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"IT'S NOT MY JOB TO CARE": UNDERSTANDING JUSTICE SCALIA'S METHOD OF STATUTORY INTERPRETATION THROUGH SWEET HOME AND CHEVRON

Karin P. Sheldon*

I. INTRODUCTION

In his dissent to Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon (Sweet Home), Justice Antonin Scalia concluded that the destruction of the habitat of an endangered species does not harm that species within the meaning of the Endangered Species Act (ESA). He disagreed with a majority of the United States Supreme Court which upheld a twenty-five year old Fish and Wildlife Service (FWS) regulation interpreting the ESA’s prohibition against harming endangered species to include damage to their habitat. The regulation applies to privately owned as well as public lands. Justice Scalia accused the majority of conscripting the lands of even “the simplest farmer” in the United States to “national zoological use.”

Justice Scalia’s Sweet Home dissent confirmed many environmentalists’ convictions that Justice Scalia is either hopelessly ignorant of the basic principles of ecology, or does not care about the impact of government and industry activities upon air, water, wildlife and other

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3 50 C.F.R. § 17.3 (1996).

4 Sweet Home, 115 S. Ct. at 2421 (Scalia, J., dissenting).
natural resources. The dissent compounded the scorn environmentalists saw expressed in Justice Scalia's decisions in environmental standing cases in which he limited the ability of environmental plaintiffs to use the courts to help protect the environment. This scorn prompted Justice Blackmun to wonder if Justice Scalia believes that environmental groups suffer some "special constitutional standing disabilities," and to accuse him of conducting a "slash and burn expedition through the law of environmental standing." It is easy to dismiss Justice Scalia as a result-oriented anti-environmentalist. It is much more important to understand his approach. Guiding the outcome in all his decisions is a consistent and comprehensive legal philosophy. Justice Scalia's opinions in environmental cases, although they have received little scholarly attention, provide particularly clear windows into his philosophy and methodology. They also reveal a great deal about his efforts to "maneuver" the Supreme Court and the law in the direction compatible with his strongly held views on the nature of our constitutional government and the role of the courts.

Justice Scalia ignores the substantive consequences of his decisions on the environment because worrying about the environment is not his job. He believes that judges are the least suited members of the government to decide what is best for society as a whole, or its environment. Judges who allow their enthusiasm for environmental issues to interfere with an objective analysis of the statute or regulation before them intrude improperly into the business of the legisla-

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6 Defenders of Wildlife, 504 U.S. at 595 (Blackmun, J., dissenting).

7 Id. at 606 (Blackmun, J., dissenting).

8 Much has been written about Justice Scalia's opinions in other types of cases. For example, in 1991, an entire symposium was devoted to his jurisprudence, although he had been on the Supreme Court less than five years. See, e.g., Alex Kozinski, My Pizza with Nino, 12 CARDOZO L. REV. 1583 (1991). Among the most illuminating articles about Justice Scalia are those prepared by the Justice himself. See, e.g., Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U. L. REV. 881 (1983); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L. J. 511; Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849 (1989); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175 (1989).

9 Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, supra note 8, at 899. Justice Scalia uses the word "maneuvering" to describe the process he intends to follow to move the law of standing back to what he believes is its original intent under the Constitution. See infra Section III.B.2 for a discussion of other ways Justice Scalia is directing the law.

10 See infra Section III.B.2.
tive and executive branches. For Justice Scalia, the majority's decision in *Sweet Home* is an example of just such judicial error.

The issue in *Sweet Home* was the proper interpretation of Section 9 of the Endangered Species Act which makes it unlawful for any person to "take" a species subject to the Act.\(^{11}\) "Take" is defined in the statute to include "harm," as well as capture, kill, wound and other words prohibiting the direct application of force against animals.\(^{12}\) Regulations of the Department of the Interior's Fish and Wildlife Service (FWS) interpret "harm" to include modification of the habitat of protected species that results in injury or death to members of those species.\(^{13}\) The regulation reaches activities on private as well as public lands. It was challenged by a group of timber companies and landowners who alleged that it exceeded the authority of the ESA.\(^{14}\)

To decide the issue, the Supreme Court applied the rule announced in *Chevron U.S.A., Inc. v. NRDC* (*Chevron*)\(^{15}\) that a court must defer to an agency's permissible construction of the ambiguous language of a statute that the agency administers.\(^{16}\) The court may not substitute its judgment for the agency's policy choices.\(^{17}\)

A majority of the Supreme Court found the statutory language defining "take" to be ambiguous and deferred to the FWS's regulation as a permissible interpretation of the statutory language.\(^{18}\) The Court concluded that Congress intended to protect and conserve both endangered species and the ecosystems on which they depend, regardless of whether the habitat is privately or publicly owned.\(^{19}\) The Court based its ruling on the "ordinary meaning" of the word "harm," the sweeping purposes of the ESA, and its legislative history.\(^{20}\)

Justice Scalia, by contrast, found Congress's intent "unmistakably clear," eliminating any need to defer to the FWS's regulation or even to consider whether it was a reasonable interpretation of the purposes of the ESA.\(^{21}\) To Justice Scalia, the ordinary meaning of "take," as

\(^{12}\) Id. § 1532(19).
\(^{13}\) 50 C.F.R. § 17.3 (1995).
\(^{16}\) Sweet Home, 115 S. Ct. at 2416 (applying *Chevron*, 467 U.S. at 866).
\(^{17}\) Chevron, 467 U.S. at 866.
\(^{18}\) Sweet Home, 115 S. Ct. at 2416.
\(^{19}\) Id. at 2415.
\(^{20}\) Id. at 2412–14, 2416.
\(^{21}\) Sweet Home, 115 S. Ct. at 2421 (Scalia, J., dissenting).
determined by the structure and context of the ESA, and the body of wildlife law into which it fits, is restricted to hunting or killing of animals, not the modification of their habitat. The habitat protection is to be achieved only through land acquisition and limits on what federal agencies are permitted to do on public lands. Private landowners bear no obligation to avoid damaging the habitat of protected species.

This article examines Justice Scalia’s dissent in *Sweet Home* as an illustration and expression of his philosophy of statutory interpretation and his application of the *Chevron* rule. Section II of the article discusses the genesis and development of the *Chevron* doctrine. It explores the differences between Justice Scalia and his colleagues on the Supreme Court with respect to the application of the *Chevron* doctrine. Justice Scalia’s formalistic approach to *Chevron* is contrasted with the more flexible manner in which *Chevron* is applied by Justice Stevens and others.

Section III of the article describes Justice Scalia’s judicial philosophy and method of statutory interpretation, as manifested through his exegesis of *Chevron*. This analysis identifies the hierarchy of factors that were critical for Justice Scalia in resolving the issues presented by *Sweet Home*, and helps to explain his dissenting opinion. The factors reviewed are the importance for Justice Scalia of the ordinary meaning of statutory provisions; the significance of context, as provided by the statute as a whole and the body of law in which it fits, and the role of history and tradition as guides to proper statutory interpretation.

As the section indicates, all of these elements are critical to what Justice Scalia regards as one of a judge’s most important tasks, the distillation of a general rule for use in future cases. Rules, in turn, are essential to the proper functioning of government. They keep order among the branches of government and constrain the courts from involving themselves improperly in the activities of the other branches.

Section IV of the article briefly reviews the Endangered Species Act and the background of the FWS regulation at issue in *Sweet Home*, before discussing the Supreme Court’s opinion and Justice Scalia’s dissent to it. The dissent is shown to have been entirely predictable and the inevitable outcome of Justice Scalia’s application

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22 Id. at 2422–23 (Scalia, J., dissenting).
23 Id. at 2426–27 (Scalia, J., dissenting).
24 Id. at 2431 (Scalia, J., dissenting).
of the *Chevron* doctrine and his method of statutory interpretation. According to Justice Scalia, the FWS regulation was entitled to no deference, regardless of the fact that it was more than twenty-five years old when it was challenged, and regardless of the ESA's goal of protecting species and the ecosystems on which they depend.

II. DEVELOPMENT OF THE *CHEVRON* DOCTRINE

Throughout the *Sweet Home* litigation, both majority and dissenting opinions relied on *Chevron* to provide the guiding principle for decision. In *Chevron*, the Supreme Court held that a court must defer to an agency's permissible interpretation of ambiguous language in a statute that the agency administers. The court may not substitute its judgment for the agency's policy choices.

The dispute in *Chevron* centered on the Environmental Protection Agency's (EPA) regulatory definition of the term "stationary source" of air pollution as used in the 1977 amendments to the Clean Air Act. The amendments established a permit process for new or modified major stationary sources of air pollution within "nonattainment" states, i.e., those states that had not achieved the national air quality standards required by earlier versions of the Clean Air Act.

Prior to 1977, EPA had allowed states to adopt a plantwide definition of stationary source. Under the plantwide definition all pollution emitting devices within the same facility or group of facilities could be treated "as though they were encased within a single bubble." The operator of the facility or facilities could install or modify a piece of equipment without meeting permit requirements or obtaining a new permit as long as the change did not increase the total emissions from the plant.

In 1980, EPA adopted regulations that abandoned the bubble concept and applied the permitting requirements to all modifications and installations of pollution emitting devices. A year later, EPA re-

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26 *Id.* at 866.
27 42 U.S.C. §§ 7401-7671 (1994). A stationary source is any building, structure, facility or installation which emits or may emit any air pollutant subject to regulation under the Clean Air Act. *Id.*
28 *Chevron*, 467 U.S. at 839-40.
29 *Id.* at 840.
30 *Id.*
31 *Id.* at 857; Statutory Restrictions on New Stationary Sources, 40 C.F.R. § 52.24 (1996).
evaluated this regulation and reverted to its earlier plantwide definition.32

The National Resources Defense Council successfully challenged the Agency's action in the United States Court of Appeals for the District of Columbia Circuit.33 The court of appeals set aside the bubble concept as contrary to the purposes of the Clean Air Act's nonattainment program.34 The court found the plantwide definition "inappropriate" for a program designed to improve, rather than simply maintain, the current level of air quality.35 In reaching its decision, the court of appeals observed that the amended Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source' to which the permit process . . . should apply," and further, that the precise issue was not "squarely addressed in the legislative history."36 For these reasons, the court of appeals determined that "the purposes of the nonattainment program should guide our decision here."37

The Supreme Court unanimously reversed. Although it agreed with the D.C. Circuit that Congress did not express its intent concerning the application of the bubble concept, it found that the court of appeals had "misconceived the nature of its role in reviewing the regulation at issue."38 Once the court had determined that the statutory language was ambiguous, its job was not to decide whether the bubble concept was the appropriate policy choice for a program designed to improve air quality, but to evaluate whether EPA's choice was a "permissible" one for the Agency to make.39

The Supreme Court announced a two-step analysis for court review of agency interpretations of statutory provisions. First, and "always," a court is to determine "whether Congress has directly spoken to the precise question at issue."40 The inquiry should focus principally on the plain language of the statute, but may consider the legislative history as well. If the intent of Congress is "clear," "that is the end of

34 Id. at 720.
35 Id. at 726.
36 Id. at 723.
37 Id. at 726 n.39.
38 Chevron, 467 U.S. at 845.
39 Id.
40 Id. at 842.
the matter, for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress.”

If, however, the court finds that the statute is silent or ambiguous with respect to the specific issue in question, the second step of the analysis is to evaluate whether the agency's answer is based upon a "permissible" construction of the statute. A permissible construction means a reasonable one, not necessarily the one preferred by the reviewing court. Indeed, the Supreme Court emphasized that a reviewing court may not substitute its policy judgment for that of the agency, but must uphold any reasonable interpretation the agency offers.

*Chevron* has been called a "watershed decision" in administrative law. It clarified Supreme Court precedent regarding the duty of the lower courts to defer to agencies' reasonable construction of the statutes committed to their administration. It also resolved a significant ambiguity in the law resulting from the existence of two conflicting lines of decisions, one calling for deference and the other disregarding deference altogether.

The benefits ascribed to the *Chevron* doctrine are many, and include providing the courts with "a consistent rationale" for deference to agency interpretation, without concern for factors such as whether the agency's interpretation was consistent over time. Judges and scholars have also praised *Chevron* for recognizing agency expertise and competence, and for furthering "the democratic values of governmental responsiveness and accountability."

