Sweet Home’s Effect on the Chevron Doctrine and the Increased Role of the Judiciary in Reviewing Agency Statutory Interpretations

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COMMENT

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The Supreme Court has described the Endangered Species Act¹ ("ESA") as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."² Pursuant to the ESA, the United States Fish & Wildlife Service ("FWS") has promulgated a regulation that defines "harm" as damage to the habitat of an endangered or threatened species.³ This definition has been challenged as an unreasonable interpretation of ESA.⁴ On June 29, 1995, the Supreme Court, in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,⁵ upheld the regulation defining "harm" as significant habitat modification that

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actually causes death or injury to an endangered species.\(^6\) This decision settled the split between the Ninth Circuit\(^7\) and District of Columbia Circuit\(^8\) and upheld federal rules limiting land use to protect endangered species.

*Sweet Home* has weakened the *Chevron* standard of review.\(^9\) In *Sweet Home*, the Supreme Court virtually ignored congressional intent in its discussion of section 9 of the ESA. Congressional intent is an important consideration in determining whether an agency interpretation is entitled to deference and it is the impetus behind the *Chevron* doctrine.\(^10\) This Comment will analyze the Supreme Court's application of *Chevron* in *Sweet Home*. Part I will briefly describe the relevant provisions of the ESA. Part II will discuss the controversy that has resulted in a split between the District of Columbia and Ninth Circuits, including the standard of review that was utilized by each court. Part III will analyze the Supreme Court's decision. Part IV will argue that *Sweet Home* did not properly determine whether clear congressional intent exists. Part V will discuss the standards that have been utilized by other Supreme Court cases to determine when clear congressional intent exists. Part VI will address the specific results and effects the Supreme Court's decision will have on the standard of review. Finally, this Comment will conclude that the Supreme Court's application of *Chevron* has weakened and dismantled the impetus of this standard of review, in an effort by the judiciary to regain some of the power it had relinquished in *Chevron*.

I. THE ENDANGERED SPECIES ACT

The Endangered Species Act of 1973 was adopted in response to congressional findings that some wildlife, fish and plant species had become extinct or were in danger of extinction as a result of unfet-

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6. *Id.* at 2416.
9. See infra notes 133-221 and accompanying text.
10. See infra notes 171-72 and accompanying notes.
tered economic growth and development. Its purposes and goals were
to provide a means whereby the ecosystems upon which endan-
gered species and threatened species depend may be conserved, to
provide a program for the conservation of such endangered species
and threatened species, and to take such steps as may be appropri-
ate to achieve the purposes of the treaties and conventions [of this
act].

ESA contains three avenues for protection of species that are
designated “endangered” or “threatened” by the Secretary of Inte-
rior. First, ESA prohibits nearly all international and interstate
trade in endangered species. Second, ESA prohibits federal
agencies from taking action which might “jeopardize the contin-
ued existence” or result in the “destruction or adverse modifica-
tion” of any endangered species habitat designated as “criti-
cal.” Finally, ESA prohibits any person from “taking” a spe-
cies of fish or wildlife, listed as endangered or threatened.

12. Id. § 1531(b) (1994).
13. Id.
14. Id. § 1536(a).
15. 16 U.S.C. § 1536(a)(2) (1994). In determining whether to designate a site
as a “critical habitat,” the Secretary must consider the “economic impact” of such
a decision. Id. § 1533 (b)(2). “The Secretary may exclude any area from critical
habitat if . . . the benefits of such exclusion outweigh the benefits of specifying
such area as part of the critical habitat, unless . . . the failure to designate . . .
will result in the extinction of the species concerned.” Id. ESA defines “critical
habitat” as “the specific areas within the geographical area occupied by the spe-
cies . . . on which are found those physical or biological features (I) essential to
the conservation of the species and (II) which may require special management
consideration or protection.” Id. § 1532(5)(A)(i).

“Critical habitat” is further defined by the Secretary of Interior in a regula-
tion as any air, land, or water, exclusive of existing man made structures not
necessary to the survival of a listed species, the loss of which would appreciably
decrease the likelihood of the survival and recovery of the endangered or threat-
ened species. The constituent elements of critical habitat include: physical struc-
tures and topography; biota; climate; human activity; and the quality and chemi-
cal content of land, water, and air. Critical habitat may include additional areas
for maintaining a reasonable population expansion. See 16 U.S.C. § 1532(5)
(1994).
16. “‘Endangered species’” means any species which is in danger of extinc-
anywhere in the United States, unless the “taking” is incidental to, and not for the purpose of, an otherwise lawful activity and a permit has been granted under section 718 or section 10. 19

Under ESA, a taking is defined as an act to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 20 Furthermore, the meaning of “harm” has been defined by the FWS as “an act which... other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection... would represent an overwhelming and overriding risk to man.” 16 U.S.C. § 1532(6) (1994).

17. “Threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id. § 1532(20).

18. 16 U.S.C. § 1536(b)(4) (1994). Incidental take permits under this section are only available for federal agencies and not private parties. Id. After consultation by the Secretary and the federal agency, an incidental take permit must be granted if the Secretary finds that: (1) the agency action will offer reasonable and prudent alternatives which the Secretary believes would not jeopardize the species or adversely modify the habitat; (2) “the taking of an endangered species or a threatened species incidental to the agency action” would not jeopardize the species or adversely modify its habitat; and (3) if an endangered “or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title.” Id. If the Secretary does not find a violation of ESA he must provide the Federal agency involved with a written statement that: (1) “specifies the impact of such incidental taking on the species;” (2) specifies those reasonable and prudent measures that the Secretary considers necessary... to minimize such impact;” (3) in the case of marine mammals, specifies those measures necessary to comply with section 1371(a)(5); and (4) “sets forth the terms and conditions... that must be complied with by the Federal agency... to implement the measures specified.” Id.

19. Incidental take permits under this section are available to both federal agencies and private parties. 16 U.S.C § 1539 (a)(1)(B) (1994). In order to obtain a section 10 incidental take permit, the applicant must specify: (1) the impact of the taking; (2) “steps the applicant will take to minimize and mitigate such impacts;” (3) funding available to implement such mitigation steps; (4) the alternatives considered, and why the alternatives are not being used. Id. § 1539(a)(2)(A). The Secretary must issue the permit if he finds that: (1) the taking is incidental; (2) the applicant will minimize and mitigate the impact of the taking, to the maximum extent possible; (3) the applicant will ensure adequate funding for the plan; (4) “the taking will not appreciably reduce the likelihood of the survival and recovery of the species;” and (5) any other measures by the Secretary will be met. Id. § 1539(a)(2)(B).

20. Id. § 1532(19) (1994).
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. Under ESA, federal agencies are expressly prohibited from modifying habitat in a manner that adversely affects endangered or threatened species. Thus, federal agencies must ensure that any agency action, such as granting permits, "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the] habitat of such species." The FWS regulation, therefore, extends this habitat modification prohibition by making it applicable to any "person," not just the federal government.

