pattern containing the element.<sup>177</sup>

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171. *Id.* at 2427 (Scalia, J., dissenting); see *supra* notes 125-27 and accompanying text (discussing the legislative history accompanying these decisions to add the term harm and delete references to habitat modification).

172. *Sweet Home*, 115 S. Ct. at 2427-28 (Scalia, J., dissenting). Justice Scalia cited statements by Senator Tunney and Representative Sullivan as evidence that while the authority to purchase land under § 5 of the Act would not be the exclusive remedy for habitat modification, it was intended that "habitat destruction on private lands [was] to be remedied by public acquisition, and not by making particular unlucky landowners" bear the burden alone. *Id.* at 2428 (Scalia, J., dissenting).

173. *Id.* (Scalia, J., dissenting).

174. *Id.* (Scalia, J., dissenting); see S. REP. NO. 418, 97th Cong., 2d Sess. 10 (1982); see H.R. CONF. REP. NO. 835, 97th Cong., 2d Sess. 30-32 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2871-73.

175. *Sweet Home*, 115 S. Ct. at 2428 (Scalia, J., dissenting).

176. *Id.* at 2429 (Scalia, J., dissenting).

177. *Id.* (Scalia, J., dissenting). To illustrate, the dissent proposed a hypothetical situation where a regulation which proscribes murder, but makes no reference to premeditation, is promulgated to accompany a statute prohibiting *premeditated* mur-

The last portion of Justice Scalia's dissent countered two arguments the Court put forth in response to issues raised in the dissenting opinion.<sup>178</sup> First, in Justice Scalia's view, the Secretary's regulation was invalid because it did not meet the proximate cause requirement embodied in the statute.<sup>179</sup> The dissent objected to the Court's insistence that the regulation did include a proximate cause limitation because it did not specifically reject the limitation<sup>180</sup> and stated that the majority refuted its own argument when it held that the Secretary's interpretation of harm properly included indirect injury.<sup>181</sup> Justice Scalia also dismissed the majority and concurring opinions' reliance on the inclusion of the term "actually" in the regulation as instilling an element of proximate cause, noting that "actually" define[d] the requisite injury, not the requisite causality."<sup>182</sup>

Second, Justice Scalia argued that the Court's acknowledgment that the Act did not prohibit injury to an entire population of a listed species as opposed to a particular member of the species was not consistent with upholding the regulation because the Secretary's interpretation included "impairment of 'breeding' as one of the modes of 'kill[ing] or injur[ing] wildlife.'"<sup>183</sup> In Justice Scalia's view, the Court essentially

der. *Id.* (Scalia, J., dissenting). According to Justice Scalia, a facial challenge of such a regulation should succeed because the regulation did not *require* the necessary element of mens rea, even though the regulation *could* apply in those killings where premeditation was present. *Id.* (Scalia, J., dissenting).

178. *Id.* at 2429-31 (Scalia, J., dissenting).

179. *Id.* at 2429 (Scalia, J., dissenting).

180. *Id.* (Scalia, J., dissenting) (referring to majority opinion and concurring opinion at 2412 n.9 and 2414 n.13 respectively).

181. *Id.* (Scalia, J., dissenting). Justice Scalia cited to Black's Law Dictionary and Webster's New International Dictionary of the English Language as support for his contention that an indirect cause by its very nature could not also be a proximate cause. *Id.* at 2429-30 (Scalia, J., dissenting).

182. *Id.* at 2430 (Scalia, J., dissenting). While courts may uphold a regulation on the grounds of "reasonable agency interpretations," Justice Scalia cautioned that a court's duty stops short of "policymaking," and thus courts could not uphold a regulation by adding a reasonable element clearly not present in the regulation. *Id.* (Scalia, J., dissenting); see *supra* note 96 and accompanying text (discussing the *Chevron* two-prong test).

183. *Sweet Home*, 115 S. Ct. at 2430 (Scalia, J., dissenting). Justice Scalia made much of Justice O'Connor's concurrence, which proposed that species are injured when they are not allowed to reproduce, noting that the only such harm which could result from this interference would be "psychic harm . . . (assuming of course, that the animal in question, perhaps an endangered species of slug, is capable of such painful sentiments)." *Id.* at 2430 n.5 (Scalia, J., dissenting). If such harm were to be



created its own statute and its own regulation, "law a la carte."<sup>184</sup> Therefore Justice Scalia could not accept the holding that habitat modification was a "taking."<sup>185</sup> Instead, returning again to what he perceived as the unambiguous text of the Act, Justice Scalia found that "only action directed at living animals constitutes a 'take.'"<sup>186</sup>

## V. IMPACT

The Supreme Court could have relied solely on application of the two-prong *Chevron* test to determine that the Secretary's regulation was a reasonable interpretation of Congress's intent in its decision to uphold the definition of harm's inclusion of critical habitat modification.<sup>187</sup> Instead, the Court devoted a considerable amount of attention to legislative history as additional support for its decision.<sup>188</sup> The implications which can be derived from this decision are twofold, and significantly divergent.