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41 Id. at 842-43.
42 Id. at 843.
43 *Chevron*, 467 U.S. at 844.
44 Id. at 866.
46 Id. at 292-93; Scalia, *Judicial Deference to Administrative Interpretations of Law*, supra note 8, at 513.
47 Starr, supra note 45, at 293-94. Judge Starr regards as a very positive outcome of *Chevron* the Court's conclusion that an agency's interpretation is not carved in stone, and can be reevaluated on a continuing basis. Id. at 297 (quoting *Chevron*, 467 U.S. at 863). As explained by Judge Starr, prior to *Chevron* the age of a regulation was a frequently cited factor in court deference to agency interpretation. Long-standing and consistent interpretations were more frequently upheld than new or changed ones. This factor was relevant in *Sweet Home*; the FWS regulation was more than 25 years old when it was challenged.
III. JUSTICE SCALIA AND CHEVRON

Justice Scalia was not on the Supreme Court when *Chevron* was decided, but is enthusiastic in his support of the opinion, calling it "perhaps the most important in the field of administrative law since *Vermont Yankee Nuclear Power Corp. v. NRDC*."\(^{49}\) His characterization of the *Chevron* rule, that "the courts will accept an agency's reasonable interpretation of the ambiguous terms of a statute that the agency administers" appears to match the rule as described in the opinion.\(^{50}\) Yet Justice Scalia often disagrees with his colleagues on the Court in his interpretation and application of *Chevron*, as he did in the *Sweet Home* case.\(^{51}\) Similarly, Justice Scalia has taken issue with many of the justifications given for the *Chevron* doctrine by other judges and legal scholars.

It is not immediately apparent to Justice Scalia why a court should ever accept the judgment of an executive agency on a question of law. "[T]he suggestion seems quite incompatible with Marshall's aphorism that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"\(^{52}\)

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\(^{49}\) Scalia, *Judicial Deference to Administrative Interpretations of Law*, supra note 8, at 512; *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). In *Vermont Yankee*, the United States Supreme Court held that the courts may not impose upon administrative agencies decisionmaking procedures not required by statute or by the agencies' own regulations. See 435 U.S. at 558.

\(^{50}\) Scalia, *Judicial Deference to Administrative Interpretations of Law*, supra note 8, at 511. In *Fort Stewart Schools v. Federal Labor Relations Authority*, Justice Scalia, writing for the majority, explained the *Chevron* rule as follows:

If, upon examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," it is clear that the [agency's] interpretation is incorrect, then we need look no further, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

If, on the other hand, "the statute is silent or ambiguous" on the point at issue, we must decide "whether the agency's answer is based on a permissible construction of the statute."


On its face this characterization tracks the Supreme Court's *Chevron* method of analysis. However, major differences have developed between Justice Scalia and his colleagues in the mode and outcome of that analysis. See infra Sections III.B.-B.1.


\(^{52}\) Scalia, *Judicial Deference to Administrative Interpretations of Law*, supra note 8, at 513 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).
Justice Scalia regards law as an “immutable product of Congress ... that cannot be altered or affected by what the Executive thinks about it.”\(^{53}\) Thus, although an agency’s expertise, familiarity with the history and purpose of a statute and practical knowledge about how best to effectuate its purposes may be good practical reasons to accept its interpretation of statutory provisions, they are “hardly a valid theoretical justification for doing so.”\(^{54}\)

Justice Scalia disagrees as well with those who argue that the constitutional principle of separation of powers requires *Chevron*,\(^{55}\) although he admits that “there is no one more fond of our system of separation of powers than I.”\(^{56}\) He describes the separation of powers rationale for *Chevron* as based on the incorrect premise that, if Congress is silent on a particular matter or leaves an ambiguity in a statute that cannot be resolved by “the traditional tools of statutory construction,” the gap or ambiguity must be resolved by a policy judgment.\(^{57}\) The premise assumes that under our system of government, policy judgments should be made by the political branches, not the judiciary.\(^{58}\) Support for this proposition is found in *Chevron*. The Supreme Court emphasized that it is for the agency, not the reviewing court, to make policy choices “resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved.”\(^{59}\)

Justice Scalia’s rejection of the separation of powers rationale for *Chevron* is puzzling at first. He seems to contradict himself on the issue of the policy role of the courts. He once retorted, “I don’t deal with policy, that’s not my business. I gave it up when I took the veil.”\(^{60}\)

\(^{53}\) Id. at 513.

\(^{54}\) Id. at 514.


\(^{57}\) Scalia, *Judicial Deference to Administrative Interpretations of Law*, supra note 8, at 515.

\(^{58}\) Id.


Justice Scalia has written at length about the limited role of the courts in dealing with "majoritarian" policy issues that are the province of the other branches of government.\textsuperscript{61} He is zealous in his support of the hands-off approach of \textit{Vermont Yankee}, believing that courts have no business establishing policy-based procedures for administrative agencies.\textsuperscript{62} Yet, in explaining his view of the \textit{Chevron} doctrine, Justice Scalia claims that policy evaluation is one of the "traditional tools of statutory construction," which, along with text and legislative history, helps a court determine whether a statute is, indeed, ambiguous.\textsuperscript{63}

What Justice Scalia means by policy considerations, in the context of \textit{Chevron}, are not the political, social, environmental, or economic values reflected or expressed in a statute or an agency's interpretation of it. Rather, he uses policy considerations to mean the evaluation of the logical consequences of a particular statutory construction to determine whether it would produce "absurd" results or results that are incompatible with the purposes of the statute.\textsuperscript{64} A reviewing court must evaluate an agency's basic policy choice in order to ascertain whether the agency acted within the scope of its legal authority. This evaluation is part of "saying what the law is," because only policy choices that logically express the statutory intent must be respected.\textsuperscript{65}

A. \textit{Chevron} Provides a Rule for Statutory Interpretation

For Justice Scalia, "the theoretical justification for \textit{Chevron}" is that it provides an "across-the-board presumption" for interpreting ambiguity in a statute.\textsuperscript{66} Before \textit{Chevron}, such ambiguity could be explained in one of two ways:

\textsuperscript{61} See, e.g., Scalia, \textit{The Doctrine of Standing as an Essential Element of the Separation of Powers}, supra note 8; Scalia, \textit{Judicial Deference to Administrative Interpretations of Law}, supra note 8.

\textsuperscript{62} Scalia, \textit{Judicial Deference to Administrative Interpretations of Law}, supra note 8, at 512.

\textsuperscript{63} Id. at 515.

\textsuperscript{64} Id.

\textsuperscript{65} See Kmiec, \textit{supra} note 55, at 277–78, for a discussion of the role of the courts in considering policy issues. Professor Kmiec disputes, as does Justice Scalia, the \textit{Chevron} Court's statement that when a challenge to an agency's construction of a statute centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, a court has a duty to respect the policy choices made by the agency. He agrees with Justice Scalia that, in such a case, "the legitimacy of the policy choice [is] the very question at issue." \textit{Id.} at 277. Deference is accorded only when a court finds the agency's interpretation "permissible" under the law. \textit{Id.} at 277–78.

\textsuperscript{66} Scalia, \textit{Judicial Deference to Administrative Interpretations of Law}, \textit{supra} note 8, at 516.
Congress intended a particular result but was not clear about it, or Congress had no particular intent, but meant to leave the resolution to the agency. The former raises a question of law, to be resolved by the courts. The latter represents a conferral of discretion on the agency and the only question for the courts is whether the agency acted within the scope of the discretion. 67

Chevron replaced the case-by-case evaluation of congressional intent with the presumption that Congress meant to confer upon the agency the discretion to construe ambiguous statutory language or to fill gaps in the statutory scheme.

Justice Scalia approves of the Chevron doctrine because the presumption amounts to a general rule for interpreting silence or ambiguity in a statute. Absolute deference to agencies is required when congressional intent is not clear, and no deference is given when it is. This rule does away with the need for a court to try to ascertain what Congress meant when its intent is not clear, a quest that “is probably a wild goose chase anyway,” 68 and notifies Congress that any ambiguity it creates will be resolved by administrative agencies whose policy biases are known. 69

Justice Scalia warns that there are consequences to a rule that statutory ambiguity indicates that Congress intended to confer discretion on the agency. There is no longer any justification for deference to long-standing and consistent agency interpretation of a statute. 70

That venerable principle made a lot of sense when we assumed that both court and agency were searching for the one, permanent “correct” meaning of the statute; it makes no sense when we acknowledge that the agency is free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose. 71

Justice Scalia sees as a major advantage of Chevron the flexibility it gives to agencies when statutory language is ambiguous to respond to new information and changing times. 72 In Chevron, the Supreme

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67 Id.
68 Id. at 517.
69 See id.
70 See id. Justice Scalia takes the position that the existence of a long-standing interpretation, especially one dating from the enactment of the statute, may be relevant under the first part of the Chevron analysis to show that the intent of Congress is clear. However, the converse is not the case. See id. at 518. A long-standing interpretation cannot be used to dispute unambiguous statutory language. See id. at 517.
71 Scalia, Judicial Deference to Administrative Interpretations of Law, supra note 8, at 517.
72 See id.
Court noted that the “basic legal error” of the court of appeals was “to adopt a static judicial definition of the term ‘stationary source’ when it had decided that Congress itself had not commanded that definition.” Under the Chevron rule, according to Justice Scalia, a “stationary source” can mean a number of things, and it is up to the Agency to specify the correct meaning. As long as an agency’s choice is reasonable, a court must defer, regardless of whether the court would have preferred a different outcome.

1. Plain Meaning as a Source of Rules

Justice Scalia has great faith in rules. He has written that his regard for the clearly enunciated rule marks his maturity as a lawyer and jurist. Justice Scalia believes that “the establishment of broadly applicable general principles is an essential component of the judicial process . . . .” Rules promote uniformity, predictability, and consistency in judicial treatment of issues, matters essential to the human sense of justice, and to the protection of individual rights. He has said, “Our highest responsibility in the field of statutory construction is to read the laws in a consistent way, giving Congress a sure means by which it may work the people’s will.”

Where do rules come from? Justice Scalia’s ready answer is the language of the statute at issue. For him, text is “the starting point and the beginning of wisdom.” “[J]udges cannot create [rules] out of

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74 Scalia, Judicial Deferece to Administrative Interpretations of Law, supra note 8, at 518.
75 Scalia, The Rule of Law as a Law of Rules, supra note 8, at 1178.
76 Id. at 1185; see also Eric J. Segall, Justice Scalia, Critical Legal Studies, and The Rule of Law, 62 GEO. WASH. L. REV. 991, 1041 (1994). Professor Segall observes that for Justice Scalia, “the essence of the judicial craft is not to dispense justice or even to derive the most accurate interpretation of the legal text, but to provide precise and principled content to the legal directive at issue in a case.” Segall, supra, at 1041.
79 Kannar, supra note 60, at 1307 (quoting Hearings on the Nomination of Judge Antonin Scalia before the Sen. Comm. on the Judiciary, 99th Cong., 2d Sess. 108 (1986)).
whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided." This is done by examining the text to determine its plain meaning, the meaning "most in accord with context and ordinary usage ... and most compatible with the surrounding body of law into which the provision must be integrated . . . ." Professor George Kannar, in his illuminating article *The Constitutional Catechism of Antonin Scalia*, observes that the ordinary meaning of statutory text assumes for Justice Scalia an enhanced role in adjudication, partially replacing statutory purpose, and completely eliminating any unconstrained examination of evolving social values. He comments further that, for Justice Scalia:

> decisions are to be arrived at in new cases by looking at the challenged law or practice, and by measuring it against the text, including, if necessary, the "glosses" on that text rendered in earlier authoritative readings. All this is to be done in as semantically precise a way as possible, so as to minimize one's own interpretive discretion and the influence of social, political, or moral context, except as that context has made its way directly into the "ordinary meaning" of relevant, legally operative words.

An example of Justice Scalia's use of "semantically precise" textual analysis to ascertain the ordinary meaning of statutory language is his opinion for the majority in *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.* (hereinafter *MCI*). The case centered on the meaning of the phrase "modify any requirement" in § 203(b) of the Federal Communications Act (FCA) of 1934. Petitioners argued that the authority given to the Federal Communications Commission (FCC) to "modify" the regulatory scheme established by the Act included the authority to make fundamental changes in it. They supported this position with several dictionary definitions of

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82 Kannar, *supra* note 60, at 1307.
83 Id. at 1308.
84 512 U.S. 218, 231–34 (1994). The United States Supreme Court held that the Federal Communications Commission's (FCC) discretion to modify the regulatory scheme established by the Federal Communications Act does not permit the FCC to make basic and fundamental changes in the scheme. The change at issue in the case, an exemption from tariff filing requirements for nondominant long distance telephone carriers, exceeded the Agency's authority. Id.
modify,” all taken from Webster’s Third New International Dictionary. One of these definitions was “to make a basic or important change in.”