In addition, ESA empowers the Secretary to acquire land by "purchase, donation, or otherwise" for the purpose of conserving any endangered or threatened species. The statute further provides, that any acquisition of land must be made, to the maximum extent practicable, with the consultation and cooperation of the States.

21. 50 C.F.R. § 17.3 (1994). In 1975, the Fish and Wildlife Service had defined "harm" to mean 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, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included in the meaning of 'harm'.

Id.

The FWS redefined the meaning of "harm" in 1981 to mean "any action, including habitat modification, which actually kills or injures wildlife, rather than the present definition which might be read to include habitat modification or degradation alone without further proof of death or injury." The Service noted that the revised definition did not require direct physical injury to an individual member. Death or injury can be caused by impairment of essential behavioral patterns. Id.

23. Id.
26. Id. § 1535(a) (1994).
ESA statutory provisions and FWS regulations apply to any person, including an individual, a corporation, and an agent or employee of federal, state and local governments. Any person who knowingly violates ESA, or any permits or regulations issued pursuant to the Act, is subject to a civil fine of up to $25,000 for each violation, and criminal penalties of up to $50,000 and/or imprisonment. Any person who knowingly violates the FWS regulations is subject to a civil fine of up to $12,000 for each violation and subject to criminal penalties of a fine or imprisonment. A charged party can escape both civil and criminal liability by demonstrating, in good faith, "that he was acting to protect himself or herself, a member of his family, or any other individual from bodily harm, from an endangered or threatened species."

Thus, the FWS regulation, vis-a-vis ESA, carries the potential of restricting or even prohibiting the development of private land by any person if doing so would destroy or modify an endangered species' habitat. There are only two avenues of recourse for a land developer restricted or prohibited from developing land. First, the land developer may apply for a permit if he qualifies for an exemption from the Act's taking prohibition. Second, the land developer may bring suit under the Fifth Amendment for a taking of private property without just compensation.

II. SPLIT IN THE CIRCUITS

A split developed in the United States Courts of Appeals over the FWS definition of "harm" as an act that may include sig-

27. Id. § 1532(13) (1994).
28. Id. § 1540 (a), (b) (1994).
29. Id.
30. Id. § 1540 (a)(1),(b)(1) (1994).
31. Id. § 1540 (a)(3), (b)(3) (1994).
32. See Id. § 1539 (1994).
34. See Palila I, 852 F.2d 1106 (9th Cir. 1988); Sweet Home II, 30 F.3d 190 (D.C. Cir. 1994).
significant habitat modification. The Ninth Circuit, in *Palila v. Hawaii Dep't of Land and Nat. Resources*, upheld the validity of the FWS definition of "harm." In contrast, the District of Columbia Circuit, in *Sweet Home*, held the regulation to be invalid.

A. The District of Columbia Circuit

In *Sweet Home Chapter of Communities for a Great Oregon*, the District of Columbia Circuit held that the FWS exceeded its authority under ESA by defining "harm" to a threatened or endangered species to include habitat modification. The court followed the Supreme Court's analysis of administrative rulemaking as outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* In *Chevron*, the Court announced a two-prong standard of review for determining whether a federal agency's interpretation and construction of a statute is permissible. Under *Chevron*, courts must first determine

35. *Palila*, 1,852 F.2d at 1110.
37. 30 F.3d 190, 193.
38. *Id.*
40. *Id.* at 842-43. At issue in *Chevron* was an Environmental Protection Agency ("EPA") regulation interpreting a provision of the Clear Air Act Amendments of 1977. *Id.* at 840. Section 172 of the Act provides that applicants who wish to construct new or modified "major stationary sources" — sources of air pollution producing more than 100 tons of pollutants annually—in an area yet to attain federally prescribed air quality standards must satisfy several stringent criteria listed in section 173. 42 U.S.C. § 7502(b)(6) (1994). In the regulation, EPA defined "source" by adopting the "bubble concept." *Chevron*, 467 U.S. at 840. The "bubble concept" provides than an entire plant is treated as a "source" and that replacements of individual pieces of process equipment are exempt from application of the stringent criteria as long as the total emission level of the plant is not increased. *Id.* at 853-59. The regulation was promulgated in response to the Reagan Administration's "[g]overnment-wide reexamination of regulatory burdens and complexities." *Id.* at 857. Organizations arguing in favor of more stringent environmental interests challenged this regulation, arguing that Congress intended
whether Congress has unambiguously expressed its intent on an interpretive issue.\footnote{\textit{Chevron}, 467 U.S. at 842-43.} As \textit{Chevron} explicitly stated, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."\footnote{\textit{Id.}} The second step provides that if Congress has in fact been silent or ambiguous on an interpretive issue, a reviewing court must exercise limited review and may not simply impose its own construction on the statute as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.\footnote{\textit{Id.}}

The \textit{Chevron} Court distinguished between two situations. In the first, Congress explicitly directed the agency to promulgate regulations, by leaving a "gap" for the agency to fill.\footnote{\textit{See Russell L. Weaver, Some Realism About Chevron, 58 Mo. L. Rev. 129, 134 (1993)(citing \textit{Chevron}, 467 U.S. at 844).}} In this situation, "the agency has an 'express delegation of authority to . . . elucidate a specific provision of the statute by regulation', and its interpretation is entitled to deference" so long as it is reasonable, and not arbitrary or capricious.\footnote{\textit{Id.} at 134 (quoting \textit{Chevron}, 467 U.S. at 844).} In the second situation Congress has unintentionally left a gap in the statutory scheme. This situation requires deference if the agency's interpretation is a "permissible construction of the statute."\footnote{\textit{Chevron}, 467 U.S. at 843; Weaver, supra note 44 at 134.} Thus an agency has

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\item[-] a more inclusive definition which would subject the maximum amount of industrial activity to the requirements of section 173. Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718, 723-24 (D.C. Cir. 1982), \textit{rev'd sub nom. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837 (1984). These groups advocated that a definition of "source" must include any pollution-producing unit of equipment that produced more than 100 tons of pollutants per year. \textit{Id.}
\end{itemize}
far more latitude when acting under an explicit interpretative grant of authority.

