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Doug Williams

Saint Louis University School of Law, williaj2@slu.edu

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A HARDER “HARD CASE”

DOUG WILLIAMS*

INTRODUCTION

In 1975, the Department of the Interior’s Fish and Wildlife Service, with little fanfare, promulgated a simple rule under the Endangered Species Act of 1973 (ESA). The rule provided that the ESA’s prohibition against the “taking” of any endangered species includes “significant environmental modification or degradation” that “actually injures or kills” a protected species.¹ Twenty years later, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Supreme Court rejected a challenge to the rule, concluding that the agency had acted reasonably.² In *Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, Professor Eskridge considers *Sweet Home* to be a “hard case.”³ It is hard from the perspectives of the major schools of “legisprudence”: positivism, Dworkinian “normativism,” and “legal process purposivism.” And yet, in Professor Eskridge’s view, none of the Justices candidly acknowledged as much. In determining whether the Department of the Interior (DOI) may properly interpret the Endangered Species Act to include as a prohibited “taking” of listed endangered species some forms of habitat modification on privately-owned land, the Justices apparently faked everyone out. The majority and dissenting opinions of Justices Stevens and Scalia, respectively, both treated “conventional legal sources” as entirely adequate to resolve the issue.⁴

From a positivist’s perspective, Professor Eskridge contends that *Sweet Home* is a hard case because “the law runs out . . . and judges then fill gaps in the law with policy judgments.”⁵ He argues that, for Justice Stevens, a “green

* Professor, Saint Louis University School of Law. I want to thank Joel Goldstein and the staff of the *Saint Louis University Law Journal* for inviting me to participate in the Childress Lecture program. Thanks also to my fellow participants, especially Bill Eskridge, for their stimulating and insightful work.

1. 50 C.F.R. § 17.3 (1975).

2. 515 U.S. 687, 708 (1995).

3. William N. Eskridge, Jr., *Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865, 892–93 (2013).

4. *Id.* at 884 n.84.

5. *Id.* at 882–83.

property norm” provided the unstated, but appropriate normative framework.⁶ By contrast, Justice Scalia’s dissent can be understood as the product of the Justice’s (un- or under-stated) commitment to “a Blackstonian preference for highly limited government.”⁷ These norms, the real drivers of the respective Justices’ positions, remained “closeted” and unexamined.⁸

So, would the resolution of the case have become clearer if the Justices had approached the interpretive problem from a Dworkinian, “law as integrity” perspective, in which norms are placed on public display and openly debated? Not even close. Professor Eskridge argues that had the closeted norms been brought out into the open, the case would remain a hard one, perhaps even harder, because there is no widespread consensus on which of the various normative, general theories best accords with the nation’s political traditions,⁹ or indeed, whether the “community of principle” undergirding Dworkin’s approach is itself a normatively desirable ideal.¹⁰

In the face of this seeming intractability, Professor Eskridge then turns to “legal process purposivism” as a potential pathway through this incredible thicket. Under this approach, which is instrumental and institutional in orientation, Professor Eskridge concludes that it might have been sufficient for the Justices simply to acknowledge that “[a]gencies chock full of expertise and more accountable to the political process and democratically elected officials are the primary interpreters in our republic of statutes, and the complicated purposive analysis required by legal process jurisprudence can better be carried out by agencies than by judges.”¹¹ Yet, even on this point, with its potential to blaze a middle way through otherwise insuperable theoretical thickets, there is a troubling obstacle—namely, “the amount of trust our legal system should be lodging in the Department of Interior to carry out the requirements of the [ESA] in a practical and purposive way.”¹² Again, however, neither Justice Stevens nor Justice Scalia stood up to that issue in *Sweet Home*. But what if they did? Are there obvious or analytically sound criteria that a judge might use in answering the “trust” question? If there are such criteria, they remain mysteriously hidden from view. It seems, alas, that there is no satisfying way for cases like *Sweet Home* to be resolved.

In this Article, I want to challenge that conclusion and voice strong (but not complete) support for Justice Stevens’ opinion for the Court. But I will first raise some questions about important aspects of *Sweet Home* that I believe

6. *Id.* at 882.

7. *Id.* at 881.

8. *Id.* at 884.

9. Eskridge, *supra* note 3, at 888–90.

10. *Id.* at 889–92.