Petitioners claimed that the variety of meanings given to “modify” created a sufficient ambiguity about what Congress intended in the Act to entitle the FCC to deference in its interpretation.

Justice Scalia disagreed, with considerable relish, on the basis of the ordinary meaning of the language and its context in the statute. He devoted three pages of the opinion to a discussion of the use of dictionary definitions and the differences between the true meaning of a word and “what is nowadays called ‘spin.’”

Justice Scalia said that he had “not the slightest doubt” about the meaning of “modify” intended by Congress in the FCA. “Modify . . . connotes moderate change,” he said, no more.

Justice Scalia dismissed the definition given in Webster’s Third International Dictionary as based on “intentional distortions, or simply careless or ignorant misuse” of the word.

Petitioners in MCI also argued that their interpretation furthered the Act’s broad purpose of promoting efficient telephone service and competition in the industry. Justice Scalia replied, “[O]ur estimations, and the Commission’s estimations, of desirable policy cannot alter the meaning of the Federal Communications Act of 1934.” The Court’s job was not to consider the relationship between the agency’s regulations and the overall purposes of the Act; it was to find the ordinary meaning of the words used in the statutory section at issue. “For better or worse,” Justice Scalia announced, the statute meant what it said.

The relationship between statutory purpose and plain meaning appeared as an issue in Sweet Home. Justice Scalia rejected the
majority’s reference to the broad goals of the ESA as support for the FWS’s interpretation of harm. The idea that damage to privately owned habitat harms endangered species may well be correct, but for Justice Scalia, it is not the idea that Congress enacted. Justice Scalia’s opinion in \textit{Mel} illustrates the difference between the policy considerations that he regards as part of a judge’s statutory interpretation toolbox and policy decisions that belong to the legislative or executive branches of government. It is not for the courts to impose policy choices upon individuals or agencies. Rather, the courts are limited to finding the intent of the legislature in the meaning of the language and its logical outcome when implemented.

\textit{Sweet Home} is another example of the Court making the same mistake. Justice Scalia believes the majority confused its appropriate policy role and approved an interpretation of the ESA that leads to absurd results and makes nonsense of the language it was intended to interpret.

2. Context and Tradition Support Plain Meaning

As noted above, for Justice Scalia, the plain meaning of a statute is also the one that is most in accord with the context of the statute as a whole and the body of law, both statutory and judge-made, into which the statute fits. In \textit{Sweet Home}, for example, Justice Scalia looked at the structure of the ESA and claimed that the meaning of the term “take” advanced by the FWS could not be used consistently throughout the statute. He also argued that the idea of “take” as limited to hunting, capturing, or killing animals is “deeply embedded in the statutory and common law concerning wildlife.”

A second contextual source of statutory meaning is what Justice Scalia refers to as “our society’s traditional understanding of [the]
text." Justice Scalia believes that the courts should respect longstanding interpretations or practices which illuminate the intent of legislatures in the use of particular language. Traditions, like rules, provide predictability and consistency in decisionmaking. Again, in *Sweet Home*, Justice Scalia looked back to the historic meaning of "take," a term he noted is "as old as the law itself," and concluded that the FWS's definition was contrary to the customary and expected understanding of the term.

3. Statutory Language, Not Legislative History, Supports Plain Meaning

For "textualists" like Justice Scalia, statutory interpretation is objective, not subjective. A court's job is to ask what the ordinary reader of a statute would have understood the words to mean at the time of enactment, not what the intentions of the enacting legislators were. Thus, he is emphatic that the meaning of a statute is to be derived from its text, context, and structure, not from some "unisolated intent" revealed by legislative history. Justice Scalia frowns on the widespread use of legislative history by judges to help decide

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104 Planned Parenthood v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring and dissenting). *Casey* involved a challenge to the constitutionality of amendments to Pennsylvania's abortion statute. See id. at 844. The United States Supreme Court held that the amendments were an undue state interference with a woman's right to have an abortion. See id. at 846. The Court ruled that the substantive liberties protected by the 14th Amendment to the Constitution are not limited to those rights expressly guaranteed by the Bill of Rights. See id. at 847-49. Justice Scalia objected to the Court's conclusion that the Constitution has "an evolving meaning" that supports decisions articulating constitutionally protected rights that are not actually stated within the Constitution itself. See id. at 1000 (Scalia, J., concurring and dissenting). He argued for an interpretation based on society's "traditional understanding" of individual rights, which does not extend, in his view, to the value judgments made by the majority. Id. at 1000-01.


106 *Sweet Home*, 115 S. Ct. at 2422 (Scalia, J., dissenting).


If I were writing on a blank slate, I suppose I would call into question the fundamental premise upon which all use of legislative history is based—the generally accepted proposition ... that "interpretive doubts ... are to be resolved by judicial resort to an intention entertained by the law-making body at the time of its enactment."

_Id._ at 454.
congressional intent, and accuses such judges of "employ[ing] a tinkerer's toolbox" or trying to "psychoanalyze" Congress, rather than read its laws. Legislative history should be avoided for three reasons: it allows courts to reach the wrong result with respect to the statute before them; it "poison[s] the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning;" and it permits "agency-liberating ambiguity".

The only appropriate function of legislative history is to verify the intent determined by textual analysis of the statute. In Sweet Home Justice Scalia used selected legislative history for this purpose, to affirm the "ordinary" meaning of "take" and "harm" in the ESA, and to demonstrate the majority's error in relying on other portions of the legislative history. Justice Scalia steadfastly maintains that he would not allow legislative history to lead him to a result different from that provided by textual analysis.

For Justice Scalia, deferring to an agency's interpretation of a statute is an infrequent occurrence. He suggests that those who favor Chevron, as he does, are those who generally find the plain meaning of a statute apparent from its text, and thus do not need to consider the agency's construction. "It is rare," Justice Scalia says, "that even the most vague and general text cannot be given some precise, principled content—and that is indeed the essence of the judicial craft."

4. Absolute Deference Is Required When a Statute Is Unclear

The question for statutory interpretation under the Chevron rule, as Justice Scalia poses it, is: "how clear is clear?" Chevron "suggests that the opposite of 'ambiguity' is not 'resolvability' but rather 'clarity.'" A statute is ambiguous when the language admits of two or more reasonable interpretations, and is, therefore, "unclear." Only

110 Id.
111 Scalia, *Judicial Deference to Administrative Interpretations of Law*, supra note 8, at 521.
114 Scalia, *Judicial Deference to Administrative Interpretations of Law*, supra note 8, at 521.
116 Scalia, *Judicial Deference to Administrative Interpretations of Law*, supra note 8, at 520 (footnotes omitted).
then should a court turn to the agency to see whether its construction of the ambiguous language is permissible.\textsuperscript{117}

As Justice Scalia applies \textit{Chevron}, when a reviewing court finds that legislative intent is "clear," it may not consider the agency's interpretation. No deference may be given, regardless of whether the interpretation is supportive of the overall goals and purposes of the statute. In \textit{Sweet Home}, for example, Justice Scalia found the majority's emphasis on the purposes of the ESA improper under the \textit{Chevron} analysis because the statutory language was clear.\textsuperscript{118}

If, on the other hand, a court finds the intent of Congress to be ambiguous, deference to an agency's permissible construction is absolute.\textsuperscript{119} A court may not substitute its own interpretation of the statutory provision at issue, regardless of its opinion of the policy outcome. In \textit{K Mart Corp. v. Cartier, Inc.},\textsuperscript{120} for example, Justice Scalia objected to the Supreme Court's adoption of an interpretation that had not been advanced by the agency and was "contrary to ordinary usage, to the purposes of the statute, and to the interpretation the agency appears to have applied consistently for half a century."\textsuperscript{121} He particularly was displeased with Justice Brennan's claim that the Court could decline to apply statutory language to a situation that it clearly covered on the grounds that, had Congress "foreseen modern circumstances," it would have provided an exception.\textsuperscript{122} He said:

\begin{quote}
The principle of our democratic system is not that each legislature enacts a purpose, independent of the language of the statute, which the courts must then perpetuate, assuring that it is fully achieved but never overshot by expanding or ignoring the statutory language as changing circumstances require.\textsuperscript{123}
\end{quote}

\textsuperscript{117} See \textit{id.} at 520-21.
\textsuperscript{118} See \textit{Babbitt v. Sweet Home Chapter of Communities for a Greater Or., 115 S. Ct. 2407, 2426 (1995)} (Scalia, J., dissenting).
\textsuperscript{119} See \textit{NLRB v. United Food and Commercial Workers Union, 484 U.S. 112, 133--34 (1987)} (Scalia, J., concurring) (expressing support for the Court's deference to the Agency's interpretation).
\textsuperscript{120} \textit{486 U.S. 281, 318 (1988)} (Scalia, J., concurring and dissenting).
\textsuperscript{121} \textit{Id.} at 323 (Scalia, J., concurring and dissenting).
\textsuperscript{122} See \textit{id.} at 324 (Scalia, J., concurring and dissenting). Justice Brennan saw the purpose of the statute at issue as protecting U.S. trademark owners from gray-market competition. In light of that purpose, he found ambiguous the statutory language prohibiting importation of goods "of foreign manufacture" bearing a trademark "owned by" a citizen of or "corporation . . . organized within the United States," and chose to defer to the regulation of the Customs Service. \textit{See id.} at 328--29 (Scalia, J., concurring and dissenting).
\textsuperscript{123} \textit{Id.} at 325 (Scalia, J., concurring and dissenting).
B. Conflicts With Supreme Court Colleagues Over Chevron Methodology

It is in his formalistic application of *Chevron* that Justice Scalia is most at odds with his Supreme Court colleagues. In *MCI*, for example, Justice Scalia ruled that an agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning the language of the provision at issue can bear. The changes proposed by the FCC “may be a good idea,” he said, “but [they are] not the idea Congress enacted into law in 1934.” Justice Stevens, in his dissent, accused Justice Scalia of abandoning the tradition of according an agency substantial leeway to interpret and apply its statutory powers and responsibilities “in favor of a rigid literalism that deprives [the agency] of the flexibility Congress meant it to have in order to implement the core policies of [an act] in rapidly changing conditions.”

The debate on this issue is quite heated. *INS v. Cardozo-Fonseca* illustrates both Justice Scalia’s aversion to the use of legislative history to discern congressional intent and his obdurate approach to the deference aspect of the *Chevron* analysis. Justice Scalia charged Justice Stevens, the primary author of the *Chevron* opinion, with expressing “controversial, and I believe erroneous, views on the meaning of this Court’s decision in *Chevron*.”

The issue in *Cardozo-Fonseca* was the meaning of two sections of the Immigration and Nationality Act dealing with the deportation of aliens. The first, § 243(h), requires the Attorney General not to deport an alien who demonstrates that his or her “life or freedom would be threatened” by deportation. In *INS v. Stevic*, the United States Supreme Court held that this standard requires an alien to show that “it is more likely than not” that he or she would be subject to persecution in the country to which he or she was deported.

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125 Id. at 231–32.
126 Id. at 235 (Stevens, J., dissenting); see also Maislin Indus. v. Primary Steel, Inc., 497 U.S. 116, 151–53 (1990) (Stevens, J., dissenting) (criticizing the majority for ignoring the regulatory history and failing to defer to the Agency’s interpretation). Justice Scalia, concurring in *Maislin*, argues that the Agency’s policy conflicts with the text of the statute and deserves no deference. Id. at 137 (Scalia, J., concurring).
128 Id. at 423; 8 U.S.C. §§ 1158(a), 1253(h) (1994).
The second section, § 208(a), authorizes the Attorney General, in his or her discretion, to grant asylum to an alien "refugee" unable or unwilling to return to his or her home country because of "a well founded fear" of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Cardozo-Fonseca was a Nicaraguan citizen who requested that she not be deported pursuant to § 243(h) and also that she be granted asylum pursuant to § 208(a). To support her request under § 243(h), she attempted to show that if she were forced to return to Nicaragua, it was "more likely than not" that her life or freedom would be threatened because of her political views. To support her request for asylum under § 208 she attempted to show that she had "a well founded fear of persecution" upon her return home.

The Immigration Judge applied the "more likely than not" standard to both requests. The judge ruled that Cardozo-Fonseca had not established "a clear probability of persecution" and, therefore, was not entitled to either form of relief. The judge's decision was affirmed by the Board of Immigration Appeals (BIA).

The United States Court of Appeals for the Ninth Circuit reversed, ruling that the "well founded fear" standard governs asylum proceedings, while the "clear probability" standard applies to deportation proceedings. The court based its conclusion on the text and structure of the Act.