Chevron recognized that an agency responsible for administering the regulatory scheme will often need to make policy based decisions regarding which interpretation best serves the regulatory agency's overall objectives.47 In Chevron, the Court recognized that regulatory agencies are in a better position than reviewing courts to make such policy choices due to the agencies' specialized expertise and political legitimacy.48 This presumption in favor of administrative deference, however, was limited by one key element: congressional intent.49 The Constitution, after all, vests Congress with lawmaking power, and if Congress has clearly spoken on an issue, an agency's interpretation may not trump that intent.50

The Sweet Home decisions utilized the Chevron doctrine to determine whether the FWS regulation defining harm as significant habitat modification was an unreasonable extension of ESA.51 In Sweet Home, parties who were dependent upon the forest products industry brought an action against the Secretary of Interior and the FWS. The plaintiffs claimed that timber harvest restrictions implemented to protect the natural habitat of the spotted owl were destroying their livelihood.52

The District Court for the District of Columbia applied the Chevron standard of review and ruled that the language, structure, and history of ESA indicated that Congress intended an expansive definition of "take."53 On appeal, the D.C. Circuit upheld the lower court's decision.54 The dissent cited Chevron to argue that,

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48. Id. at 420-21.
49. Id. at 421; Weaver, supra note 44, at 138.
50. Weaver, supra note 44 at 138-40.
53. Id.
54. Sweet Home III, 1 F.3d 1, 2 (D.C. Cir. 1993).
while Congressional intent behind the term "take" might be ambiguous, the FWS regulation should be invalidated on the grounds that it was an unreasonable expansion of the term.\textsuperscript{55} Further, the dissent proposed a more stringent reading of Chevron's first step and stated that, although there was some congressional ambiguity, it was not proper to "cram the agency's huge regulatory definition into the tiny crack of ambiguity Congress left."\textsuperscript{56}

To determine congressional intent, the dissent applied the doctrine of noscitur a sociis,\textsuperscript{57} and found that most of the words of ESA section 9, for example, "hunt, shoot, wound, kill, trap, capture, collect," require a direct injury to an endangered species.\textsuperscript{58} Judge Sentelle reasoned that, since "harm" is in the same category of words, it too prohibits only conduct that relates to certain acts aimed at individual representatives of that particular species of wildlife.\textsuperscript{59} The dissenting judge's persuasive argument resulted in a reversal of the court's decision in less than three months, on petition for rehearing.\textsuperscript{60} The concurring judge reversed his position, and authored the opinion based on the new 2-1 majority favoring invalidation of the regulation.\textsuperscript{61}

In the new D.C. Circuit decision,\textsuperscript{62} the majority opinion held that the FWS regulation defining "harm" to include habitat modification was invalid because the definition was neither authorized by Congress nor was a "reasonable" interpretation of the statute.\textsuperscript{63} The court found that congressional intent is clearly manifested in the Senate's deletion of the phrase "habitat modification" from the draft bill.\textsuperscript{64} The majority noted that the definition

\begin{thebibliography}{99}
\bibitem{55} Id. at 12-13.
\bibitem{56} Id.
\bibitem{57} Id. The maxim means a word "is known by its associates" and in application it means that a word may be defined by an accompanying word. NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, §§ 46.05, 47.16 (5th ed. 1992).
\bibitem{58} Sweet Home III, 1 F.3d at 12.
\bibitem{59} Id.
\bibitem{60} Sweet Home II, 30 F.3d 190 (D.C. Cir 1994).
\bibitem{61} Id.
\bibitem{62} Sweet Home III, 17 F.3d 1463 (D.C. Cir. 1994).
\bibitem{63} Id. at 1472.
\bibitem{64} Id. at 1466-67.
\end{thebibliography}
of “harm” extends far beyond all of the other terms used in the definition. Through the federal land acquisition program and the directive to federal agencies to avoid adverse impacts on critical habitat, the court felt that the allocation of land for habitat preservation was intended for the government, not private citizens. The court poignantly stated, “Congress clearly did not hang so massive an expansion of government power on so slight a nail as § 9’s provision that no one should ‘harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect’ an endangered species.”

The appellate court noted that its application of Chevron did not require a clear demarcation of the two step inquiry, but rather a general determination of whether the regulation should be upheld. The court reasoned that the ESA manifests a clear intention by Congress that when there is no direct action against a member of an endangered or threatened species, the section 9 prohibitions should not reach habitat modification as defined by the FWS. One commentator has characterized this opinion as a matter-of-fact analysis, based on the premise that “no matter how high the priority nor how great the cost, Congress did not intend to foist preservation on individual property owners merely because they own habitat for endangered species.”

65. Id. at 1464-65.
66. Id.
67. Id.
68. Id. The court stated “[b]ecause the court in determining whether Congress unambiguously expressed its intent on the issue, is to employ all the traditional tools of statutory construction, the factors involved in the first step are also pertinent to whether an agency’s interpretation is reasonable. Id. Thus the exact point where an agency interpretation falls down may be unclear. Indeed, the Chevron Court itself never specified which step it was applying at any point in its analysis. See 467 U.S. at 859-66.
69. Sweet Home II, 30 F.3d 190, 193 (D.C. Cir. 1994).
B. The Ninth Circuit

In the *Palila* line of cases, 71 the Ninth Circuit upheld the FWS’s regulation defining “harm” as significant habitat modification. 72 The Ninth Circuit decision is founded upon four decisions spanning between 1979 and 1988. 73 The cases involve the maintenance of herds of feral sheep, feral goats, and mouflon sheep imported for sport hunting in the Mauna Kea area of Hawaii, which had been designated as a critical habitat for the endangered bird, palila. 75 Since the 1950s, Hawaii has allowed herds of feral sheep and goats to roam throughout the palila’s habitat. 76 The herded sheep and goats, however, directly caused a significant degradation of the habitat the palila needed to survive. In particular, the sheep and goats caused significant degradation of the *manane-naio* forest on which the palila depends for survival. 77


72. *Palila I*, 852 F.2d 1106 (9th Cir. 1988); *Palila II*, 639 F.2d 495 (9th Cir. 1981)

73. *Palila IV*, 471 F. Supp. 985 (D. Haw. 1979), aff’d, 639 F.2d 495 (9th Cir. 1981); *Palila III*, 649 F. Supp. 1070 (D. Haw. 1986), aff’d, 852 F.2d 1106 (9th Cir. 1988). Palila I and Palila III sought to remove feral sheep and goats. Palila I and Palila II sought to remove all mouflon sheep from the critical habitat of the palila. The mouflon sheep had not been addressed in Palila I and III because research of their effect upon the palila’s habitat had not yet been completed.

74. A “feral” animal is one that was once domesticated but is now living as a wild creature. The feral sheep and goats were first introduced as domestic animals in Hawaii in the 18th Century by Captain Vancouver. *Palila IV*, 471 F. Supp. at 989.

75. The palila is a member of the Hawaiian Honeycreeper family and is only found in Hawaii. *Palila II*, 639 F.2d at 496. The palila was designated an endangered species in 1967 and in 1977 its critical habitat was designated. *Id.*

76. *Id.* Between 1921 and 1946, Hawaii had been pursuing a program for eradicating the sheep, but in 1950 the program was terminated because of the hunters’ desire for recreational game. *Palila IV*, 471 F. Supp. 985, 989.