11. *Id.* at 904.

12. *Id.* at 905.

were also "closeted" by the Court. I will make two arguments. First, I will argue, in agreement with Professor Eskridge, that *Sweet Home* was, indeed, a "hard case," perhaps even harder than Professor Eskridge suggests. My argument, however, comes from a more conventional, doctrinal perspective. The central focus of this argument is on the *Sweet Home* Court's application of the rule of deference to agency interpretations of law as articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.¹³

Although Professor Eskridge mentions *Chevron* in passing, he gives scant attention to its application in *Sweet Home*. This is a bit curious given the place of prominence *Chevron* has secured in the practicing bars, as well as the courts' ways of framing legal issues in cases like *Sweet Home*.¹⁴ Viewed through *Chevron*'s framework, *Sweet Home* seems to be an easy case. The statute, if it does not fully support the DOI's interpretation, is at least ambiguous on the "harm" question. So, under *Chevron*, the Court must defer to the DOI's interpretation unless it is simply unreasonable.

But here's the rub against this just-so story: there is a substantial question about whether the *Chevron* framework should apply at all in *Sweet Home*. This is what has become known as the "*Chevron* Step Zero" problem,¹⁵ which the Court most prominently addressed in *United States v. Mead Corp.*¹⁶ In *Mead*, the Court limited the application of *Chevron* to those instances in which it is apparent that Congress vested the agency with the authority "to speak with the force of law."¹⁷ This key question was neither asked nor answered by the Court in *Sweet Home*.

The *Chevron* Step Zero problem in *Sweet Home* is based on two themes that stand in the way of a straightforward application of *Chevron*'s rule of deference. First, in some cases, the courts have concluded that agency interpretations raising "major" or "fundamental" issues about the compass of a statutory program are not entitled to *Chevron* deference, at least not unless Congress has expressly given the agency the authority to resolve such

13. 467 U.S. 837 (1984).

14. For reviews of *Chevron*'s prominence, see Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 399 (Peter L. Strauss ed., 2006); Orrin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

15. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001) (describing "step zero" in the *Chevron* doctrine as "the inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all"); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (describing "*Chevron* Step Zero" as "the initial inquiry into whether the *Chevron* framework applies at all").

16. 533 U.S. 218 (2001).

17. *Id.* at 229.

questions.¹⁸ In my view, *Sweet Home* raises a fundamental issue in the administration of the ESA, though one must range considerably from the Court's description of the issue to fully appreciate the significance of the DOI's harm rule. If the "major issues" exception to *Chevron* is, in fact, governing law, then a strong argument can be made that the Court was obligated to decide for itself whether the harm rule is mandated by the ESA, not just a "policy" choice open to the DOI in the face of statutory ambiguity.

The second theme of the *Chevron* Step Zero problem in *Sweet Home* involves what is known as the "avoidance canon." In brief, this aid in statutory interpretation directs courts to prefer an interpretation of a statute that avoids serious constitutional questions over interpretations that push the limits of constitutional authority.¹⁹ In the *Chevron* Step Zero context, the canon counsels that *Chevron* deference be withheld when an otherwise ambiguous statute is interpreted by an agency in a way that approaches constitutional limitations.²⁰ The expanded footprint of the ESA brought about by the harm rule pushes federal regulatory power perilously close to constitutional limits, as subsequent decisions by the courts of appeals have confirmed.²¹ This, too, makes the majority's reliance on *Chevron* considerably more controversial.

My second argument, presented in Part II, pertains to the problem with which Professor Eskridge is primarily concerned: the "closeting" of decisional criteria—such as norms—on the part of the Justices in *Sweet Home*. In this respect, however, I am not concerned with the closeting of the sort of things with which Professor Eskridge is concerned; instead, I return to the *Chevron* argument and consider why the Court never raised the *Chevron* Step Zero problem. I conclude that the Court was correct to apply *Chevron*. The principal reason is that the Court's decision in *Sweet Home* reflects both the limitations on the Court's own understanding of the implications of its decision and a willingness to permit a relatively nascent regulatory program to define itself more clearly. In these respects, the case shares many of the characteristics of the situation in *Chevron* itself.