The United States Supreme Court affirmed the Ninth Circuit, holding that the "ordinary and obvious meaning" of the statutory language, as well as the structure of the Act, indicated Congress's intent to provide two procedures for dealing with deportable aliens, each with its own standard of proof. The Court held that the question of whether Congress had intended the two standards in the Act to be

132 8 U.S.C. § 1101(a)(42) (defining a refugee as a person who cannot return home because of a well founded fear of reprisal).
134 Id. at 425.
135 Id. at 424.
136 Id. at 425.
137 Id.
138 Cardozo-Fonseca, 480 U.S. at 425.
140 Id.
141 See Cardozo-Fonseca, 480 U.S. at 431–32.
identical was “a pure question of statutory construction for the courts to decide,” using “traditional tools of statutory construction.”

Writing for the majority, Justice Stevens then “confirmed” the plain meaning of the statutory language with a lengthy discussion of the legislative history of the Act, prior immigration policy and practice, and the applicable United Nations protocol on the subject. Justice Stevens also concluded that courts must defer to the INS’s interpretation of the standards as the Agency applied them in particular circumstances:

There is obviously some ambiguity in a term like “well-founded fear” which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling “any gap left, implicitly or explicitly, by Congress,” the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.

Justice Scalia concurred in the judgment of the Court that the Immigration and Nationality Act calls for two separate standards for treating deportable aliens. He did not join in the Court’s opinion, however, because of what he called the majority’s “ill-advised deviation” from Chevron. When the language of the statute is clear, there is no need for any discussion of legislative history, much less the “excessive” review provided by the majority.

Justice Scalia was even more troubled by the Court’s “gratuitous” consideration of whether INS’s construction of the statute was entitled to deference. In the absence of statutory ambiguity, he said, “there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference.” He found the majority’s “superfluous discussion” to be “flatly inconsistent with [the] well-established interpretation of Chevron.” To Justice Scalia, the majority’s discussion implied that courts may substitute their own translation of a statute for that of an agency whenever, using the traditional tools of statutory construction, they are able to reach a

142 Id. at 446.
143 See id. at 432–43.
144 Id. at 448.
145 Id. (quoting Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 (1984)).
146 Cardozo-Fonseca, 480 U.S. at 452 (Scalia, J., concurring).
147 Id. (Scalia, J., concurring).
148 Id. at 453 (Scalia, J., concurring).
149 Id. (Scalia, J., concurring).
150 Id. (Scalia, J., concurring).
151 Cardozo-Fonseca, 480 U.S. at 454 (Scalia, J., concurring).
conclusion as to the proper explanation of the statute.\textsuperscript{152} He warned that this approach makes deference "a doctrine of desperation," authorizing the courts to defer only when they are unable to construe the statute before them.\textsuperscript{153}

The strength of Justice Scalia's conviction that the majority was terribly wrong in its understanding and application of \textit{Chevron} in Cardozo-Fonseca was expressed further in letters to Justice Stevens.\textsuperscript{154} Justice Scalia wrote, "I continue to believe that your discussion of \textit{Chevron} deprives that case of all utility"\textsuperscript{155} and "is utterly destructive of \textit{Chevron} as a significant guide to decisions."\textsuperscript{156} Justice Stevens responded:

I believe your criticism ... is based on a misreading of the Court's opinion in \textit{Chevron}. That opinion did not announce a simple black letter rule requiring absolute deference to agencies unless there is clear evidence of congressional intent, and no deference when the intent is clear. ... The more important inquiry is whether the issue is one that Congress intended itself to resolve or whether it is in an interstitial area in which Congress intended to delegate lawmaking authority to the agency.\textsuperscript{157}

Justice Scalia remained unconvinced. He reiterated his position that the purpose of the \textit{Chevron} rule is to direct the courts to determine congressional intent "on the basis of the clarity with which Congress has spoken," and nothing more.\textsuperscript{158} If the statute is ambiguous, "resolution of the ambiguity is presumptively for the agency that Congress has put in charge of implementing the law."\textsuperscript{159}

1. Without Rules, Government is Rudderless

Although Justice Scalia claims to renounce the separation of powers principle as a central rationale for \textit{Chevron}, his explanation of the

\textsuperscript{152} Id. (Scalia, J., concurring).
\textsuperscript{153} Id. (Scalia, J., concurring).
\textsuperscript{155} Id. (quoting Letter from Justice Antonin Scalia to Justice John Paul Stevens 1 (Feb. 10, 1987)).
\textsuperscript{156} Id. (quoting Letter from Justice Antonin Scalia to Justice John Paul Stevens 1 (Feb. 5, 1987)).
\textsuperscript{157} Id. (quoting Letter from Justice John Paul Stevens to Justice Antonin Scalia (Feb. 9, 1987)).
\textsuperscript{158} Id. at 48 (quoting Letter from Justice Antonin Scalia to Justice John Paul Stevens (Feb. 10, 1987)).
\textsuperscript{159} Schwartz, supra note 154, at 48.
justification for the *Chevron* doctrine focuses on the appropriate roles for the various branches of government. He approves of *Chevron* because it established a general rule for statutory interpretation in administrative law cases.\(^\text{160}\)

Rules are essential to the proper functioning of government. Indeed, Justice Scalia has said, “a government of laws means a government of rules.”\(^\text{161}\) Rules define institutional roles for the three branches of government. They direct and control the activities of these branches, preserving the checks and balances within our Constitutional system.\(^\text{162}\) Rules advise the legislature of what to expect from the other branches. The *Chevron* rule, for example, notifies Congress that if it is not clear in expressing its intent in a statute, administrative agencies will resolve the ambiguity as they see fit, and the courts will defer so long as the resolution is reasonable.\(^\text{163}\)

Rules also constrain judges, and prevent them from intruding improperly into the spheres of the political branches. “Only by announcing rules do we hedge ourselves in,” says Justice Scalia, noting that rules both inhibit courts from legislating and embolden them to stand up for the minority against the popular will.\(^\text{164}\) This latter benefit vindicates what, for Justice Scalia, is the courts’ most significant role under the Constitution: “to decide the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion.”\(^\text{165}\)

For a member of the judiciary, Justice Scalia has a particularly cynical view of his colleagues. He labels judges “elitist” or “classist,” and accuses them of having a distorted view of reality.\(^\text{166}\) He regards an unrestrained judiciary determined to decide cases as it pleases as

\(^{160}\) Scalia, *Judicial Deference to Administrative Interpretations of Law*, supra note 8, at 516.


\(^{162}\) Scalia, *The Rule of Law as a Law of Rules*, supra note 8, at 1180. The checks and balances to which Justice Scalia refers are not checks and balances as we usually understand them. The Justice believes in a government of separated powers. The branches constrain each other only as a function of the implementation of their respective enumerated authorities.

\(^{163}\) See id. at 1183.

\(^{164}\) Id. at 1180.

\(^{165}\) Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, supra note 8, at 883 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

\(^{166}\) Id. at 896. Justice Scalia has described the judiciary as a group “selected from the aristocracy of the highly educated, instructed to be governed by a body of knowledge that values abstract principle above concrete result, and (just in case any connection with the man on the street might subsist) removed from all accountability to the electorate.” Id.
a threat to individual liberty, democratic government, and the sanctity of the Constitution. 167

Nowhere does he find the judiciary's wrong-headed enthusiasm for improper interference with "majoritarian" issues more pronounced than in its response to environmental cases. In his article *The Doctrine of Standing as an Essential Element of the Separation of Powers*,168 Justice Scalia contrasted the constitutionally proper province of the courts, as set forth in *Marbury v. Madison*, with the role depicted by the United States Court of Appeals for the District of Columbia Circuit in the opening paragraphs of its decision in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*.169 In *Calvert Cliffs*, the court ordered the Atomic Energy Commission to comply with the National Environmental Policy Act (NEPA) of 1969170 and set the stage for a host of lawsuits to enforce that statute. *Calvert Cliffs* is widely regarded as one of the most significant and compelling court decisions on environmental matters ever written. Justice Scalia himself labeled the decision as the start of "the judiciary's long love affair with environmental litigation."171 The D.C. Circuit characterized *Calvert Cliffs* as "the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment."172 The court of appeals defined its "duty" in this litigation as to "see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."173

For Justice Scalia, it is emphatically not the duty of the courts to protect the environment, unless of course, some individual has suffered a particularized, redressable injury relating to it.174 Furthermore, it is a "good thing" if important legislative purposes are lost or misdirected in the vast halls of the federal bureaucracy, as long as no minority interests are affected.175

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169 449 F.2d 1109 (D.C. Cir. 1971).
171 Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, *supra* note 8, at 884.
172 *Calvert Cliffs*, 449 F.2d at 1111.
173 *Id.*
175 *Id.* at 897.
issues like clean air and water improperly involve the courts in the political process, and turn political decisions into legal ones. The Constitution restricts the courts to deciding the rights of individuals because the courts have been “specifically designed to be bad” at vindicating the rights of the majority, and instead substitute their own distorted judgments for those that would be made by the public.\footnote{Id. at 896.}

Where the courts, in the supposed interest of all the people, do enforce upon the executive branch adherence to legislative polices that the political process itself would not enforce, judges are likely (despite the best of intentions) to be enforcing the political prejudices of their own class. Their greatest success in such an enterprise—ensuring strict enforcement of the environmental laws, not to protect particular minorities but for the benefit of all the people—met with approval in the classrooms of Cambridge and New Haven, but not in the factories of Detroit and the mines of West Virginia.\footnote{Id. at 897.}

Apart from the temperature of his rhetoric, Justice Scalia’s views on the principal benefit of \textit{Chevron} resemble those of Judge Starr described above, despite Justice Scalia’s explicit rejection of the separation of powers as a justification for the \textit{Chevron} rule. As articulated by Judge Starr, \textit{Chevron} produced a more correct alignment of authority within and among the branches of government.\footnote{Starr, \textit{supra} note 45, at 300–04.} The decision, along with \textit{Vermont Yankee}, effected a shift from a “supervisory paradigm” to a more deferential “check and balance” paradigm.\footnote{Id. at 300.} Under the supervisory paradigm, the federal courts often saw their role as supervisors of administrative agencies, as if the agencies were subordinate in the organizational structure of government. The courts provided the agencies with procedural rules and undertook de novo interpretation of statutes, even when the agencies had developed their own construction.\footnote{Id. at 300, 304–05.}

For Judge Starr, \textit{Chevron} “strongly suggests that courts should see themselves . . . more as a check or bulwark against abuses of agency power.”\footnote{Id. at 300–01.} It is not their role to impose procedures on either of the two coordinate branches of government or to ensure that executive policies or congressional decisionmaking are internally consistent.\footnote{Id. at 301, 303.}
long as the procedures and policies of the legislative and executive branches pass constitutional muster, the courts will not interfere. As Judge Starr stated:

_Chevron_ vindicates the appropriate and traditional function of judicial review. It confirms the judiciary's historic role of declaring what the law is, but prevents the judiciary from going beyond that venerable, legitimate role and straying into the forbidden ground of overseeing administrative agencies. When Congress has not spoken to an issue, _Chevron_ forbids the courts to engage in supervisory oversight of the agencies. Ours is not to supervise; that role is allotted to the political branches, those directly accountable to the people. _Chevron_ affirms that fundamental allocation of responsibility.183

The concept of the “fundamental allocation of responsibility” among the branches of government is critical to Justice Scalia’s legal philosophy.184 Indeed, separation of powers is the “central mechanism” of our constitutional government,185 “more sacred than any other [principle] in the Constitution.”186 Unlike Judge Starr, however, for whom the model achieved by _Chevron_ is a deferential check and balance paradigm, for Justice Scalia, the realignment caused by _Chevron_ helps confine the branches of government to their constitutionally designated spheres of power. For Justice Scalia, the cardinal constitutional standard defining the roles of governmental institutions is not federalism, but rather “[a] system of separate and coordinate powers.”187 He believes the Framers of the Constitution drew bright lines around each branch of government and gave it enumerated and exclusive authority.188 The powers of government are not equally distributed