77. The feral sheep and goats were consuming the mamane seedlings and shoots, thereby preventing the regeneration of the forest and bringing about a destruction of the Palila’s habitat. *Palila IV*, 471 F. Supp. at 989. The palila is totally dependent on the *manane-naio* forests for its existence. The palila eats mamane flowers, buds, leaves and berries of the naio tree. The bird also depends on the manane for shelter and nesting. *Palila III*, 649 F. Supp. 1070, 1073.
Suit was brought by the Sierra Club, the National Audubon Society, and Alan C. Ziegler, head of the Division of Vertebrate Zoology at the Bishop Museum in Hawaii, in the name of the palila against the Hawaii Department of Land and Natural Resources. The Hawaii Department was responsible for allowing the sheep and goats into the palila habitat.\footnote{Palila IV, 471 F. Supp. at 987, 991.}

The Ninth Circuit, in \textit{Palila},\footnote{852 F.2d 1106 (9th Cir. 1988).} applied the \textit{Chevron} standard of review as outlined by the Supreme Court in \textit{United States v. Riverside Bayview Homes}.ootnote{474 U.S. 121 (1985).} In \textit{Riverside}, the court stated "the Secretary’s construction of the statute [is] . . . entitled to deference if . . . reasonable and not in conflict with the intent of Congress."\footnote{Palila I, 852 F.2d 1106, 1108 (9th Cir. 1988).} The Ninth Circuit upheld the FWS regulation.\footnote{Id. at 1106.} The court reasoned that the Secretary’s inclusion of habitat destruction in the definition of "harm" follows the plain language of the statute because it serves the overall purpose of ESA, which aims to "provide a means whereby the ecosystem upon which endangered species and threatened species depend may be conserved."\footnote{Id. at 1107 (quoting 16 U.S.C. § 1531(b)).} In addition, the court quoted language from the Senate Report, which stated that "'take' is defined in . . . the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."\footnote{S. Rep. No. 307, 93d Cong., 1st Sess. 23 (1973), \textit{reprinted in} 1973 U.S.C.C.A.N. 2989, 2995.}

Affirming the lower court, the Ninth Circuit endorsed the FWS regulation and held that the impairment of essential behavior patterns, such as the palila’s feeding and nesting habits, constituted harm.\footnote{Palila III, 649 F. Supp. 1070, 1077 (D. Haw. 1976).} The court further reasoned that a finding of "harm" does not require a finding that habitat degradation is presently driving the species further toward extinction.\footnote{Id.} Although the Secretary redefined "harm" in 1981, "to mean any action, includ-
ing habitat modification, which actually kills or injures wildlife," the court stated that direct physical injury to an individual member of an endangered species is not required to trigger protection under ESA. The court further noted that a showing of "harm" does not require a decline in population numbers. Rather, by impairing essential behavioral patterns through habitat modification, death or injury would be certain to occur, thereby, fulfilling the definition of "harm" under ESA.

III. THE SUPREME COURT RESOLUTION OF THE CIRCUIT SPLIT

In Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, the Supreme Court ruled that the FWS regulation was valid and settled the square conflict between the Ninth Circuit and the District of Columbia Circuit. In a 5-1-3 decision, Justice Stevens, joined by Justices Kennedy, Souter, Ginsburg and Breyer reversed the D.C. Circuit decision and held that the federal definition of "harm" naturally encompasses habitat modification that results in actual injury or death to members of endangered or threatened species. Justice O'Connor filed a concurring opinion. Justice Scalia filed a dissenting opinion joined by Chief Justice Rehnquist and Justice Thomas.

A. Majority Opinion

In the majority opinion, Justice Stevens framed the inquiry around the Chevron standard and upheld the FWS's definition of "harm" within the provision defining "take" as "including significant habitat modification that actually kills or injures wildlife".

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91. Palila I, 852 F.2d 1106 (9th Cir. 1988).
93. Id. at 2412-18.
94. Id. at 2418 (O'Connor, J., concurring).
95. Id. at 2421 (Scalia, J., dissenting).
96. Id. at 2415-16.
The Court provided three reasons for concluding that the FWS regulation was reasonable.\(^9\) First, the Court relied on the ordinary understanding of the word "harm" and concluded that the plain meaning of the term supports the FWS interpretation. Second, the broad purpose of ESA to protect endangered species supports the FWS interpretation. Finally, the fact that Congress, in 1982, authorized the FWS to issue permits for takings that would otherwise be prohibited by section 9(a)(1)(B) of ESA led the Court to believe that ESA was intended to prohibit indirect, as well as, direct takings.\(^9\)

The Court, interpreting *noscitur a sociis*, focused on the definition of the word “harm” and the context within which it is found in the statute.\(^9\) The D.C. Circuit had ruled that the *noscitur a sociis* maxim mandated a narrow interpretation of “harm,” limited to direct acts of force.\(^10\) The Supreme Court rejected this analysis and determined that the circumstances under which “harm” is found in the statute inextricably leads to a broad definition that encompasses indirect acts.\(^10\) Justice Stevens reasoned that words such as “harass,” “pursue,” “wound,” and “kill” clearly referred to actions or effects that could be indirect.\(^10\) The Court found that the D.C. Circuit had improperly applied the maxim because it denied the word “harm” independent meaning.\(^10\) Congress intended the word to serve a distinct function. Under the D.C. Circuit’s interpretation it would be superfluous.

The Court noted that Congress clearly intended “harm” to include habitat modification due to ESA’s broad purpose of providing comprehensive protection for endangered species.\(^10\) The Court did not find the fact that Congress had deleted “[habitat] modification” from the definition of “take”, “especially significant.”\(^10\)

\(^{97.}\) *Id.* at 2412-14.

\(^{98.}\) *Id.* at 2414.

\(^{99.}\) *Id.* at 2413.

\(^{100.}\) *Sweet Home II*, 30 F.3d 190, 193-94 (D.C. Cir. 1994).

\(^{101.}\) *Sweet Home I*, 115 S. Ct. at 2413.

\(^{102.}\) *Id.*

\(^{103.}\) *Id.*

\(^{104.}\) *Id.* at 2408.