Nonetheless, I believe *Sweet Home* is a hard case because it provides strong hints that the Court may have made a simple, but understandable, category mistake in *Chevron* itself. That mistake was to regard the rule under review as an exercise of "statutory interpretation," rather than as an act of policymaking pursuant to delegated statutory authority.²² While the agency

18. Sunstein, *supra* note 15, at 193.

19. Merrill & Hickman, *supra* note 15, at 914–15.

20. *Id.*

21. *See infra* notes 104–12 and accompanying text.

22. For an extended argument that *Chevron* confuses "statutory interpretation" with "public administration," see Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How*

actions in both *Chevron* and *Sweet Home* undoubtedly involve some element of statutory interpretation, in neither case was "interpretation" the primary purpose of the agency's decision, nor were the factors driving the agency's policymaking the kind of factors one would ordinarily consider to be interpretive methodologies. To borrow Professor Herz's terminology, in both cases the agencies were engaged in "lawmaking," not in legal interpretation.²³

Viewed from this perspective, the application of *Chevron* in *Sweet Home* emphasizes the incidental character of the agency's statutory interpretation in the larger policymaking process that yielded the harm rule. The unstated message the Court may have sent is, therefore, quite different from the closeted norms discussed by Professor Eskridge. We might plausibly view Justice Stevens's opinion for the Court not as premised on an embrace of a "green property norm," but, rather, as an acknowledgement of the absence of any reliable norm to which one might appeal in assessing the legality of the agency's exercise of lawmaking. In those circumstances, it may be that the Court was willing to permit the DOI to experiment with ways to make the ESA both meaningful and workable by accommodating conflicting norms as it implemented and refined the application of the harm rule—in other words, to administer a statutory program through an iterative process of policymaking. A contrary conclusion would disrupt the ongoing process of creating legal meaning, or "lawmaking"—what Robert Cover has called "jurisgenesis"²⁴—and disrupt that process in ways that do violence to the possibility of building cooperation and shared commitments among persons and institutions with otherwise incompatible worldviews. If there is a "closeted norm" at work in *Sweet Home*, it is at least one that *Chevron* embraces: a modest judicial rule in overseeing the complex and policy-laden judgments of administrative agencies in which Congress has invested its trust.

I. A HARDER HARD CASE, CONVENTIONALLY SPEAKING

The majority in *Sweet Home* ultimately based its judgment on the rule of deference to agency interpretations of law, as established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*²⁵ In *Chevron*, the Court concluded that when an agency's interpretation of a statute that the agency administers is challenged, the reviewing court must first ascertain "whether

Chevron Misconceives the Function of Agencies and Why It Matters, 59 ADMIN. L. REV. 673 (2007).

23. See Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187 (1992).

24. See Robert M. Cover, *Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983) (describing "jurisgenesis" as "the creation of legal meaning").

25. 467 U.S. 837 (1984).

Congress has directly spoken to the precise question at issue.”²⁶ If so, then Congress’s decision must be respected, regardless of a different agency interpretation and whatever reasons the agency offers in support of it. This initial inquiry has become known as *Chevron* Step One. But, “if the statute is silent or ambiguous with respect to the specific issue,” then the Court proceeds to *Chevron* Step Two, in which “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”²⁷ The “permissibility” of an agency construction of a statutory provision is based on a rule of strong deference to the agency, reflecting the Court’s conclusion that a statutory “gap,” or ambiguity, should (at least sometimes) be viewed as an implicit delegation of authority from Congress to the agency to resolve the statutory ambiguity. The strength of that deference is particularly robust when the gap to be filled concerns issues of “policy.” Indeed, in *Chevron*, the Court concluded that “[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”²⁸

In *Sweet Home*, Justice Stevens concluded that “Congress did not unambiguously manifest its intent to adopt [the challengers’ interpretation of the statute] and that the Secretary’s interpretation is reasonable”²⁹ Under *Chevron*, the Court concluded, these two conclusions “suffice” to decide the case in favor of the DOI.³⁰

To be sure, as Professor Eskridge suggests, Justice Stevens’s opinion in *Sweet Home* may be read to provide a different, stronger basis for supporting the DOI’s harm rule—i.e., that it was the uniquely correct interpretation of the ESA’s definition of “harm,” and thus, was “hardwired into the statute.”³¹ Nonetheless, the Court rather clearly stopped short of concluding that Congress had addressed the “precise question at issue,” preferring the conclusion that the DOI’s rule was not foreclosed by the statute.³² Moreover, at every key juncture

26. *Id.* at 842.