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183 Starr, _supra_ note 45, at 309.
184 Scalia, _The Doctrine of Standing as an Essential Element of Separation of Powers, supra_ note 8, at 894–97; see also Karkkainen, _supra_ note 92, at 425–28.
185 Scalia, _The Doctrine of Standing as an Essential Element of the Separation of Powers, supra_ note 8, at 881.
186 Antonin Scalia, _Remarks at the Administrative Law Section’s 1976 Bicentennial Institute on Oversight and Review of Agency Decisionmaking, 28 ADMIN. L. REV. 569, 686 (1976)._
188 Scalia, _supra_ note 186, at 686. For an example of how this view is expressed in an opinion, see INS v. Chadha, 462 U.S. 919, 951 (1983), which struck down the legislative veto as a violation of the separation of powers doctrine. In _Chadha_, Justice Burger observed that the Constitution divides national power “into three defined categories, Legislative, Executive, and Judicial...” and that it guarantees “[a]s nearly as possible, that each Branch of government [will] confine itself to its assigned responsibility.” _Id._
among the branches. Some administrative power is concentrated in the executive and can be constrained by the other branches only as they exercise their own exclusive powers, or by the electoral and political processes.\\footnote{189}

It is not surprising, then, that Justice Scalia does not accept Justice Stevens's characterization of \textit{Chevron} as permitting a court to decide whether the issue before it is in "an interstitial area in which Congress intended to delegate lawmaking authority to the agency."\\footnote{190} In a system of separated powers there are no "interstitial areas." The bright lines dividing the branches must not be blurred. Although Justice Scalia acknowledges that "a certain degree of discretion \ldots in\textit{heres} in most executive or judicial action," he emphasizes that "it is up to Congress, by the relative specificity or generality of its statutory commands, to determine \ldots how small or large that degree shall be."\\footnote{191} He made this argument in his dissent in \textit{Mistretta v. United States}, which upheld the constitutionality of the Federal Sentencing Commission as an independent body within the judicial branch.\\footnote{192} He characterized the Commission as "illogical and destructive of the structure of the Constitution" and "a new Branch altogether, a sort of junior-varsity Congress."\\footnote{193} The Commission's authority to issue sentencing guidelines is a lawmaking function, but one that is "completely divorced from any responsibility for execution of the law or adjudication of private rights under the law."\\footnote{194}

For Justice Scalia, it is beyond the constitutional authority of Congress to delegate legislative power. "[T]he power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power."\\footnote{195}\footnote{196} Courts may distill categorical rules from broadly worded statutes, and agencies may promulgate binding regulations because the exercise of lawmaking power in these situations is "ancillary" to the proper exercise of the court's or agency's own constitutional authority.\\footnote{196} See \textit{Mistretta}, 488 U.S. at 417 (Scalia, J., dissenting). For a discussion of the contrast
As noted above, one of the principal reasons for a strict separation of powers is to preserve individual liberties by keeping the power of each branch of government limited. Government is controlled most effectively by the rule of law, which, as Justice Scalia describes it, means a law of rules. Justice Scalia truly believes that if the original meaning of a statute is not “fixed” and “immutable,” and instead expresses evolving social values that a court, or an agency for that matter, is free to interpolate, everything falls apart, “we are rudderless.” He made this point in his forceful dissent in *Morrison v. Olson*, which upheld the Ethics in Government Act, the statute providing for an independent special counsel to investigate and prosecute criminal activity in the executive branch. The majority concluded that the statute was constitutional because it gave the executive branch “sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”

Justice Scalia argued that control was not the issue. The rule set forth in the Constitution is that all executive branch authority must reside in the executive branch, and it is not for the courts to say otherwise.

The Court has . . . replaced the clear constitutional prescription that the executive power belongs to the President with a “balancing test.” Once we depart from the text of the Constitution, just where . . . do we stop? . . . Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all.

2. The Methodology is The Message

Justice Scalia is committed to his method of statutory interpretation and his concept of the *Chevron* rule. He often refuses to join in the opinions of his colleagues, despite agreement with the results, if he believes they got there the wrong way. The importance of method between Justice Scalia and his colleagues on separation of powers issues see Mark Nielson, *Mistretta v. United States and the Separation of Powers*, 12 HARv. J.L. & PUB. POL’y 1049, 1059–60 (1989).

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197 Karkkainen, supra note 92, at 427; see also Scalia, *The Rule of Law as a Law of Rules*, supra note 8, at 1184.

198 Karkkainen, supra note 92, at 427.


200 *Id.* at 696 (Scalia, J., dissenting).

201 *Id.* at 708–10 (Scalia, J., dissenting).

202 *Id.* at 711–12 (Scalia, J., dissenting).

203 Dean Edelman, a classmate of Justice Scalia at Harvard, writes that he and the Justice
gives the impression that he cares little about the substantive consequences of his decisions on the environment. In *Sweet Home*, for example, his decision that damage to the habitat of species protected by the Endangered Species Act does not constitute harm to those species seems almost ludicrous on its face. A bird whose nesting tree has been cut down is obviously harmed, as is a fish whose lake is drained or poisoned.

As we have seen, however, Justice Scalia’s opinions are intended to do more than express his views in particular cases. They are part of his campaign to “maneuver” the law back to the “original understanding” of how the Constitution designed the government to function. Professor Thomas Merrill has commented that, since his appointment to the Supreme Court, Justice Scalia “has been conducting what amounts to a continuous seminar on the virtues of textualism and evils of legislative history.”

The “seminar” has other subjects as well. Professor Brisbin suggests that Justice Scalia is using his decisions on executive power and administrative law to reduce the role of the judiciary in policy matters and to compartmentalize administrative politics in the executive branch.

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204 Dean Edelman suggests that Justice Scalia’s methodology often results in a lack of judicial protection for “the poor, the powerless and the unpopular.” Edelman, supra note 203, at 1801; see also Toby Golick, *Justice Scalia, Poverty and the Good Society*, 12 *Cardozo L. Rev.* 1817, 1820 (1991).

205 Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, supra note 8, at 899.

206 Professor Thomas Merrill is the John Paul Stevens Professor of Law at Northwestern University School of Law.


208 Brisbin, supra note 187, at 128.
Various institutions and segments of society are the intended students of the Scalia “seminars.” As the Justice conceives of the function of our constitutional system, the role of the courts is to protect individual rights and pronounce rules for others to follow. Courts examine statutory text to say what the law is, not what they would like it to be. Congress must learn that if it does not like the rule of absolute deference to administrative agencies when statutory language is ambiguous, it should write clearer, more precise laws as the Constitution requires. Environmentalists unhappy about court rulings that seem to moor statutory provisions in the past should ask Congress to change the laws. Problems experienced by the public with administrative agencies should be remedied by elections. From all this, the constitutionally proper social order will emerge. It is, however, a social order of the past. As Dean Edelman remarked:

Justice Scalia’s world is one that did most definitely exist in the past but had changed quite considerably over the last half century in particular, although not completely by any means. The question about his jurisprudence is not whether it will take us back in time. That is obvious. The question is how far he really means to go if he can garner the votes to do so.209

IV. THE SWEET HOME LITIGATION

A. Introduction to the Endangered Species Act

The Endangered Species Act (ESA) of 1973210 is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”211 The statute has as its purpose the conservation of plants and animals threatened with extinction, and the ecosystems upon which they depend.212 The Act defines “conserve” and “conservation” to include the use of all methods and procedures necessary to bring protected species to the point at which the measures provided by the Act are no longer required.213 The Act requires recovery and restoration as well as protection of species in danger of extinction.214

209 Edelman, supra note 203, at 1815.
213 Id. § 1532(3).
214 See id.
The legislative history of the ESA indicates that Congress considered ecosystem conservation to be "basic" and "essential," a goal to which the statute's other purposes were "allied." Congress further recognized that habitat destruction is both "the most significant" threat to species and the "most difficult to control." Remarkably for 1973, Congress pronounced the ecological principle that "everything is connected to everything else" as "nothing more than cold, hard fact."

The ESA accomplishes its goals in a number of ways. It authorizes the Secretary of the Interior, in cooperation with the states, to acquire land to aid in conserving imperiled species. The Act directs the Secretary of the Interior to list species that are endangered or threatened according to certain criteria and to define their critical habitats. Once listed, species are entitled to the full range of protections provided by the Act.

Federal agencies are given considerable responsibility for protecting and restoring listed species. In addition to the obligation to conserve species, each federal agency must "consult" with the Secretary of the Interior or the Secretary of Commerce to "insure that any..."
action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence" of any listed species “or result in the destruction or adverse modification of” its critical habitat.223 Through the consultation process, the Department of the Interior’s Fish and Wildlife Service (FWS) evaluates the potential impacts of an agency’s proposed action on the affected species.224 The FWS issues an opinion describing those effects.225 If the FWS concludes that the action may jeopardize a listed species, it proposes “reasonable and prudent alternatives” that will avoid this result.226 After consultation, the final decision about whether to proceed with the action lies with the agency.227 The FWS has no veto authority over agency conduct.228

B. “Taking” Under The ESA

The duty to protect listed species is not limited to the federal agencies alone. At issue in *Sweet Home* was the proper interpretation of Section 9 of the ESA which makes it “unlawful for any person subject to the jurisdiction of the United States to . . . take any [endangered] species . . . .”229 This prohibition is one of the few nearly absolute commandments in environmental law.230 It appears to admit of no exception.231 The prohibition applies to everyone, public official and private citizen alike.232 It applies everywhere, reflecting Congress’s intent that the protections provided by the Act follow the

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223 Id. § 1536(a)(2). Critical habitat is defined by 16 U.S.C. § 1532(5)(A) as “specific areas . . . 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 . . . .”

224 Id. § 1536(b)(3)(a).

225 Id.


227 Id. § 1536(b)(4).

228 Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1037 (8th Cir. 1988); National Wildlife Fed’n v. Coleman, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976). Of course, a federal agency that disregards a jeopardy opinion is subject to the prohibition against the taking of protected species. See Coleman, 529 F.2d at 375.


231 A limitation on the “take” prohibition was added by amendment in 1982. Section 10(a)(1)(B) authorizes the Secretary of the Interior to permit a taking, “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)(1)(B).

232 The term “person” is defined by Section 3 of the Act to mean private individuals and corporations, as well as officers, employees, agents, departments and agencies of government at the federal, state and local level. 16 U.S.C. § 1532(13).
species wherever they travel or live, even on private lands. Violations of the taking ban may result in civil or criminal penalties.233

"Take" is defined by the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."234 The Act does not explicitly include destruction or modification of the habitat of protected species in the definition of prohibited taking activities. Habitat protection is provided through designation of critical habitat,235 and by federal land acquisition.236

C. The Fish and Wildlife Service Regulation

In 1975, the FWS, of the Department of the Interior, issued a regulation defining "harm" within the definition of "take" to include injury to listed species resulting from habitat destruction or modification.

"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."237

The regulation was determined by the FWS to be "necessary for proper implementation of the Act" and "a reasonable response to the habitat needs of listed species."238 "Congress specifically acknowledged these needs by stating in the 'Purposes' subsection of the Act: 'The purposes of this Act are to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.'"239 The FWS emphasized that potential restrictions on habitat modification would be limited to those activities causing actual death or injury to members of a protected species of wildlife.240

234 Id. § 1532(19).
235 Id. § 1533(a)(3), (b)(2).
236 Id. § 1534.
238 Id. at 44,413.
239 Id.
240 Id.
D. Prelude to Sweet Home

The FWS regulation was first used to challenge activities that resulted in damage to the habitat of threatened and endangered species in 1979. In Palila v. Hawaii Department of Land and Natural Resources (Palila I), the United States District Court for the District of Hawaii directed the State of Hawaii to remove feral goats from the critical habitat of the Palila, an endangered species of bird.241 The court ruled that the defendants had "taken" Palila birds, in violation of the Act, by allowing the goats to eat mamane and naio trees, essential to the birds' survival.242 The court reached its ruling on the basis of evidence concerning the status of the Palila population.243 It did not require plaintiffs to prove actual bird death or injury, finding that "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 habitat."244

The United States Court of Appeals for the Ninth Circuit affirmed the district court's injunction, ruling that the FWS regulation was consistent with the purposes and legislative history of the statute.245

In 1981, in reaction to what it viewed as an overly broad application of the regulation in Palila I, the FWS amended the regulation "to eliminate the confusion that commentators and the courts have had with the present definition" and to limit more narrowly the meaning of "harm."246 The FWS claimed that the old definition contained a "significant ambiguity" that rendered it inconsistent with the intent of Congress in enacting the ESA.247

If the words "such effects" are read to refer to the phrase ""["significant disruption of essential behavioral patterns,""] then any significant environmental modification or degradation that disrupts essential behavioral patterns would fall under the definition of harm, regardless of whether an act killing or injuring of wildlife is demonstrated. Under such an interpretation, a showing of habi-
tat modification alone would be sufficient to invoke the criminal penalties of Section 9. . . [S]uch a result is inconsistent with the intent of Congress.\textsuperscript{248}

The new definition of "harm" became:

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.\textsuperscript{249}

In explaining the amended regulation, the FWS emphasized that it was not the Agency's intent to confine "harm" to direct physical injury to individual members of wildlife species.\textsuperscript{250} The purpose of the redefinition was to preclude a claim of a taking from habitat modification alone, without any attendant death or injury to protected wildlife.\textsuperscript{251}

In 1986, the plaintiffs in \textit{Palila I} moved to reopen the case to consider the impact of mouflon sheep on Palila habitat.\textsuperscript{252} The United States District Court of the District of Hawaii held that the amended definition of "harm" did not require plaintiffs to establish death or injury to individual members of the species.\textsuperscript{253} Rather, a showing of harm to the species as a whole through habitat destruction or modification would suffice.\textsuperscript{254}

On appeal, the Ninth Circuit affirmed the district court, finding that impairment of essential behavioral patterns by depleting the Palila's sources of food and shelter constituted "harm" under the ESA.\textsuperscript{255} The appellate court supported its decision by reference to the broad purposes of the ESA and to legislative history in Senate and House Reports that expressed Congress's intent to define "take" in "the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."\textsuperscript{256}

\textsuperscript{248} Id.
\textsuperscript{249} 50 C.F.R. § 17.3 (1995).
\textsuperscript{251} See generally id.
\textsuperscript{252} See Palila v. Hawaii Dep't of Land & Natural Resources (\textit{Palila II}), 649 F. Supp. 1070, 1072 (D. Haw. 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988).
\textsuperscript{253} See id. at 1077.
\textsuperscript{254} See id.
\textsuperscript{255} See Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106, 1108 (9th Cir. 1988).
\textsuperscript{256} Id. (quoting S. REP. No. 93–307, at 7 (1973), \textit{reprinted in} LEGISLATIVE HISTORY, supra note 215, at 300, 306).
Following the Palila cases, a number of other courts applied the FWS definition of harm to various kinds of habitat modification.\(^{257}\) Perhaps the most significant of these cases for understanding Sweet Home is Sierra Club v. Yeutter, in which the United States Court of Appeals for the Fifth Circuit enjoined the United States Forest Service from clear cutting timber within 1200 meters of endangered red cockaded woodpecker colonies.\(^{258}\) The court held that the timber harvest harmed the birds by interfering with their breeding, and by damaging nesting and foraging habitat.\(^{259}\)

Although both Palila and Yeutter involved public land, the court in each case held that management activities carried out for private purposes could be enjoined as harmful to protected species.\(^{260}\) The implication for private landowners was clear.

E. Sweet Home in the Lower Courts

Rather than wait for a suit by environmental organizations to enjoin timber harvest in the habitat of the Northern spotted owl, a coalition of small timber companies, trade associations, and "timber dependent" families called Sweet Home Chapter of Communities for a Greater Oregon challenged the validity of the FWS regulation on its face.\(^{261}\) They argued that, by establishing habitat modification as a form of harm, the regulatory definition of "take" went far beyond the meaning intended by Congress.\(^{262}\) Plaintiffs further claimed that the FWS restrictions on logging in the habitat of the Northern spotted owl, and other listed forest dependent species such as the red cockaded woodpecker, injured them economically by reducing the timber supply, thereby causing a loss of their livelihood.\(^{263}\)

The United States District Court for the District of Columbia, applying the Chevron rule, upheld the FWS regulation as entirely


\(^{259}\) Id. at 1271-72.

\(^{260}\) See Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106, 1108 (9th Cir. 1988); Sierra Club v. Yeutter, 926 F.2d 429, 439 (5th Cir. 1991).


\(^{262}\) See id. at 283.

\(^{263}\) See id. at 282.
consistent with the ESA's definition of "take." The court concluded that "the language, structure and history of the ESA reveal that Congress intended an expansive interpretation of the word 'take,' an interpretation that encompasses habitat modification." The court added that, even if it were "somehow to find the ESA 'silent or ambiguous' with respect to this issue, it would nevertheless uphold the [agency's] regulation as a reasonable interpretation" of the statutory provision.

After extensive consideration of the Act's legislative history, the district court rejected the plaintiffs' claim that the Senate did not intend "take" to encompass habitat modification because it did not report out one of the original versions of the statute that explicitly included habitat modification in the "take" definition. The court also rejected plaintiffs' argument that Congress intended to address habitat modification only through federal land acquisition. The court found it "worth noting" that although Congress was aware of the court decisions upholding the FWS interpretation of "harm" when it amended the ESA in 1982, it chose not to correct that interpretation or to delete "harm" from the definition of "take."

On appeal, the United States Court of Appeals for the District of Columbia Circuit initially affirmed the district court, ruling that the "harm" regulation did not violate the ESA by including activities that modify habitat among prohibited takings. Judge Mikva observed that it was logical to assume that Congress must have intended to include habitat damage within the meaning of "take."

It is hard to construct a legislative scenario in which Congress would have avoided the problem of habitat modification when it crafted the ESA. The drafters of the statute realized that the degradation of habitats posed one of the gravest threats to the continued existence of endangered and threatened species.

Judge Williams agreed with the outcome, but only because the 1982 amendments which authorized the FWS to issue permits for "inciden-
tal” taking of protected species supported the inference that the ESA otherwise forbids such takings, including takings through habitat modifications.272

Judge Sentelle dissented, also invoking *Chevron.*273 He found no ambiguity in the ESA sufficient to justify the FWS regulation. “I cannot cram the agency’s huge regulatory definition into the tiny crack of ambiguity Congress left.”274 To define “harm” as broadly as the agency did would be to render all other words in the statutory definition superfluous, in violation of the presumption against surplusage.275

Apparently, Judge Williams was uncertain about his initial conclusions as to the scope of the 1982 amendments. On rehearing, he reversed his earlier decision and joined with Judge Sentelle to invalidate the FWS regulation, this time ruling that the Agency’s definition of “harm” “was neither clearly authorized by Congress nor a ‘reasonable interpretation’ of the statute” under *Chevron.*276

The FWS had referred to “harm” as “the most elastic” of the words used to define prohibited actions under the ESA.277 The new majority feared the potential implications of this elasticity, given the civil and criminal penalties imposed on private individuals for taking protected species. It relied on the principle of *noscitur a sociis* (a word is known by the company it keeps), a canon of statutory construction “wisely applied” where a word that has many meanings could be used to give unintended breadth to an act of Congress.278 Because all other words in the “take” definition “contemplate . . . the direct application of force against the animal taken,” the court of appeals limited the meaning of “harm” to “the basic model ‘A hit B.’”279

The D.C. Circuit found that the structure and history of the ESA confirmed its restricted reading of the definition, and indicated Congress’s intent to place primary responsibility for habitat protection on the government.280 The court determined that the Act’s conservation

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272 See id. at 11.
273 See id. at 12 (Sentelle, J., dissenting) (invoking Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)).
274 Id. (Sentelle, J., dissenting).
275 See *Sweet Home,* 1 F.3d at 13 (Sentelle, J., dissenting).
276 Babbitt v. Sweet Home Chapter of Communities for a Greater Or., 17 F.3d 1463, 1464 (D.C. Cir. 1994).
277 See id.
278 See id. at 1465.
279 See id.
280 Id. at 1466.
purposes are to be achieved through three mechanisms: land acquisition by federal agencies, strict obligations on federal agencies to avoid adverse impacts to listed species, and the prohibition on taking of endangered species by anyone.\footnote{1997 SCALIA'S STATUTORY INTERPRETATION 525}

The court of appeals supported its construction of the statute with statements from the floor managers of the bill which became the ESA.\footnote{Sweet Home, 17 F.3d at 1466.} It also saw the deletion of habitat modification from the definition of “take” in the version of the bill reported to the Senate from the Commerce Committee as a clear indication of congressional intent.\footnote{Id. at 1466-67.} Finally, the court of appeals rejected arguments that Congress implicitly ratified the FWS regulation in 1982 by its failure to change the Agency’s definition of harm. “[I]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.”\footnote{Id. at 1467.}

Calling the majority’s decision “unfortunate,”\footnote{Id. at 1469 (quoting Girouard v. United States, 328 U.S. 61, 69 (1946)).} Judge Mikva, now the lone dissenter, stated that the decision “scuttles a carefully conceived Fish and Wildlife Service regulation” and “jettison[s] the Chevron standard.”\footnote{Id. at 1469 (quoting Girouard v. United States, 328 U.S. 61, 69 (1946)).} According to Judge Mikva, the majority turned the Chevron analysis on its head by requiring the FWS to demonstrate that its definition of “harm” was clearly authorized by the ESA or a reasonable interpretation of the statute.

Chevron does not place the burden on a responsible agency to show that its interpretation is clearly authorized or reasonable. On the contrary, the burden is on the party seeking to overturn such an interpretation to show that Congress has clearly spoken to the contrary or that the agency’s interpretation is unreasonable.\footnote{Id.}

Judge Mikva also chided the majority for substituting its own “favorite reading” of the ESA for that of the Agency, again contrary to Chevron.\footnote{Id. at 1473.} Once the court determined that the statute was not clear as to whether “harm” includes “significant habitat modification that actually kills or injures wildlife,” the only question was whether the FWS’s interpretation constituted a reasonable reading of the ambigu-
ous language. Whether it was the majority's preferred interpretation was irrelevant.

F. Sweet Home in the Supreme Court

Faced with a split in the circuits caused by the differing outcomes of *Palila* and *Sweet Home*, the Supreme Court agreed to hear the *Sweet Home* case. In a six-to-three decision, the Court reversed the D.C. Circuit, ruling that the FWS had not exceeded its authority under the ESA by defining "harm" to include habitat modification.

The majority found that the text of the ESA provided three reasons for ruling that the Agency's interpretation is reasonable. First, the "ordinary understanding" of the word "harm" includes indirect injury. Second, the broad purposes of the ESA make it logical to extend the Act's protection against activities that cause the kinds of harms that Congress enacted the statute to avoid. Third, the 1982 amendments to the ESA authorizing the FWS to issue permits for "incidental taking" indicated that Congress understood "harm" to include indirect as well as direct takings.

The Supreme Court rejected the court of appeals' ruling that "harm" must be limited to the direct application of force because the other words in the definition of "take" are similarly limited. It found that several words in the list, for example, "harass," "pursue" and "wound," do not require direct application of force. The Court also held that if "harm" has essentially the same function as the other words in the definition, it becomes superfluous and deprived of its independent meaning, contrary to the canon of statutory construction that statutory interpretation should not render words surplusage.

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289 Id. at 1473–74.
290 Id. at 1471.
292 See id. at 2412–13. In the context of the ESA, said the Court, the definition "naturally encompasses habitat modification that results in actual injury or death to members of endangered or threatened species." Id.
293 Id. at 2413–14. The majority quoted *Tennessee Valley Authority v. Hill* in which the Court called the ESA "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Id. at 2413 (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978)).
295 *Sweet Home*, 115 S. Ct. at 2414.
296 See id. at 2414–15.
297 Id. at 2415.
tory context of "harm" indicated to the Supreme Court that Congress intended it "to serve a particular function in the ESA, consistent with but distinct from the functions of the other verbs used to define 'take.'" 298

The Court was not convinced that the land acquisition authority of Section 5 and Section 7's mandate to federal agencies to avoid adverse modification of critical habitat were intended to be the exclusive references to habitat protection in the ESA. 299 The Court noted that Sections 5, 7 and 9 set forth distinct responsibilities and obligations that are not replicated in the other sections. 300 Section 7 applies only to federal agencies, while Section 9 applies to "any person." 301 Section 7 imposes on federal agencies an affirmative duty to avoid adverse modification of critical habitat that Section 9 does not. 302 The land acquisition authority of Section 5 allows for habitat protection before activities have harmed any endangered animal, whereas the government cannot enforce the Section 9 prohibition unless harm can be demonstrated. 303

Justice O'Connor concurred with the majority, principally because the respondents had made a facial challenge to the regulation. 304 Her concurrence was based on two "understandings": (1) that the regulation was limited in application to actions that actually kill or injure protected animals, and (2) that the regulation was limited in application to habitat modification that was the proximate cause of death or injury. 305 On both of these, Justice O'Connor disagreed with Justice Scalia. 306

To reach its substantive conclusions the Supreme Court relied on the standard of review provided by Chevron. 307 Under step one of the Chevron analysis, it found that Congress had not "unambiguously manifest[ed]" its intent to restrict "harm" to the direct application of force against a member of a protected species. 308 Under step two, it determined that the FWS's interpretation of the statutory language

298 Id.
299 See id. at 2415--16.
300 Sweet Home, 115 S. Ct. at 2415--16.
301 Id. at 2415.
302 Id.
303 Id.
304 See id. at 2418 (O'Connor, J., concurring).
305 Sweet Home, 115 S. Ct. at 2418. (O'Connor, J., concurring).
306 Id. (O'Connor, J., concurring).
307 Id. at 2416.
308 Id.
was reasonable.\footnote{Id.} The Court supported its ruling with the legislative history of the statute, particularly the 1982 amendment that gave the Agency the authority to permit "incidental" takings.\footnote{Id.} The history of this amendment, said the Court, "focused squarely on the aspect of the 'harm' regulation at issue in this litigation."\footnote{Id. at 2418.}

The Court also noted that in the ESA Congress delegated particularly broad administrative and interpretive powers to the FWS.