### A. Judicial Support of ESA

One possible reason the Court went out of its way to validate its decision was to signal the lower courts that its precedent of endorsing the broad purpose of the Act was to continue.<sup>189</sup> Failure to protect the critical habitat denies endangered species the opportunity to survive or be restored to an unendangered status.<sup>190</sup> The Federal Register cites

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encompassed by the regulation, Justice Scalia suggested that a logical corollary would be the prohibition of "psychic harm of not being able to frolic about—so that the draining of a pond used for an endangered animal's recreation, but in no way essential to its survival, would be prohibited by the Act." *Id.* (Scalia, J., dissenting).

184. *Id.* at 2430-31 (Scalia, J., dissenting).

185. *Id.* (Scalia, J., dissenting).

186. *Id.* at 2431 (Scalia, J., dissenting).

187. See *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (instructing courts to defer to reasonable agency interpretation of statute where Congress's intent is ambiguous); see *supra* note 96 and accompanying text (discussing the *Chevron* doctrine).

188. See *Sweet Home*, 115 S. Ct. at 2416-18.

189. The seminal Supreme Court case recognizing the high significance Congress placed on conservation of endangered species via the Act is *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (holding near-completed dam could not be finished because operation of the dam would harm the endangered snail darter); see *supra* notes 24-34 and accompanying text (discussing *TVA*).

190. See generally Kristen M. Fletcher, *Conserving Their Kingdom: Habitat Modification as a Harm Under the Endangered Species Act*, 21 J. LEGIS. 133 (1995) (urging the legislature to reauthorize ESA to expressly include habitat modification in the definition of "take" and thus address the pivotal relationship between loss of habitat and preservation of species). Section 2 of the ESA, which contains the goals, states "[t]he purposes of this chapter are to provide a means whereby the *ecosystems* upon

destruction of critical habitat as the main threat against endangered species.<sup>191</sup> The Act contains express provisions for critical habitat conservation in two separate sections.<sup>192</sup> By finding the Secretary's definition of harm permissible, alteration of critical habitat becomes a prohibited "taking" under section 9, thus extending liability to individuals, corporations, and government entities.<sup>193</sup> The Court's holding effectively embraces the course it adopted in *TVA*, where it declined to consider any economical ramifications of its decision and instead noted that "the balance ha[d] been struck [by Congress] in favor of affording endangered species the highest of priorities."<sup>194</sup> Thus, despite the burden the regulation places on the private landowner,<sup>195</sup> the Court followed its own precedent and merely ruled on the reasonableness of the interpretation of the statute.<sup>196</sup> Lower courts have since followed the Supreme Court's lead, citing *Sweet Home* as support for decisions

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which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b) (1994) (emphasis added).

191. See Oliver A. Houck, *Reflections on the Endangered Species Act*, 10 NAT. RESOURCES & ENV'T 9, 9-10 (Summer 1995).

192. 16 U.S.C. § 1534(a)(1)-(2) (1994). Section 5 authorizes the Secretary to engage in the acquisition of land to facilitate the conservation of endangered or threatened species. The jeopardy provision contained in § 7 prohibits federal agency action "likely to jeopardize the continued existence of any endangered species or threatened species or result in destruction or adverse modification of [critical] habitat of such species." *Id.* § 1536(a)(2).

193. See *id.* § 1538. Section 3 defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). The regulation promulgated by the Secretary through the Director of the Fish and Wildlife Service is as follows: "Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (1994).

194. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

195. See generally Jane Kay, *On a Mission: Property-Rights Advocate Finds Congress Niche*, CHI. TRIB., Nov. 18, 1995, at 17 (discussing bill proposed by Congressmen Richard Pombo and Don Young to reauthorize the Endangered Species Act and specifically remove habitat destruction from the definition of harm); Nancie G. Marzulla, *Endangered Breed: Those Who Own Land*, AUSTIN AM.-STATESMAN, Nov. 22, 1995, at A9 (examining the impact the Endangered Species Act has on private property owners and arguing that unless the Act is revised, landowners themselves will become extinct).