27. *Id.* at 843.

28. *Id.* at 866.

29. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703 (1995).

30. *Id.*

31. Eskridge, *supra* note 3, at 878–79. Others have agreed with Professor Eskridge on this point. See Sunstein, *supra* note 15, at 238–39 (2006) (concluding that in *Sweet Home* the Court “embarked on its own independent construction of the statute, suggesting the correctness of the [agency’s] broad construction”).

32. See *Sweet Home*, 515 U.S. at 703 (“[O]ur conclusions that Congress did not unambiguously manifest its intent to adopt respondents’ view and that the Secretary’s interpretation is reasonable suffice to decide this case.”); see also Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331, 419 (2004) (noting that “[i]n the end, *Chevron* would cripple the attack” on the harm rule).

in his opinion for the Court, Justice Stevens stressed the "reasonableness" or "permissibility" of the DOI's interpretation, rather than its exclusivity as a reading of the ESA.³³ I view these moves by Justice Stevens to be more significant than does Professor Eskridge. The Court's constant refrain of "reasonableness" strongly suggests an unwillingness on the Court's part to stray far from the commitments of *Chevron*. The assessment of "reasonableness" also signals the Court's recognition that the primary activity in which the agency was engaged when it promulgated the harm rule was not "statutory interpretation," but instead developing a policy within the scope of the agency's delegated authority, which in the agency's judgment, provided greater protection to endangered species.

Taken at face value, the Court's reliance on *Chevron* casts Justices Stevens's opinion in a light far different from that suggested by Professor Eskridge. The majority's analysis may be understood not as an attempt to demonstrate that the DOI was uniquely correct in its interpretation, nor an attempt to remain "blind" to the contrary arguments by Justice Scalia; instead, Justice Stevens might be making a much more modest point—namely, that there are sufficient reasons to conclude that Justice Scalia's interpretation, which mirrored the interpretation proffered by the rule's challengers, is not unambiguously correct. If this is right, Professor Eskridge's characterization of *Sweet Home* as a "hard" case is questionable. Indeed, from a positivist perspective, Professor Eskridge may be understood as agreeing with Justice Stevens; his demonstration that *Sweet Home* is a hard case is based on a conclusion of statutory ambiguity, and the inevitable need for a "policy" choice to resolve the dispute between the parties. But this compellingly paves the way for an appropriate application of *Chevron* deference. Ironically, Professor Eskridge, in efforts to demonstrate just how hard *Sweet Home* was, makes this an easy case under *Chevron*.

Moreover, when Professor Eskridge does address the deference question, he views it not through conventional, positivist *Chevron* lenses, but through the

33. See *Sweet Home*, 515 U.S. at 698 ("A reluctance to treat statutory terms as surplusage supports the reasonableness of [the DOI's] interpretation."); *id.* at 699 ("Congress' intent to provide comprehensive protection . . . supports the permissibility of [the DOI's] 'harm' regulation."); *id.* at 700 ("Given Congress' clear expression of the ESA's broad purpose . . . [the DOI's] definition of 'harm' is reasonable."); *id.* at 701 ("Congress' addition of the § 10 permit provision supports [the DOI's] conclusion . . ."); *id.* at 702 (*noscitur a sociis* canon invoked to support "permissibility" of the DOI's rule); *id.* at 703 ("[W]e owe some degree of deference to [the DOI's] reasonable interpretation."); *id.* at 704 ("Our conclusion that [the DOI's] definition of 'harm' rests on a permissible construction of the ESA gains further support from the legislative history . . ."); *id.* at 706 (statement in legislative materials did not "undermine[] the reasonableness of [the DOI's] rule"); *id.* at 708 (the DOI's "broad discretion" makes the Court "reluctant to substitute our views" for those of DOI). *Id.* (the DOI "reasonably construed the intent of Congress . . .").

framework of “legal process theory.”³⁴ This is a subtle move, for it maintains the “hardness” of *Sweet Home*. On the view advanced by Professor Eskridge, the relevant inquiry—namely, whether to extend deference to the DOI—depends on whether the Justices should “trust” the DOI.³⁵ But from a conventional, doctrinal perspective, a judge’s decision to defer to an agency’s interpretation is not at all dependent on how much the judge trusts the agency; under (at least one of) the Court’s current views of *Chevron*, deference is owed when there are sufficient reasons to believe that Congress has explicitly or implicitly invested *its* trust in the agency “to speak with the force of law.”³⁶ Indeed, the very point of *Chevron* is to limit the circumstances in which it is appropriate for judges, when faced with situations in which “law runs out,” to make a policy choice.³⁷ From this perspective, the absence of any open discussion among the Justices about green property norms, Blackstonian norms, or the trustworthiness of the DOI is not a point of criticism; instead, it is an exemplary and faithful application of the *Chevron* framework of analysis.