\(^{105.}\) *Id.* at 2416.
The Court also discounted the significance of the 1982 amendments as an indication that Congress intended the “harm” definition to apply only to direct acts against an endangered species.\(^{106}\) According to the Court, this 1982 amendment was not limited to situations of accidental killings that might occur, for instance, in the course of hunting, but rather covered situations where it is foreseeable that an activity will result in a taking that is incidental to the activity.\(^{107}\) The Court stated that Congress intended “harm” to encompass not only direct harm, but also foreseeable harm, thereby extending its application to indirect as well as deliberate activities.\(^{108}\) The Court further stated that, in light of this provision, a narrow interpretation of the statute to include only direct harm would be absurd.\(^{109}\)

Justice Stevens based the Court’s decision on a practical level as well.\(^{110}\) Respondents argued that Congress intended to provide the federal government with an exclusive check against habitat modification of private property through land acquisition authority under section 5 and the section 7 directive to federal agencies to avoid destruction or adverse modification of critical habitat.\(^{111}\) Thus, respondents argued, by extending this power via the section 9 definition of “harm,” legislative intent would be defeated because the government would lack any incentive to purchase land under section 5 when it had the power to prohibit takings under section 9.\(^{112}\) The Court disagreed, reasoning that respondents had missed a key point in their analysis — purchasing habitat lands may cost the government less than pursuing criminal or civil penalties under section 9, the “takings” prohibition.\(^{113}\) Furthermore, although the government has the requisite power to prohibit takings under section 5 of ESA, by purchasing habitat lands, the section 9 provision might provide greater protection for landowners because the government must prove that

\(^{106}\) Id. at 2413.
\(^{107}\) Id. at 2418.
\(^{108}\) Id. at 2414.
\(^{109}\) Id.
\(^{110}\) Id. at 2410, 2415.
\(^{111}\) Id. at 2415.
\(^{112}\) Id.
\(^{113}\) Id. at 2415.
an animal has actually been killed or injured before commencing an action.\textsuperscript{114} There is no analogous requirement under section 5.\textsuperscript{115} Rather, section 5 could be extended to situations where the government wants to prevent the modification of land that has not yet been designated a habitat for endangered or threatened species, but may be designated as such in the future.\textsuperscript{116}

The Court further reasoned that the section 9 prohibition is more expansive because it can be applied to any "person," whereas the section 7 directive applies only to the Federal Government.\textsuperscript{117} The Court was careful to point out that the section 7 directive imposes a broad duty to avoid habitat modification.\textsuperscript{118} Whereas, section 9 limits its prohibitions to actions that "actually kill or injure wildlife,"\textsuperscript{119} section 7 contains no such limitation, but rather applies to all actions "likely to jeopardize the continued existence of any endangered species or threatened species,"\textsuperscript{120} and to modifications of habitat that are designated "critical."\textsuperscript{121}

\section*{B. The Dissent}

The dissent, led by Justice Antonin Scalia, based its reasoning on the \textit{Chevron} doctrine and declared the regulation invalid because the FWS definition of harm as "significant habitat modification" was neither authorized by Congress nor was a reasonable interpretation of ESA.\textsuperscript{122}

It concluded that Congress clearly did not intend nor authorize the FWS's interpretation due to the ESA's structure and language.\textsuperscript{123} According to the dissent, Congress had intended "take" to be defined in the same sense as it had been defined in previous legislation.\textsuperscript{124} Thus, Congress intended a definition of

\begin{itemize}
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} 16 U.S.C. \S\ 1534(a).
\item \textsuperscript{116} \textit{Sweet Home I}, 115 S. Ct. at 2415.
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} 16 U.S.C. \S\ 1538(a).
\item \textsuperscript{120} 16 U.S.C. \S\ 1536(a)(2).
\item \textsuperscript{121} 16 U.S.C. \S\ 1533(b)(2)
\item \textsuperscript{122} \textit{Sweet Home I}, 115 S. Ct. at 2421 (Scalia, J., dissenting).
\item \textsuperscript{123} \textit{Id.} at 2421-22 (Scalia, J., dissenting).
\item \textsuperscript{124} \textit{Id.} at 2422-23 (Scalia, J., dissenting). \textit{See, e.g.,} Migratory Bird Treaty
"take" which "means to reduce those animals, by killing or capturing, to human control." Furthermore, the dissent relied on statutory structure by focusing on section 1536 of the United States Code, which provides that "[e]ach Federal Agency shall insure . . . that any action . . . will not . . . result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be "critical"." It argued that an explicit prohibition of habitat modification in one section bars the inference that a similar prohibition of habitat modification in section 1538(a)(1)(B) was unintentionally omitted by Congress. Since section 1538(a)(1)(B) applies to federal agencies as well as individuals, the regulation's additional "harm" definition would render the provision in section 1536(a)(2) superfluous.

The second part of the dissent's opinion detailed three reasons for the finding that the FWS regulation is unreasonable in light of ESA. First, the regulation is unreasonably far reaching and not bound by principles of intent or foreseeability. Second, the regulation applies to omissions and does not require an act. Third, the regulation applies to injury of populations of protected species, rather than individual members.

The dissent further argued that habitat modification and takings were separate problems addressed by different sections of ESA. It relied on statements by Senator Tunney and Representative Sullivan that habitat destruction on private land would be stopped by the land acquisition program of section Act, 16 U.S.C. § 703 (1994) (no person may "pursue, hunt, take, capture, kill, [or attempt to take, capture, or kill" any migratory bird); Agreement on the Conservation of Polar Bears, November 15, 1973, Art. I, 27 U.S.T. 3918, 3921, T.I.A.S. No. 8409 (defining "taking" as "hunting, killing, and capturing").

125. Sweet Home I, 115 S. Ct. at 2422 (Scalia, J., dissenting).
127. Sweet Home I, 115 S. Ct. at 2425 (Scalia, J., dissenting).
128. Id. at 2426 (Scalia, J., dissenting).
129. Id. at 2426-29 (Scalia, J., dissenting).
130. Id. at 2420 (Scalia, J., dissenting).
131. Id. at 2421 (Scalia, J., dissenting).
132. Id. (Scalia, J., dissenting).
133. Id. at 2427 (Scalia, J., dissenting).
1534, while the problem of takings would be solved by section 1538 of the Act.\textsuperscript{134} This, according to the dissent, "was bad enough to destroy the Court's legislative history case."\textsuperscript{135}

IV. ANALYSIS OF THE SUPREME COURT DECISION

A. Ruling in Sweet Home

The Court, in Sweet Home, citing the \textit{Chevron} doctrine, upheld the FWS regulation defining "harm" as significant habitat modification.\textsuperscript{136} The Court did not, however, address the validity and the permissiveness of the FWS interpretation in the specific setting of section 9 of ESA.\textsuperscript{137} Rather, it considered the FWS interpretation in the broad context of ESA, a practice which the \textit{Chevron} doctrine explicitly forbids.\textsuperscript{138}

According to \textit{Chevron}, clear congressional intent is not expressed when a court resorts to the general purpose of the statute to resolve the issue.\textsuperscript{139} Thus, under \textit{Chevron}, resorting to the general purpose of the statute to determine an interpretive issue is a "basic legal error" because it engages the judiciary in a policy-balancing test that is the task of legislative bodies, not the courts.\textsuperscript{140}