196. See *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2412-14 (1995).

which prohibit habitat modification as a violation of the taking provision of section 9 of the ESA.<sup>197</sup>

### B. Congressional Reauthorization

Another possible reason the Court relied so heavily on legislative history as one of the grounds for its decision was to send a clear message to Congress that policy making is in the hands of Congress, not the Court, and only a substantial change in the Act itself could result in a different outcome.<sup>198</sup> Justice O'Connor hinted as much in her concurrence when she stated "Congress may, of course, see fit to revisit this issue."<sup>199</sup> Congress has not hesitated in the past to take action regarding the Act when disgruntled by a Supreme Court ruling: After completion of the Tellico dam was halted by the TVA decision, Congress (which had previously appropriated more than \$100 million to build the dam) amended section 7 of the Act to allow for exemptions from the jeopardy provision.<sup>200</sup> When an exemption to complete the dam was

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197. See *Loggerhead Turtle v. County Council*, 896 F. Supp. 1170 (M.D. Fla. 1995) (granting an injunction against vehicles traveling the beach at nighttime because they posed various risks to both hatchlings attempting to reach the ocean and to the adult females who come ashore to lay eggs); *Earth Island Inst. v. Christopher*, 922 F. Supp. 616 (Ct. Int'l Trade 1995) (prohibiting importation of shrimp caught with commercial fishing technology that results in incidental takings of four species of endangered sea turtles). *But see* *Mausolf v. Babbitt*, 913 F. Supp. 1334 (D. Minn. 1996) (holding that prohibition of snowmobiling on lakeshore was not warranted because the agency's finding that snowmobiling on lakeshore resulted in incidental taking of endangered wolves and bald eagles was merely speculative) (citing *Sweet Home*, 115 S. Ct. at 2420 (O'Connor, J., concurring) (stating the Act and its corresponding regulation require more than "speculative or conjectural effects"))).

198. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'") (quoting *TVA*, 437 U.S. at 195); *TVA*, 437 U.S. at 194 ("[I]t is . . . emphatically—the exclusive province of the Congress . . . to formulate legislative policies. . . ."). See generally Richard Stone, *Court Upholds Need to Protect Habitat*, *SCIENCE*, July 7, 1995, at 23 ("This is a call to arms for Congress to scrap the current ESA and write a law that works.").

199. See *Sweet Home*, 115 S. Ct. at 2421 (O'Connor, J., concurring). See generally *Endangered Species Conservation and Management Act of 1995: Hearings on H.R. 2275 Before the House Comm. on Resources*, 104th Cong., 1st Sess. (1995) (statement of W. Henson Moore, President and CEO, American Forest & Paper Ass'n) (noting in his testimony in support of the bill that Justice O'Connor's concurrence "invited Congress to revisit this issue").

200. See 16 U.S.C. § 1536(e)-(h) (1994). A federal agency can seek exemption from the jeopardy provision which proscribes agency actions that threaten the existence of a listed species or destroy or degrade critical habitat. *Id.* The Endangered Species Committee (known informally as the "God Squad") grants the exemption only when

not granted as expected, Congress ultimately passed a bill mandating completion of the dam.<sup>201</sup>

Similarly, in the wake of *Sweet Home*, a number of bills have been proposed in Congress which would effectively eviscerate ESA.<sup>202</sup> Envi-

there are no other reasonable and prudent alternatives, the agency action is in the public interest on both a regional and national basis, and the benefits of the proposed action outweigh the benefits of actions that do not jeopardize. 16 U.S.C. § 1536(h)(A)(i)-(iv) (1994). For an in-depth look at the exemption process and the function of the "God Squad," see John L. Weston, Comment, *The Endangered Species Committee and the Northern Spotted Owl: Did the "God Squad" Play God?*, 7 ADMIN. L.J. AM. U. 779 (Fall 1993-Winter 1994); Jared des Rosiers, Note, *The Exemption Process Under The Endangered Species Act: How The "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825 (1991).

201. See Energy and Water Development Appropriation Act of 1979, Pub. L. No. 96-69, 93 Stat. 437 (codified as amended at 16 U.S.C. § 1539 (1979)).