This argument, however, proves too much. Despite the majority’s conclusion that *Chevron* provides the appropriate frame for analysis, Justice Stevens does not explain why that should be so. Justice Scalia’s dissent also does not address that question, though his curt statement that he “shall assume that the Court is correct to apply *Chevron*,”³⁸ perhaps suggests at least some measure of doubt on the issue. Professor Eskridge, likewise, does not address that question in terms. Is it self-evident that the rule of *Chevron* applies in *Sweet Home*? The answer, from my perspective, is no, and that is why *Sweet Home* is a harder case from a purely conventional perspective.

A. *The Chevron Step Zero Problem*

The circumstances in which *Chevron*’s framework applies—the *Chevron* Step Zero problem—are frequently debated in the academic literature, fueled in part by the Court’s inconsistency in invoking the doctrine.³⁹ From the cases,

34. See Eskridge, *supra* note 3, at 893–906.

35. See Eskridge, *supra* note 3, at 905–06.

36. *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001).

37. See Eskridge, *supra* note 3, at 882–83; see also *Chevron*, 467 U.S. 837, 866 (concluding that “[t]he responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones”).

38. *Sweet Home*, 515 U.S. at 715 (Scalia, J., dissenting).

39. See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008). For a sampling of views on when *Chevron* should be applied, see Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–82 (1986); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 269–70, 277–78 (1988); Antonin Scalia, *Judicial*

it is clear that when Step Zero is addressed, the Court is divided on the issue, with some preferring a categorical approach to *Chevron*'s application and others arguing forcefully for a more nuanced, case-by-case inquiry.⁴⁰ Justice Scalia tends to view *Chevron* as more rule-like in scope, applicable whenever the court is asked to review an agency's "authoritative" interpretation of a statute.⁴¹ He tends to write separate opinions taking this position whenever the majority appears to qualify or otherwise restrict the application of *Chevron*.⁴² Justice Breyer, by contrast, sees *Chevron*'s application in much more contextual terms, concluding that it depends on a variety of case- and statutory-specific factors.⁴³

The Court has addressed *Chevron* Step Zero explicitly in a relatively small number of cases. The most prominent is *United States v. Mead Corp.*⁴⁴ There, the Court held that *Chevron* applies in two circumstances: when Congress expressly delegates to an agency the authority to fill a statutory gap or to elaborate the meaning of statutory terms, or when there is an implicit delegation of such authority.⁴⁵ An implicit delegation may be found when it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law"⁴⁶

Two circumstances have often been suggested as good indicators that Congress did not intend to confer lawmaking authority on an agency, and each of these might have been invoked by the Court in *Sweet Home* to deny *Chevron*'s application to the DOI's harm rule. Neither was. The first is expressed in a number of ways, but it reflects a general proposition suggested by Justice Breyer in a 1986 law review article. There, Justice Breyer argued that courts, in determining whether it "makes sense" to infer that Congress wanted the courts to defer to an agency's interpretation, should consider the overall importance of the interpretive issue to the statute's functioning.⁴⁷ The

Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 512; Sunstein, *supra* note 15, at 207–11.

40. For discussion on this point, see Eskridge & Baer, *supra* note 39, at 1088–91, 1097–1136.

41. See *Mead Corp.*, 533 U.S. at 241 (Scalia, J., dissenting) (describing the "doctrine of *Chevron*" as establishing that "all authoritative agency interpretations of statutes they are charged with administering deserve deference"); see also Scalia, *supra* note 39, at 512.

42. See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 226 (2002) (Scalia, J., concurring).

43. See Breyer, *supra* note 39, at 373 (concluding that "[t]o read *Chevron* as laying down a blanket rule . . . would be seriously overbroad, counterproductive and sometimes senseless.").