The issue in Sweet Home was whether Congress intended the word "take" to include "significant habitat modification that actually kills or injures wildlife."\textsuperscript{141} The \textit{Sweet Home} Court did not apply the "traditional tools of statutory construction."\textsuperscript{142} Rather, it impliedly conceded that Congress did not precisely address whether habitat modification of an endangered species constituted

\begin{itemize}
\item \textsuperscript{134} \textit{Id.} at 2426-27 (Scalia, J., dissenting).
\item \textsuperscript{135} \textit{Id.} at 2427.
\item \textsuperscript{136} \textit{Id.} at 2418.
\item \textsuperscript{137} \textit{Id.} at 2416-18.
\item \textsuperscript{138} \textit{Id.}.
\item \textsuperscript{140} \textit{Id.} at 494 (quoting \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837, 842 (1984)).
\item \textsuperscript{141} \textit{Sweet Home I}, 115 S. Ct. at 2407.
\item \textsuperscript{142} Lynch, supra note 139, at 494 (quoting \textit{Chevron}, 467 U.S. at 843 n.9).
\end{itemize}
"harm" for the purposes of section 9.\textsuperscript{143} The Court emphasized the broad purpose of ESA, rather than section 9, and found that congressional intent was ambiguous.\textsuperscript{144} Thus, the Court erred by basing its decision on the general purposes of the statute, which is not one of the "traditional tools of statutory construction" used to determine whether clear congressional intent exists.\textsuperscript{145}

An analysis of legislative history demonstrates that Congress did not intend the definition of "take" to encompass "habitat modification."\textsuperscript{146} By deleting habitat modification, Congress defined "take" and as an act to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."\textsuperscript{147} Thus, Congress demonstrated a clear intent to adopt a narrow definition.

Furthermore, since Congress did not leave the term "taking" undefined, it is unlikely that it meant to delegate broad defining power to the FWS.\textsuperscript{148} The word "take" had previously been defined in earlier legislation, such as the Bald Eagle Protection Act,\textsuperscript{149} the Marine Mammal Protection Act,\textsuperscript{150} and the Endangered Species Preservation Act of 1966.\textsuperscript{151} None of these statutes define "take" to mean "harm."

The ESA bill initially introduced in the House of Representatives defined "take" as "threaten, harass, hunt, capture, or kill."\textsuperscript{152} The House Subcommittee on Fisheries and Wildlife

\textsuperscript{143} Sweet Home I, 115 S. Ct. at 2415.
\textsuperscript{144} Id. at 2416. The Court relied on Committee Reports accompanying ESA, which do not specifically discuss the meaning of "harm," but state that Congress intended "take" to be defined broadly. See id. (citing S. REP. No. 307, 93d Cong., 1st Sess. 7 (1973), reprinted in 1973 U.S.C.C.A.N. 2989, 2995).
\textsuperscript{145} Lynch, supra note 139, at 494 (citing Chevron, 467 U.S. at 843).
\textsuperscript{146} See infra text accompanying notes 162-168.
\textsuperscript{148} Brief for Sweet Home Chapter of Communities for a Great Oregon, Sweet Home I (1995)(No. 94-859) [hereinafter Brief].
\textsuperscript{149} 16 U.S.C. § 668(c) (1994) (defining "take" as "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest, or disturb").
\textsuperscript{150} 16 U.S.C. § 1362(13) (defining "take" as "harass, hunt, capture, or kill").
\textsuperscript{151} Id. The Endangered Species Act of 1966, defined take as "pursue, hunt, shoot, capture, collect, kill." Id.
\textsuperscript{152} H.R. 37, 93d Cong., 1st Sess. § 3(6) (1973). This definition was redefined as "harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect." Legislative
Conservation and the Environment considered including “habitat destruction, modification or curtailment,” but rejected inclusion as an unnecessary departure from the conventional definitions of “take.” Hearings before the Senate Subcommittee on the Environment also included arguments that the “destruction, modification, or curtailment of habitat” be included in the take definition. Not surprisingly, the Senate Subcommittee also excluded this language before sending the bill to the full Senate.

The statutory scheme of ESA also provides clear congressional intent against adopting “habitat modification” as a definition of “harm.” Under ESA, Congress explicitly prohibits federal agencies from taking actions which might result in the “destruction or adverse modification” of any endangered species habitat designated as “critical.” This provision implies that the structure of ESA operates to assign the task of habitat preservation to the federal government. By extending the habitat modification definition to private individuals, a substantial burden and cost is shifted from the federal government to non-federal entities without any congressional direction.

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155. ESA Senate Hearings, supra note 153, at 99.


158. Brief, supra note 150.

159. Id.
Congressional history further lends to the conclusion that Congress clearly did not intend to define "take" as including "habitat modification." In 1982, ESA was amended to include incidental "take" permits for "any taking otherwise prohibited by section 1538(a)(1)(B)(9) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."160 The majority, led by Justice Stevens, concluded that this incidental "take" provision implicitly ratified the regulatory definition of "harm" which included the modification of a species' habitat.161 However, the legislative history of the 1982 amendments proves that incidental "take" permits under section 10(a) do not include habitat modifications under the regulatory definition of "harm."162 The Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries had notice of the FWS's definition of "harm" when proposing the 1982 amendments.163 The Committee also knew of the Palila decision rendered by the Ninth Circuit.164

The legislative history of the 1982 amendments demonstrates that Congress intended "takings" be defined as direct applications of force, not habitat modifications.165 Since the potential impact of the Palila166 decision as well as the FWS definition of "harm" were ignored by Congress when they proposed the 1982 ESA amendments, it is clear that section 10(a) and the amendments themselves should not be viewed as ratifying the FWS's definition of "harm" as "habitat modification".

162. Id. at 105-06.
164. Moore, supra note 163, at 107; see also 128 Cong. Rec. 12,956-962, 13,181-184 (1982).
165. Moore, supra note 163, at 108.
166. Palila I, 852 F.2d 1106 (9th Cir. 1988).
V. CONGRESSIONAL INTENT IN OTHER SUPREME COURT RULINGS

In *Sweet Home*[^167^], the *Chevron* doctrine was not properly applied to determine whether the FWS regulation was valid since the Court did not determine congressional intent in the specific setting of section 9 of ESA.[^168^] Clear Congressional intent is the first, and the most important, element of the *Chevron* inquiry.[^169^] Congressional intent is a paramount concern under *Chevron* because the Constitution vests lawmaking power in Congress.[^170^] When courts interpret statutes, they have much discretion.[^171^] However, the respect for legislative authority generally limits a court's discretion.[^172^] As Justice Frankfurter noted, the judiciary is

under the constraints imposed by the judicial function in our democratic society . . . no one will gainsay that the function in construing a statute is to ascertain the meaning of the words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature.[^173^]

*Chemical Manufacturers Association v. Natural Resources Defense Council*[^174^] provides insight into the standards that the judiciary must consider in their quest to determine whether clear congressional intent exists.[^175^] *Chemical Manufacturers* involved section 301(1) of the Clean Water Act which prohibits EPA from modifying any requirement that applies to pollutants on the toxic pollutants list.[^176^] Against this backdrop, EPA had promulgated effluent limitations for each category, and provided polluters with


[^168^]: Id. at 2416.