The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress ... Fashioning appropriate standards for issuing permits under § 10 . . . for takings that would otherwise violate § 9 necessarily requires the exercise of broad discretion. The proper interpretation of a term such as "harm" involves a complex policy choice.\footnote{Id. at 2421 (Scalia, J., dissenting).}

For these reasons, the Court concluded, "the text, structure, and legislative history of the ESA" support the conclusion that the Agency reasonably construed the intent of Congress when it defined harm to include habitat modification that actually kills or injures wildlife.\footnote{Id.}

V. JUSTICE SCALIA'S DISSENT

Justice Scalia delivered a stinging dissent in \textit{Sweet Home}, on behalf of himself, Chief Justice Rehnquist, and Justice Thomas. It begins with a paragraph of vintage Scalia prose in which he lambasts the majority for imposing "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."\footnote{Id. at 2421 (Scalia, J., dissenting).}

With that rousing start to get the majority's attention, Justice Scalia identified three features of the FWS's regulation that violate the ESA. First, the regulation prohibits habitat damage that is the cause in fact, rather than the proximate cause, of death or injury to wildlife.\footnote{See \textit{Sweet Home}, 115 S. Ct. at 2421 (Scalia, J., dissenting).} Second, the regulation applies to "omissions" as well as acts, and third, harm is not limited to direct physical injury to individual members of a protected species, but encompasses injury inflicted

\begin{itemize}
\item \footnote{Id.}
\item \footnote{\textit{Sweet Home}, 115 S. Ct. at 2417.}
\item \footnote{Id. at 2418.}
\item \footnote{Id.}
\item \footnote{Id. at 2421 (Scalia, J., dissenting).}
\item \footnote{See \textit{Sweet Home}, 115 S. Ct. at 2421 (Scalia, J., dissenting).}
\end{itemize}
upon populations.316 None of these features of the regulation is found in the statutory language supposed to authorize it, and, therefore, the regulation’s effect could not have been intended by Congress.317

Perhaps to tweak the majority even further, Justice Scalia announced that he would assume that the Court was correct to apply *Chevron*, because the FWS regulation had to fail, even under the majority’s rule.318 Justice Scalia proclaimed that Congress was “unmistakably clear” in expressing its intent that the prohibition on taking in Section 9 of the ESA apply only to the hunting and killing of endangered animals and that habitat protection be achieved solely through federal land acquisition.319 Consequently, the FWS’s interpretation of the statutory provision was entitled to no deference, whether it was reasonable or not.320

To reach this conclusion, Justice Scalia followed the process he outlined in other opinions as proper under step one of the *Chevron* rule. He looked for Congress’s intent by: (1) analyzing the ordinary meaning of the text, both alone and in the context of the ESA and the traditions of the body of wildlife law into which it fits, and (2) considering the policy consequences of the Agency’s construction to see whether that construction would produce an absurd or unintended result.321 Through this method Justice Scalia articulated a generalized rule for future interpretation of the taking prohibitions of the ESA.322

1. Text and Tradition

Justice Scalia found no textual support for the “radically different” interpretation of the term “take” approved by the Court.323 He stressed that the ordinary meaning of “take,” according to both historic and current usage, requires “affirmative conduct intentionally directed against a particular animal or animals.”324 Justice Scalia further declared that even if “take” were not defined by the ESA “none could dispute what it means, for the term is as old as the law itself.”325 It

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316 See id. at 2422 (Scalia, J., dissenting).
317 See id. at 2421–22 (Scalia, J., dissenting).
318 See id. at 2421 (Scalia, J., dissenting).
319 See id. (Scalia, J., dissenting).
320 See *Sweet Home*, 115 S. Ct. at 2421 (Scalia, J., dissenting).
321 See id. at 2424–25 (Scalia, J., dissenting).
322 See id. at 2421, 2430, 2431 (Scalia, J., dissenting).
323 See id. at 2431 (Scalia, J., dissenting).
324 See id. at 2424 (Scalia, J., dissenting).
325 *Sweet Home*, 115 S. Ct. at 2422 (Scalia, J., dissenting).
means “to reduce [wild] animals, by killing or capturing, to human control.” Justice Scalia supported his claim with references to the Digest of Justinian, Blackstone’s Commentaries, international treaties, various dictionaries, and other federal wildlife laws. He said that these authorities establish that “take” is “a term of art deeply embedded in the statutory and common law concerning wildlife [and] describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).”

“Harm” is subordinate to and limited by the historic and common meaning of “take,” Justice Scalia concluded, because it has no legal force of its own. “Take” is the only “operative” term in the statute, despite the majority’s efforts to treat “harm” as a self-executing prohibition. Furthermore, “harm” is only one of ten prohibitory words in the definition; the other nine accompanying it fit the “ordinary meaning” of “take” perfectly. All share the “sense of affirmative conduct intentionally directed against a particular animal or animals.” Justice Scalia dismissed as an “empty flourish” the statement in the legislative history that Congress intended to define “take” “in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.”

Although Justice Scalia maintained that “take” has a universally known and accepted meaning, Congress did define it in the ESA, and patched together terms from a number of other wildlife statutes to do so. Tracking these terms back to their original sources dispels any idea of a commonly understood definition in wildlife law. A variety

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326 Id. (Scalia, J., dissenting).
327 Id. (Scalia, J., dissenting) (citing the Digest of Justinian as relied upon in Geer v. Connecticut, 161 U.S. 519, 523 (1896)).
328 See id. (Scalia, J., dissenting).
329 Id. at 2422–23 (Scalia, J., dissenting).
330 See Sweet Home, 115 S. Ct. at 2422 (Scalia, J., dissenting).
331 See id. (Scalia, J., dissenting).
332 Id. at 2423 (Scalia, J., dissenting).
333 Id. at 2424 (Scalia, J., dissenting).
334 Id. at 2427 (Scalia, J., dissenting) (quoting S. REP. No. 93–307, at 7 (1973), reprinted in 1973 U.S.C.C.A.N. 2995). To Justice Scalia, such a statement merely says “‘this statute means what it means all the way’ [and] counts for little even when enacted into the law itself.” Id.
of formulations of "take" are used in the various statutes, each one probably reflecting distinct legislative intentions. None of the definitions include "harm," lending weight to the conclusion that Congress intended a new and more expansive meaning of an old term.

Furthermore, if, as Justice Scalia claimed, "take" has a fixed, traditional meaning that "none could dispute," many of the verbs used to define it in the ESA are rendered surplusage in other wildlife statutes. The Migratory Bird Treaty Act, for example, makes it unlawful "to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, [or] offer for sale" the birds subject to the Act. The Bald Eagle Protection Act defines "take" as "to pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb" eagles. Under Justice Scalia's theory, if "take" simply means "to capture" or "kill," there was no need for Congress to include, either in the ESA or other wildlife statutes, any additional words describing direct application of force to animals.

2. Statutory Purposes and Context

Justice Scalia rejected the majority's reliance on the broad purposes of the ESA as support for its ruling that the FWS's interpretation of harm is reasonable. According to Justice Scalia, purposes do not substitute for reading the language of the provision at issue. "Take," he argued, is limited to the meaning given by the words actually used to define it, as those words were ordinarily and customarily interpreted at the time the ESA was enacted, and as consistent with the structure of the statute as a whole.

Nor did Justice Scalia find the meaning given to "take" in the FWS regulation supported by the context of the ESA. In his view, the FWS definition is inconsistent with the use of the term throughout the statute. In Section 11(e)(4)(B), for example, Congress provided

336 See generally Batt, supra note 216, at 1206-09 (surveying various statutes' definitions of "take" and the rationales behind those definitions).
337 See id.
339 Id. § 668c (1994).
340 Sweet Home, 115 S. Ct. at 2426 (Scalia, J. dissenting).
341 See id. (Scalia, J., dissenting).
342 See id. at 2425 (Scalia, J., dissenting).
343 Id. (Scalia, J., dissenting).
344 Id. (Scalia, J., dissenting).
for the forfeiture of “guns, traps, nets and other equipment” used in the taking of protected animals.345 If “take” meant habitat modification, stated Justice Scalia, the list of equipment would have specified backhoes, plows, and bulldozers.346

The broad structure of the statute further confirmed Justice Scalia’s conclusion that the FWS regulation is unreasonable. He compared Section 7, which requires federal agencies to insure that their actions are not likely to result in the destruction or adverse modification of critical habitat, with Section 9, which contains no reference to habitat.347 From such a comparison, Justice Scalia concluded that the explicit prohibition against habitat modification in Section 7 does not imply a similar prohibition in Section 9.348 Rather, when Congress includes particular language in one section of a statute, but omits it in another, the presumption is that Congress acted intentionally and purposely.349 That presumption is even stronger when, as is the case in the ESA, Congress was careful to define and limit the application of the language in the section where it appears.350

Justice Scalia further stated that by defining “harm” to include habitat modification, the regulation makes the restriction on habitat modification in Section 7 almost wholly superfluous, contrary to the canon of construction that statutes should be read so far as possible to give effect to all their provisions.351

In his discussion of habitat modification, Justice Scalia refused to accept that the term “habitat,” as used in the FWS regulation, is not synonymous with the term “critical habitat” in Section 7 of the ESA.352 “Critical habitat” refers to habitat determined by the Secretary of the Interior to be essential for the life functions of listed species.353 It is expressly not all the occupied or potential habitat of a listed species.354 The Secretary need not designate “critical habitat,” if he determines that it is not possible or prudent to do so, and the Secretary may consider economic factors in deciding how much habitat to designate, if any.355 Federal agencies are charged with ensuring that their pro-

345 Sweet Home, 115 S. Ct. at 2425 (Scalia, J., dissenting) (citing 16 U.S.C. § 1540(e)(4)(B)).
346 Id. (Scalia, J., dissenting).
347 Id. (Scalia, J., dissenting) (comparing 16 U.S.C. §§ 1536(a)(2) with 1538(a)(1)(B)).
348 Id. (Scalia, J., dissenting).
349 Id. (Scalia, J., dissenting).
350 Sweet Home, 115 S. Ct. at 2425 (Scalia, J., dissenting).
351 Id. at 2426 (Scalia, J., dissenting) (discussing 16 U.S.C. § 1636(a)(2)).
352 Id.
354 Id. § 1533(b)(2).
grams are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat.” This mandate is distinct from the FWS regulation’s directive to avoid habitat damage, and more limited.

As discussed in the first section of this article, Justice Scalia’s unwillingness to consider legislative purposes to assist in statutory interpretation under the first step of *Chevron* conflicts sharply with the approach of his Supreme Court colleagues. Justice Stevens and others look to overall statutory purposes to explain or confirm the congressional intent of specific provisions. They believe that ignoring legislative goals in the interpretation of statutory text robs agencies of the flexibility that they need, and that Congress intends to provide in order to implement the core policies of a statute in new ways. Ignoring legislative goals also permits the particular language of parts of a statute to take precedence over the statute’s fundamental purposes, thereby distorting congressional intent. In the ESA, Justice Scalia’s use of an out-dated definition of the term “take” virtually wipes out of the statute protection of species from the most significant cause of their decline.

Obviously, Justice Scalia’s approach ignores the political, and often disorderly, nature of the legislative process as well. Congress hardly acts as a single mind and body when preparing a piece of legislation, and sections of complex and lengthy statutes often lack clarity or consistency. Some of this is quite intentional. The statements of broad legislative purposes and goals included in a statute assist in clarifying and reconciling statutory sections.

3. Policy Consequences

Justice Scalia evaluated the policy consequences of the majority’s insistence that the canon of *noscitur a sociis* should not be applied so as to deprive “harm” of its independent meaning. He maintained that this leads to absurd results in the ESA. “If it were true, we ought to give the word ‘trap’ in the definition its rare meaning of ‘to clothe’... since otherwise it adds nothing to the word ‘capture.’”