44. 533 U.S. 218, 218 (2001).

45. *Id.* at 229–30.

46. *Id.* at 229.

47. Breyer, *supra* note 39, at 370; see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) ("Congress may have intended

theory is that Congress most likely would not hesitate to delegate authority to an agency to resolve routine, interstitial questions that arise in the ordinary course of administering a statutory program; indeed, that is what ordinary administration is all about.⁴⁸ A healthy respect for the jurisdictional choices Congress makes, as between administrative and judicial implementation of regulatory programs, strongly counsels against courts assuming too aggressive a role in reviewing agency action. In these sorts of cases, the tools of policymaking and political accountability are much more relevant to effective resolution of issues than are the traditional tools of legal interpretation, and in these cases, it is precisely those policymaking tools on which an agency will rely.

But, a different conclusion might be reached concerning major issues—such as the scope of the agency’s jurisdiction.⁴⁹ For these issues, the lines separating congressional choices about jurisdictional authority as between agencies and courts are blurred, but pushed in the direction of a stronger judicial role to adjust the agency’s range of choice. In these cases, the traditional tools of legal interpretation, rather than the policymaking toolkit, are more likely to be responsive to congressional choices.⁵⁰ As Justice Breyer suggested, for these major issues, it is more likely that Congress would expect the courts, not an administrative agency, to say what the law is.⁵¹

not to leave the matter of a particular interpretation up to the agency . . . where an unusually basic legal question is at issue.”).

48. Breyer, *supra* note 39, at 370.

49. For a debate among the Justices about whether questions concerning the scope of an agency’s jurisdiction are subject to *Chevron*, compare *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring) (noting that “the rule of deference applies even to an agency’s interpretation of its own statutory authority or jurisdiction.”), with *id.* at 387 (Brennan, J., dissenting) (rejecting idea that deference should be extended to an agency’s jurisdictional determination because “we cannot presume that Congress implicitly intended an agency to fill ‘gaps’ in a statute confining the agency’s jurisdiction”). For a more recent case in which the scope of *Chevron* is called into question when the statutory provision at issue is, in a sense, jurisdictional, see *AKM LLC v. Secretary of Labor*, 675 F.3d 752, 764–69 (D.C. Cir. 2012) (Brown, J., concurring).

50. See Foote, *supra* note 22, at 712–13 (noting that “questions about an agency’s basic jurisdiction . . . require resolution by a neutral and independent court using traditional judicial processes to find fixed meaning in statutory text”).

51. Breyer, *supra* note 39, at 370. A similar theme is that *Chevron* deference should be withheld if the agency interpretation concerns the scope of the agency’s statutory jurisdiction. See, e.g., *N. Ill. Steel Supply Co. v. Sec’y of Labor*, 294 F.3d 844, 846–47 (7th Cir. 2002) (holding that the court must conduct de novo review of agency determination of its jurisdiction). But see *City of Arlington v. FCC*, 668 F.3d 229, 248 (5th Cir. 2012) (applying *Chevron* to jurisdictional question). Relatedly, some cases suggest that *Chevron* deference is inappropriate if the agency’s interpretation involves matters of great “economic and political magnitude.” *N.Y. State Bar Ass’n v. FTC*, 276 F. Supp. 2d 110, 126 (D.D.C. 2003) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), *aff’d sub nom.* *Am. Bar Ass’n v. FTC*, 430

The second circumstance is known as the "avoidance canon." As formulated by the Court, deference will be withheld if the agency's otherwise acceptable construction of a statute raises serious constitutional problems.⁵² Again, the theory is that courts should not lightly presume that Congress intended to permit an agency to press the boundaries of constitutional authority in the absence of a clear statement to the contrary.⁵³ The thin pillar of statutory ambiguity is, in these circumstances, an insufficient support for *Chevron* deference.