[^169^]: Weaver & Schweitzer, supra note 47, at 421.

[^170^]: See id.

[^171^]: See id.

[^172^]: Id. at 421-22.

[^173^]: Id. (quoting Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947)).


[^175^]: Lynch, supra note 139, at 495.

the ability to apply for a "variance" from specified limits.\textsuperscript{177} Industrial organizations challenged the variance system alleging that section 301(1), with its prohibition against "modifications" of toxic pollutants, barred the regulation.\textsuperscript{178}

The Court applied the first prong of \textit{Chevron}, and inquired whether legislative history evinced a clear congressional intent to preclude the use of variance with respect to toxic pollutants. The Court noted that several legislators had used the terms "waivers," "modifications," and "variances" interchangeably in debate, as well as the fact that the manager of the bill explained section 301(1) in a manner directly supporting the agency interpretation.\textsuperscript{179} As a result the Court concluded that clear congressional intent was not present.\textsuperscript{180} Accordingly, the Court moved on to the second prong of \textit{Chevron}, and found that, because EPA's interpretation was not inconsistent with the language and legislative history of the Act, it was entitled to deference.\textsuperscript{181}

\textit{Chemical Manufacturers} is significant because it sheds light on the standard of whether Congress clearly spoke to the language at issue.\textsuperscript{182} To the majority, an important element was the fact that Congress had not made any explicit statement that precluded the agency's interpretation.\textsuperscript{183} This, in addition to the facial conflict between the provisions, and the lack of congressional explanation on the intended scope of the word "modify," was sufficient for the Court to find congressional ambiguity.\textsuperscript{184}

Another important case in the judiciary's development of the standard to determine clear congressional intent is \textit{City of Chicago v. Environmental Defense Fund, Inc.}\textsuperscript{185} The Court held that a

\textsuperscript{177.} Lynch, \textit{supra} note 139, at 487 n.131 (citing 40 C.F.R. § 403.13 (1984)).
\textsuperscript{178.} Lynch, \textit{supra} note 139, at 488 & n.134 (citing National Ass'n of Metal Finishers v. EPA, 719 F.2d 624, 636, 643 (3d Cir. 1983)).
\textsuperscript{179.} Id. at 489 & n. 141
\textsuperscript{180.} Id. at 489 n.146 (citing statements of Sen. Muskie, Senate manager of the bill and Rep. Roberts, House manager of the bill).
\textsuperscript{181.} Lynch, \textit{supra} note 139, at 489-90 n. 149.
\textsuperscript{182.} Id. at 492.
\textsuperscript{183.} Id. at 492-93.
\textsuperscript{184.} Id. at 491.
\textsuperscript{185.} 114 S. Ct. 1588 (1994).
statute's plain meaning precluded deference to EPA.\textsuperscript{186} At issue was whether the 1984 Clarification of Household Waste Exclusion exempted municipal waste combustion ("MWC"), ash produced during combustion from regulation under Subtitle C of the Resource Conservation and Recovery Act ("RCRA").\textsuperscript{187} The Court viewed the omission of the term “generation” from the 1984 amendment to the household waste exemption as determinative of Congress’ intention to place MWC ash beyond the scope of the exclusion.\textsuperscript{188} The Court further rejected deference to EPA on the grounds that RCRA had two goals to foster — resource recovery and prevention of contamination — by holding that diverse policies must be reconciled, and the court’s most reliable source is the enacted text.\textsuperscript{189} As the Court stated, “the [agency’s] interpretation . . . goes beyond the scope of whatever ambiguity [the statute] contains . . . [and it] simply cannot be read to contain” the agency’s interpretation.\textsuperscript{190}

An additional Supreme Court decision that properly applied the first prong of \textit{Chevron} is \textit{ETSI Pipeline Project v. Missouri}.\textsuperscript{191} In this case the \textit{Chevron} analysis was focused primarily on statutory language.\textsuperscript{192} The Court refused to defer to an agency’s interpretation because the federal statute spoke directly to the dispute in the case, and congressional intent as expressed in the Act clearly indicated that the agency did not have authority to enter into a contract to withdraw water from the Army reservoir for industrial use without approval.\textsuperscript{193} As a result, the Court terminated its analysis at \textit{Chevron}’s first prong, because the statute was clear and that was “the end of the matter.”\textsuperscript{194}

\textsuperscript{186} Id. at 1591.
\textsuperscript{187} \textit{See} 42 U.S.C. §§ 6901-6992(h) (1994).
\textsuperscript{188} \textit{Environmental Defense Fund}, 114 S. Ct. at 1593.
\textsuperscript{190} \textit{Environmental Defense Fund}, 114 S. Ct. at 1594.
\textsuperscript{191} 484 U.S. 495 (1988).
\textsuperscript{192} Id. at 517.
\textsuperscript{193} Id. at 506, 517.
\textsuperscript{194} Id. at 517.
VI. THE IMPACT OF SWEET HOME ON THE EVOLUTION OF THE CHEVRON DOCTRINE

The Sweet Home decision upholding the FWS regulation defining harm as significant habitat modification is a continuation of the judiciary’s weakening of the Chevron standard of review. On several occasions, the judiciary has modified the two-prong standard of review in an effort to regain some of the power it had relinquished in Chevron. The Chevron test, as D.C. Circuit Judge Abner J. Mikva plainly noted, “is ad hoc and malleable,” and it like “the length of the chancellor’s foot in equity court; it varies from chancellor to chancellor.”

Since deciding Chevron in 1984, the judiciary has limited that decision’s impact in many Supreme Court decisions. For example, at times, the Court has declared the Chevron standard of review inapplicable even when the statute was silent or ambiguous, and even though the agency’s interpretation was reasonable and in all respects worthy of deference under the Chevron doctrine. In Immigration & Naturalization Service v. Cardoza-Fonseca, the Court held that it need not defer issues of statutory construction to agencies. In this case, while the Court acknowledged that the legislature had left some ambiguity that could be clarified by the administering agency, it concluded that the dispute involved the interpretation of two legal standards, and the Court viewed this as a “narrow legal question” best resolved by the judiciary.