202. See H.R. 2364, 104th Cong., 1st Sess. (1995) (bill proposing removal of punitive regulations from the Act) (introduced by Rep. John Shadegg (R-Ariz.)); S. 1364, 104th Cong., 1st Sess. (1995) (balancing the need to protect endangered species with need to protect rights of private property owners and requiring compensation for owners whose property is devalued by ESA) (introduced by Sen. Dirk Kempthorne (R-Idaho)); S. 768, 104th Cong., 1st Sess. (1995) (addressing the problem property owners face when their land is designated critical habitat under the Act) (proposed by Sen. Slade Gorton (R-Wash.)); H.R. 2275, 104th Cong., 1st Sess. (1995) (requiring that social and economical consequences of enforcing the Act be taken into consideration and mandating compensation for landowners whose property declines more than 20% in value as a result of the Act) (proposed by Reps. Don Young (R-Ala.) and Richard Pombo (R-Cal.)); H.R. 2374, 104th Cong., 1st Sess. (1995) (implementing an advisory panel chosen by the Secretary of Agriculture and Secretary of Commerce which would conduct a cost-benefit analysis to determine if measures should be taken to conserve an endangered species) (proposed by Rep. Wayne Gilchrest (R-Md.)); see also S. 1459, 104th Cong., 1st Sess. (1995) (redesignating land previously controlled by the Bureau of Land Management and United States Forest Service into the control of a small number of graziers and exempting permit holders who claim economic distress from controls designed to eliminate resource damage) (proposed by Sen. Pete Domenici (R-Ariz.)); S. 22, 104th Cong., 1st Sess. (1995) (expanding the meaning of private property to encompass acts done in pursuit of making a profit from the property, and providing for compensation when protection afforded under various federal provisions diminishes the fair market value of the property) (introduced by Sen. Bob Dole (R-Kan.)). See generally Alexander Cockburn, *A Bait-and-Switch Battle Over Endangered Species*, SEATTLE TIMES, Nov. 23, 1995, at B13 (articulating the premise that while various legislation is being promulgated on the hill, the ESA has already been gutted by administrative decrees which drastically impact numerous endangered species); Jim Nichols, *The Remaking of Environmental Law: Cost, Property Rights Emerge as Issues; Change Brewing on Environmental Law*, PLAIN DEALER (Clev.), Nov. 29, 1995, at 1A (summarizing common themes running through the numerous bills proposing environmental reform).

ronmental reform proposals range from specifically excluding habitat modification from the definition of harm,<sup>203</sup> to adding economic and social consequences as a factor to be considered when enforcing the Act,<sup>204</sup> to mandating compensation for landowners who experience diminished property values resulting from enforcement of ESA.<sup>205</sup> Despite the wave of proposed legislation which has swept through Congress in the aftermath of the Court's holding, the ESA to date remains relatively unscathed, and in fact seems to be holding its own.<sup>206</sup> Public opinion polls indicating environmental issues are still a priority with voters may be the reason behind Congress's failure to implement reforms set forth in its Contract With America.<sup>207</sup> However, whether the ESA will survive the frontal assault remains to be seen.

## VI. CONCLUSION

The red-cockaded woodpecker and the spotted owl have been granted a reprieve by the United States Supreme Court. Whether it becomes a temporary grace period will be determined by Congress. Members of the legislature, however, should take heed of the strong message contained in the Court's decision. The Endangered Species Act sets the value of species diversification very high, and courts have interpreted this value to be "incalculable."<sup>208</sup> Beyond the compelling argument for conservation for future generations' sake, if one requires an economic

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203. H.R. 2275, 104th Cong., 1st Sess. (1995). See generally *Endangered Species Reauthorization, 1995: Hearings on H.R. 2275 Before the House Comm. on Resources*, 104th Cong., 1st Sess. (1995) (statement of Stuart L. Pimm, Professor of Ecology, Univ. of Tenn.) (implicating the degradation of habitat as the primary force behind loss of species, and noting "[t]his bill's redefinition of 'harm' thus removes the most significant cause of extinction from the scope of the Act's prohibitions").

204. S. 1364, 104th Cong., 1st Sess. (1995); S. 768, 104th Cong., 1st Sess. (1995); H.R. 2275, 104th Cong., 1st Sess. (1995).

205. S. 1364, 104th Cong., 1st Sess. (1995).

206. See Timothy Noah, *U.S. Rollback of Green Agenda is Stalled*, WALL ST. J., Dec. 27, 1995, at 2 (noting that despite numerous attempts by the Republican Congress to scale back various environmental statutes, including the Endangered Species Act, no proposals containing significant environmental reform have been passed).

207. See generally *id.* at 2 (noting a study which found that while "a 61% majority believes the EPA does not need to issue more regulations to improve environmental quality . . . a 62% majority of the same respondents said environmental protection ought to be a bigger priority than cutting the number of regulations"). But see John Kimak, *Endangered Species Act Scrutinized*, L.V. REV. J., July 8, 1993, at 5D (documenting complaints of the Wildlife Legislative Fund of America, an organization comprised of 1.5 million hunters, in regard to the ESA and calling for amendments to address their concerns).

208. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187-88 (1978) ("[T]he plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.'").

rationale, the potentially life-saving drugs which can be developed from yet-discovered plants and species, and the economic potential such resources represent, should be an added incentive to protect critical habitat.<sup>209</sup> Without adequate ecosystems in which to feed, breed, and find shelter, species which are threatened or endangered cannot survive. Destruction or degradation of habitat critical to a listed species harms not only the particular animal itself, but it also harms all of humanity, for once extinct, a species is lost forever. Mankind cannot afford the loss.

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209. See, e.g., ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW § 1, at 5-9 (4th ed. 1995) (reprinting G. Ledec & R. Goodland, *Wildlands: Their Protection and Management in Economic Development*, 5-15 (1988) (advocating the importance of biological diversity)).