According to Justice Scalia, the FWS definition of “harm” leads to other, more significant, absurdities. “The verb ‘harm’ has a range of

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355 Id. § 1536(a)(2).
356 *Sweet Home*, 115 S. Ct. at 2424 (Scalia, J., dissenting).
meaning: 'to cause injury' at its broadest, 'to do hurt or damage' in a narrower and more direct sense. By defining "harm" as an act or omission that actually kills or injures a wildlife population through habitat modification, the FWS has chosen:

a meaning that makes nonsense of the word that harm defines—requiring us to accept that a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby "impairs [the] breeding" of protected fish, has "taken" or "attempted to take" the fish. It should take the strongest evidence to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense.\footnote{Id. at 2423 (Scalia, J., dissenting).}

For environmentalists, it is quite logical to assume that Congress did indeed intend the prohibition against harm to reach the farmer tilling his field. Ordinary, daily activities are often the most damaging to the ecosystems on which endangered species depend. The newspapers abound with examples: the draining of wetlands that destroys their water filtering and cleansing functions; the construction of suburban housing developments that eliminate animal travel corridors or breeding areas; domestic livestock grazing that starves out native species of wildlife that cannot compete for forage. To omit such activities from the ambit of the ESA, as Justice Scalia would, leaves a substantial hole in the Act's protective cover.

For Justice Scalia, a further indication that policy considerations dictate against the FWS's interpretation of "harm" is that the civil penalty for unknowing acts could be read in conjunction with the regulation and applied to lawful, private land managing activities that result, unforeseeably, in wildlife damage.\footnote{Id. (Scalia, J., dissenting).} He could not imagine that a legislature could reasonably be thought to have intended such consequences.\footnote{See id. at 2424 (Scalia, J., dissenting).}

His colleagues disagreed with him that this is at all a likely outcome. The majority stated:

\footnote{Id. at 2423 (Scalia, J., dissenting).}  
\footnote{Id. (Scalia, J., dissenting).}  
\footnote{See id. at 2424 (Scalia, J., dissenting).}  
\footnote{Id. (Scalia, J., dissenting). The ESA provides that any person who "knowingly" violates the taking prohibitions of § 1538(a)(1)(B) is subject to criminal penalties under § 1540(b)(1) and civil penalties under § 1540(a)(1). See 16 U.S.C. §§ 1538(a)(1)(B), 1540(a)(1), 1540(b)(1). In addition, under § 1540(a)(1), any person "who otherwise violates" the taking ban may be assessed a civil penalty for each offense. See id. § 1540(a)(1). Justice Scalia is concerned that a person who "otherwise violates" the taking prohibition, i.e., violates it unknowingly, may be subject to substantial civil penalties, even for otherwise lawful activities necessary to making a daily living. See \textit{Sweet Home}, 115 S. Ct. at 2424 (Scalia, J., dissenting).}
In order to be subject to the Act’s criminal penalties or the more severe of its civil penalties, one must “knowingly violat[e]” the Act or its implementing regulations. . . . The Act does authorize up to a $500.00 civil fine for “[a]ny person who otherwise violates” the Act or its implementing regulations. . . . That provision is potentially sweeping, but it would be so with or without the Secretary’s “harm” regulation, making it unhelpful in assessing the reasonableness of the regulation. 361

In any event, said the majority, the proper place to determine whether the civil penalty in Section 9 is improperly broad is a challenge to the enforcement of the provision itself, “not a challenge to a regulation that merely defines a statutory term.” 362

Furthermore, as the majority discussed, Justice Scalia need not have decided that “take” did not include habitat damage in order to protect private property owners. 363 The “incidental take” provisions were added to the ESA in 1982 to address the conflict between efforts to protect endangered species and the interests of private property owners. 364 These provisions provide a process for resolving such conflicts between the public interest in wildlife and property owners’ interests in pursuit of economic gain. 365

4. Legislative History

Although Justice Scalia is scornful of the use of legislative history as a tool to clarify congressional intent, particularly when “the enacted text is as clear as this,” 366 in Sweet Home he assumed its utility in order to rebut the majority’s claims. He quoted statements of the Senate and House floor managers of the bill as “direct evidence” that takings and habitat destruction on private lands were regarded as two separate problems to be addressed by two different sections of the ESA. 367 In particular, he emphasized Senator Tunney’s statement

361 Sweet Home, 115 S. Ct. at 2412 n.9 (citations omitted).
362 Id.
363 Id. at 2414 n.13.
365 Sweet Home, 115 S. Ct. at 2417–18. As noted by Justice Stevens, the model for the incidental take provisions was provided by the habitat conservation plan developed to protect two species of endangered butterflies from the effects of a private housing development. See id. at 2418; see S. Rep. No. 97-418, at 10 (1982); H.R. Conf. Rep. No. 97-835, at 30–32 (1982); Batt, supra note 216, at 1216.
367 Id. at 2427 (Scalia, J., dissenting).
368 Id. (Scalia, J., dissenting).
that "[t]hrough [the] land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction."369 He also pointed to Congressman Sullivan's comment that "the principal threat to animals stems from destruction of their habitat. . . . [The bill] will meet this problem by providing funds for acquisition of critical habitat . . . ."370

On their face these statements do not suggest that the taking prohibitions and the federal land acquisition program provisions were intended to be mutually exclusive. Justice Scalia appears to have assumed that the fledgling ESA's floor managers' references to land acquisition as a way to conserve habitats on private lands indicated that they meant it to be the only way to do so. There is no indication in the legislative history that this is the case.

Justice Scalia's attempt to refute the majority's reliance on the legislative history of the 1982 amendments to the ESA is even more problematic. The amendments, which authorize the Secretary of the Interior to permit incidental taking, were enacted the year after the Secretary of the Interior promulgated the current version of the FWS regulation. The majority concluded that the legislative history of the incidental take provision "strongly suggests that Congress understood § 1538(a)(1)(B) to prohibit indirect as well as deliberate takings."371

Justice Scalia first rejected the majority's analysis because habitat modification is not the only "otherwise lawful activity" that might cause a taking.372 For that reason, the Court could not reliably assume that Congress truly meant to include it. He followed this argument with a claim that illustrates his Chevron analysis and the approach to statutory interpretation considered in this article. Justice Scalia was faced with an interpretive obstacle that he could not get through, so he announced that the obstacle did not, indeed could not possibly, exist.373

369 Id. (Scalia, J., dissenting) (quoting 119 CONG. REC. 25,669 (1973)).
370 Id. (Scalia, J., dissenting) (quoting 119 CONG. REC. 30,162 (1973)).
371 See Sweet Home, 115 S. Ct. at 2414.
372 Id. at 2428 (Scalia, J., dissenting).
373 See id. (Scalia, J., dissenting). Justice Scalia had made such pronouncements before. In Lujan v. National Wildlife Fed'n, 497 U.S. 871, 890 (1990), he announced that it was "impossible" for the National Wildlife Federation's standing affidavits to enable the Federation to challenge the Department of Interior program. It was not impossible, of course, since the district court and the court of appeals had considered the issue and concluded that the organization met the standing requirements of the United States Constitution. Similarly, in Defenders of Wildlife v. Lujan he decried the respondent's standing theories as "beyond all reason." 504 U.S. 555, 566 (1992)
Justice Scalia acknowledged that the Senate Committee Report and the House Conference Committee Report "clearly contemplate" that the incidental take provision will enable the Secretary to allow habitat modification, but then refused to accept that the language of the amendment means what it says.

[T]he text of the amendment cannot possibly bear that asserted meaning, when placed within the context of an Act that must be interpreted . . . not to prohibit private environmental modification. The neutral language of the amendment cannot possibly alter that interpretation, nor can its legislative history be summoned forth to contradict, rather than clarify, what is in its totality an unambiguous statutory text.374

Justice Scalia's conclusion that the legislative history and the text of the 1982 amendments to the ESA cannot possibly change the plain meaning of the definition of "take" is the nub of his dissent. For him, the ESA never did, and never will prohibit damage to the habitat of protected species that results in harm to those species. Application of the proper methodology of statutory interpretation will not lead to that result. The FWS regulation defining harm to species to include alteration of their habitat is unreasonable for Justice Scalia because the plain meaning of "take" in the statute was carved in statutory stone in 1973. It is limited to the direct application of force against animals subject to the Act. Venerable historical sources, the common law and tradition, and the context of the ESA as a whole support his judgment. The legislative history cannot contradict the plain meaning of statutory language as determined by textual analysis. To accept the FWS's definition of harm would lead to absurd policy consequences and deprive private landowners of rights to carry out otherwise lawful activities.

For Justice Scalia, because the statutory meaning is unmistakably clear, the FWS regulation prohibiting modification of the habitat of protected species that results in injury or death to members of those species is entitled to no deference under the Chevron rule, regardless of its longevity, the expertise of the agency, or whether it supports the overall purposes of the ESA. Habitat protection is to be accomplished only through land acquisition and constraints on federal activities affecting critical habitat. Private property owners have limited obligations to wildlife. They may not "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect" endangered species, but

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374 *Sweet Home*, 115 S. Ct. at 2428 (Scalia, J., dissenting).
they may hurt or destroy them by damaging their homes, their food, and their shelter.

Even in terms of Justice Scalia’s own concept of “policy consequences,” such a result seems absurd. It ought to take “the strongest evidence” to indicate that Congress intended such an outcome. The ESA was passed to protect endangered species and the ecosystems on which they depend. Congress did not limit ecosystems to those under federal jurisdiction.

VI. CONCLUSIONS AND APPLYING THE LESSONS LEARNED

Justice Scalia’s approach to statutory interpretation and his formalistic application of the *Chevron* rule results in a fixation on a historically and socially isolated text that may not allow a rational interpretation that reflects changed social, economic, or scientific understanding. His dissent in *Sweet Home* illustrates this fixation and its outcome. To be true to “tradition” in *Sweet Home* Justice Scalia argued for a construction of statutory language that makes no biological sense and would drastically limit the usefulness of the ESA to protect endangered and threatened species and their habitats. In searching for rules, he confined an important legal concept to its ancient common law meaning, thereby hobbling federal efforts to stem the alarming loss of species resulting from the ordinary, habitat-damaging activities of human beings. By disconnecting the prohibition against harm to endangered species from the purposes of the ESA, he narrowed and distorted clearly expressed congressional intentions concerning the function of the statute in American society.

Justice Scalia may not care about the substantive outcome of his decisions as long as the other branches of government learn the lessons he is attempting to teach, but environmentalists who work to protect the nation’s dwindling natural resources care a great deal. Much more is at stake than abstract legal principles. Justice Scalia’s philosophy has significant consequences in application, as *Sweet Home* amply illustrates. It is important, therefore, for environmental lawyers to understand his methodology and approach so that cases reaching the Supreme Court can be constructed strategically for the best chance of success. Next time environmentalists meet Justice Scalia in a case involving statutory interpretation or the application of the *Chevron* doctrine, they would be wise to focus their arguments on the plain meaning of the statutory language, as supported by the context and tradition of the law in which it fits. They should avoid scientific rationales for interpreting statutes that reflect new understandings
of ecological principles. Justice Scalia is not interested in biology, except if it can be shown that Congress was as well. Environmental lawyers certainly should not claim that deference is owed to a long-standing agency interpretation, or plead for the Court to speak for creatures that cannot speak for themselves. That might play in New Haven (or South Royalton, Vermont), but not in the halls of the Supreme Court.

Nor will it do for environmental lawyers to argue to Justice Scalia that courts must monitor agencies or step in to supply appropriate policy choices when Congress is ambiguous. The best strategy is to demonstrate that the analysis of the statutory text leads to the result being sought, either because Congress intended it, or if congressional intent is not clear, because the agency that Congress entrusted to implement the statute has made a permissible construction of the statutory provision.

It may be, as some have suggested, that the environment will never win when Justice Scalia speaks for a Supreme Court majority, or that the words of a statute will mean whatever he wants them to mean in a particular case. My sense of the Justice, from the vantage point of engaging him across the bench when he was on the D.C. Circuit, is that he has a comprehensive and consistent philosophy which truly does guide his search for a decision. He truly believes that his job as a judge is to interpret the plain meaning of statutory language, not to substitute his policy preferences or enthusiasms for those of the publicly elected legislature. It is not his job to care. Only when the legislature is ambiguous is deference to administrative interpretations of law appropriate. The rule of law is a law of rules. Lawyers who understand Justice Scalia’s philosophy and method and are able to respond to it will be better prepared to argue for environmental protection in the Supreme Court. They may even find him on their side.

375 The author argued before Justice (then Judge) Scalia in Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983).