The Court has also avoided Chevron by holding that deference is not mandated when the agency’s interpretation conflicts with

198. See supra, note 198.
199. See id.
201. Id. at 448.
previous Court decisions.202 In Lechmere Inc. v. NLRB,203 the Court held that under principles of stare decisis, a court’s determination of the clear meaning of a statute could not be contradicted by subsequent agency interpretations.204 This reasoning was used in later Court decisions that similarly rejected administrative interpretations on the grounds that the Court had interpreted the statute differently in the past.205 Prior to the Chevron decision, the Supreme Court did not generally defer to agency interpretations.206 In most cases, the Supreme Court would independently determine whether the agency’s interpretation should be given any weight, using standards developed in Skidmore v. Swift & Co.207 Generally, courts would “consider” agency interpretations but would ultimately make an independent interpretive decision.208 Consequently, many regarded Chevron as an erosion of the judiciary’s power.209 One commentator went so far as to argue that Chevron made agency interpretations as binding as the “force of law,” and advocated limited applications of Chevron.210

Despite this rhetoric, it is important to remember that Chevron does not delegate unfettered power to agencies.211 Rather, Chevron encapsulates a two step review process that has been used

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203. Id.
204. Id. at 847.
206. See Weaver, Some Realism About Chevron, supra note 44, at 134.
207. 323 U.S. 134, 140 (1944).
208. This of course, would depend on the clarity of congressional intent. If Congress explicitly spoke on the issue, courts would generally defer; if Congress did not manifest clear intent, the courts would make interpretive decisions. See Batterton v. Francis, 432 U.S. 416, 425 (1977); Skidmore v. Swift & Co., 323 U.S. 134 (1944); Weaver, Some Realism About Chevron, supra note 44, at 129.
211. Weaver, supra note 44, at 131.
irregularly by the courts.\footnote{212} Under \textit{Chevron}, a court is first required to determine whether clear congressional intent exists.\footnote{213} The judiciary's role is limited because the second step can not be reached unless it is first determined that Congress was silent or ambiguous on the specific issue at question. Thus, courts may only decide the reasonableness of an agency interpretation in instances where Congress is silent or ambiguous.\footnote{214}

\textit{Sweet Home} reduced the importance of this standard of review because it did not analyze congressional intent in the specific setting of section 9 of ESA. In doing so, the Court, engaged in a detailed analysis of step two of \textit{Chevron}, and reestablished a more powerful role for the judiciary in interpreting agency actions. Thus, the Court placed greater emphasis on judicial balancing than on congressional intent. This application is a deviation from the principles underlying the \textit{Chevron} doctrine. One commentator has argued that a stronger application of the \textit{Chevron} standard could have been produced if the \textit{Sweet Home} majority would have applied \textit{noscitur a sociis} and looked at the legislative history of section 9 at the first prong and avoided the second prong of \textit{Chevron} altogether.\footnote{215} This would have led to a "soft" interpretation of \textit{Chevron}—an interpretation that is less likely to defer to agency interpretations because it finds clear congressional intent under \textit{Chevron}'s first prong.\footnote{216}

\textit{Chevron} formulated a standard of review that prohibits judicial infringement on the agency's legitimate authority while keeping congressional intent a paramount concern. In \textit{Sweet Home}, this prohibition was disregarded.\footnote{217} The two-step analysis ensures that the governmental bodies charged with policy-making will

\footnote{212} The Court would either apply "controlling" deference standards or would limit its function to a determination of whether the agency action was "reasonable" or "consistently applied." See Weaver & Schweitzer, \textit{supra} note 47, at 413. 
\footnote{213} \textit{Chevron}, 467 U.S. at 842. 
\footnote{214} \textit{Id.} at 843. 
\footnote{215} Moore, \textit{supra} note 163, at 97. 
\footnote{216} \textit{Id.} To see how the "soft" interpretation of the \textit{Chevron} test has evolved, see \textit{K-Mart Corp. v. Cartier Corp.}, 486 U.S. 281 (1988) and \textit{Public Citizen v. Dep't of Justice}, 491 U.S. 440 (1989). 
\footnote{217} \textit{See Sweet Home I}, 115 S. Ct. at 2415.
actually make those decisions and that the judiciary will abstain from interfering.\textsuperscript{218} Thus, \textit{Chevron} forbids the judiciary's independent perception of the proper statutory construction by asking initially whether Congress, in drafting the statute, dealt with the interpretive issue. If it did, the inquiry is terminated. Thus, "the heart of \textit{Chevron} analysis is the judicial determination whether Congress has 'unambiguously' expressed its intent."\textsuperscript{219} To determine congressional intent, \textit{Chevron} as well as subsequent decisions, such as \textit{Chemical Manufacturers}, indicate that courts must not look to the general purpose of the statute, but rather must apply the proper tools of statutory construction.\textsuperscript{220} In \textit{Sweet Home}, the Court failed this task.

The \textit{Sweet Home}\textsuperscript{221} decision is a divergence from the traditional \textit{Chevron} doctrine because the Court's primary concern does not seem to be congressional intent, but rather whether the agency interpretation was reasonable.\textsuperscript{222} This framework renders the \textit{Chevron} doctrine meaningless and reinstates a standard of review that was commonly utilized by the Court prior to the \textit{Chevron} decision. Consequently, \textit{Sweet Home} is another example of the Court's efforts to resume a stronger role in determining the validity of agency decisions. Although, at face value, it appears that the \textit{Sweet Home} decision strengthened the role of agency deference, the actual effect of the decision may be an increase in the number of agency actions that come under \textit{Chevron}'s second prong test. By reducing the likelihood that the first prong will be satisfied, the Court has increased its interpretive role in deciding whether agency actions must be overturned or enforced.

\textit{Chevron} produced a new scheme in administrative law. Many commentators suspiciously questioned the Court's seemingly selfless decision to shift its power to overturn agency decisions to the executive branch.\textsuperscript{223} Subsequent case law, however, proved

\begin{itemize}
  \item [218.] Lynch, \textit{supra} note 139, at 479.
  \item [219.] \textit{Id.} at 495.
  \item [221.] 115 S. Ct. 2407 (1995).
  \item [222.] \textit{Id.} at 2415.
  \item [223.] \textit{See} Lynch, \textit{supra} note 139, at 495.
\end{itemize}
that the Court’s bark was stronger than its bite. The judiciary did not abdicate its own power to overturn agency decisions. The Court still dominates deferential issues. *Sweet Home,* is a recent example of the Supreme Court’s disarmament of the infamous *Chevron* standard of review.

**CONCLUSION**

*Sweet Home* is a major environmental case of the past 10 years. The *Sweet Home* decision is important because it has weakened the *Chevron* standard of review. Under *Chevron,* courts must apply a two-prong test when determining the validity of an agency’s interpretation of a statute. This test places primary importance on congressional intent. In *Sweet Home,* congressional intent on the specific issue at question, section 9 of ESA, was virtually ignored. As a result, the underpinnings of *Chevron* have been dismantled.

Critics of this decision characterize it as an example of the Court making public policy decisions. This Comment does not argue that the ban on “habitat modification” wrong, but rather that it was not the intent of Congress. Thus, although some of us may agree with the Court’s decision, we must not lose sight of the fact that the legislature and the judiciary have different roles in our form of government. When one branch of government encroaches upon the prerogatives of another’s, we must be cautious.

*Sweet Home* is notable from a legal perspective because it has reformulated the standard of review for agency interpretations. By reducing the importance of congressional intent, the judiciary has reclaimed some of the power it had relinquished in *Chevron.* As a result, courts will exercise a greater degree of control in determining the validity of agency actions.