1. *Chevron* and "Major Issues"

Both the "major issues" and "avoidance canon" exceptions to *Chevron* find support in the Court's decisions. On the major issues exception, four cases are particularly instructive: *MCI Telecommunications Corp. v. FCC*,⁵⁴ *FDA v. Brown & Williamson Tobacco Corp.*,⁵⁵ *Gonzales v. Oregon*,⁵⁶ and *Massachusetts v. EPA*.⁵⁷

In *MCI*, the Court considered whether the Federal Communications Commission (FCC) could exempt "non-dominant" telecommunications carriers, like MCI Telecommunications, from the tariff filing requirements of

F.3d 457, 458–59 (D.C. Cir. 2005)). Moreover, the Court has refused to defer to agency interpretations of ambiguous statutes that produce major regulatory effects on the theory that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). For discussion of *Chevron*'s application in circumstances involving major issues, see Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010); Merrill & Hickman, *supra* note 15, at 909–14; Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got it Wrong)*, 60 ADMIN. L. REV. 593 (2008); Sunstein, *supra* note 15, at 234–36.

52. Merrill and Hickman have identified two versions of the avoidance canon. The first, which they call "the avoidance of unconstitutionality," provides that given a choice between an unconstitutional agency interpretation and a constitutional interpretation of a statute, the Court will select the constitutional one. The second, which they call "the avoidance of questions" canon, is closer to the one described in this Article. It provides that a court should prefer an interpretation of a statute that does not raise serious constitutional questions over an agency interpretation that does raise such questions. See Merrill & Hickman, *supra* note 15, at 914–15. For a fuller discussion of the difference in avoidance canons, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006).

53. Merrill & Hickman, *supra* note 15, at 914.

54. 512 U.S. 218 (1994).

55. 529 U.S. 120 (2000).

56. 546 U.S. 243 (2006).

57. 549 U.S. 497 (2007).

the 1934 Communications Act.⁵⁸ Tariffs are scheduled rates for services that are filed with the FCC. They are a key mechanism for ensuring effective regulatory oversight of carriers' practices in implementing statutory requirements that require that rates charged by carriers be nondiscriminatory, as well as just and reasonable. The FCC had exempted the non-dominant carriers from tariff requirements in an effort to promote competition in the long-distance telecommunications market, which had long been dominated by AT&T.⁵⁹ The de-tariffing order would enable non-dominant carriers to compete on price with AT&T in a much more effective and flexible way—by, for example, permitting the carriers to change their rates without going through the cumbersome process of filing new tariffs.⁶⁰ The FCC claimed it had authority to exempt non-dominant carriers by virtue of its statutory authority to “modify any requirement” pertaining to common carriers, including the tariff filing requirement.⁶¹

The Court rejected the FCC's interpretation of the term “modify.”⁶² In the Court's view, the term permits only incremental or moderate changes, not “radical or fundamental” ones.⁶³ The Court held that deference to the FCC's interpretation was not warranted under *Chevron* because it went “beyond the meaning that the statute can bear.”⁶⁴ This conclusion might be viewed as a straightforward application of *Chevron* Step One, but the Court suggested a far different basis for its conclusion, one that resembles the *Chevron* Step Zero analysis under *Mead*: the Court said that “[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”⁶⁵ Of course, Justice Scalia's point in making this statement may be limited to reinforcing his conclusion for the majority that the

58. *MCI Telecomms. Corp.*, 512 U.S. at 220. The tariff requirements are found in section 203(a) of the Communications Act, which provides:

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges . . . , whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges

Id. at 224 (quoting 47 U.S.C. § 203(a) (1988)).

59. *MCI Telecomms. Corp.*, 512 U.S. at 220–21.

60. *Id.*

61. *Id.* at 225. Section 203(b)(2) of the Communications Act provides: “The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section” 47 U.S.C. § 203(b)(2).

62. *MCI Telecomms. Corp.*, 512 U.S. at 225–28.

63. *Id.* at 228–29.

64. *Id.* at 229.

65. *Id.* at 231.

statute is not ambiguous on what the term "modify" means. Nonetheless, it provides a kind of "common sense" reason for concluding that any ambiguity that might be drawn from the term "modify" is not the sort of ambiguity that provides an implicit congressional delegation to the agency to "speak with the force of law" on whether the tariff requirements should be limited only to dominant communications carriers.

A similar conclusion was reached in *Brown & Williamson*, in which the Court struck down the Food and Drug Administration's (FDA) attempt to regulate cigarettes.⁶⁶ The agency had concluded that nicotine was a "drug" and cigarettes were "drug delivery devices" within the meaning of the Food, Drug, and Cosmetic Act (FDCA).⁶⁷ The agency, relying on those conclusions, promulgated rules aimed at preventing cigarette manufacturers from marketing their products to minors.⁶⁸ The Court rejected the FDA's plea for deference under *Chevron*, concluding that Congress had clearly precluded the agency from regulating cigarettes.⁶⁹ As in *MCI*, the Court phrased its decision as an application of *Chevron*'s Step One, but it also cast even stronger doubt on whether a finding of statutory ambiguity would warrant deference to the agency's interpretations of the FDCA.⁷⁰ The Court said:

Deference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.⁷¹

Indeed, the Court, analogizing to *MCI*, concluded that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."⁷² Under *Mead*, such confidence would doom an agency's plea for *Chevron* deference.

In *Gonzales v. Oregon*, the Court considered a challenge to an interpretive rule issued by the Attorney General under the Controlled Substances Act (CSA) that would effectively preempt Oregon's Death with Dignity Act.⁷³ The Oregon law exempts from criminal and civil liability licensed physicians who, in compliance with safeguards, administer lethal doses of drugs to terminally ill patients.⁷⁴ The Attorney General's interpretive rule made it a federal crime

66. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (2000).

67. *Id.* at 127.

68. *Id.* at 128–29.

69. *Id.* at 159–60.

70. *Id.* at 160–61.

71. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159 (citation omitted).

72. *Id.* at 160.

73. 546 U.S. 243, 249 (2006).

74. *Id.*

to administer drugs for this purpose, concluding that this use of drugs is not a legitimate medical practice.⁷⁵

The Court held that the Attorney General's rule was invalid because in enacting the CSA Congress expressed its "unwillingness to cede medical judgments to an executive official who lacks medical expertise."⁷⁶ The Court, as in *Brown & Williamson* and *MCI*, refused to defer to an agency on issues of great import without a clear statement of congressional intent to confer such interpretive authority on the agency.⁷⁷ But in *Gonzales v. Oregon*, the Court was much more explicit than in prior cases on whether *Chevron* applies in such circumstances. And, the Court held, it does not.⁷⁸ "*Chevron* deference," the Court concluded, "is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official."⁷⁹ When the administrative official claims "broad and unusual authority" on the basis of ambiguous statutory language, the delegation must be more than "implicit"; "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."⁸⁰

A more unusual case is *Massachusetts v. EPA*.⁸¹ The Court's decision in that case reinforces the major issues exception to *Chevron*, but applies it to deny deference to an agency's decision to refuse to address major regulatory issues arising under a statute the agency administers. In *Massachusetts*, the Court rejected the EPA's conclusion that it lacked authority under the Clean Air Act to regulate greenhouse gases that contribute to global climate change.⁸² The EPA relied heavily on *Brown & Williamson*, arguing that regulating "greenhouse gases would have even greater economic and political repercussions than regulating tobacco," and that "climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the agency to address it."⁸³ No matter, the Court concluded—when Congress has "so carefully and so broadly" empowered an agency with explicit authority to address significant issues, sometimes with great social, political, and economic consequences, the agency may not, on the basis of "expedient" policy reasons, refuse to do so by narrowly (and unreasonably) interpreting its

75. *Id.* at 253–54.

76. *Id.* at 266.

77. *Id.* at 267.

78. *Gonzales*, 546 U.S. at 258.

79. *Id.*

80. *Id.* at 267 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

81. 549 U.S. 497 (2007).

82. *Id.* at 534.

83. *Id.* at 512.

statutory authority.⁸⁴ In such cases, there is no room for *Chevron* deference. The relevant "policy" had been selected by Congress, leaving no room for agency "lawmaking."

What is striking about *Massachusetts* is that, on the question of whether greenhouse gases may be considered "air pollutants" that may be regulated under the Clean Air Act, the agency's answer relied almost entirely on arguments based on techniques of statutory interpretation.⁸⁵ When the agency offered policy reasons for refusing to regulate, the Court did not frame the question as one of "statutory interpretation," but rather as one requiring inquiry into whether the agency had offered a "reasoned explanation" for its decision⁸⁶—an inquiry demanded by the Clean Air Act's instruction to courts to "reverse any [agency] action found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁸⁷ There is thus a hint in *Massachusetts* that *Chevron* is appropriately invoked in cases where an agency incidentally engages in "statutory interpretation" in the course of making "law" based on larger policy considerations, but its application may be questioned when the agency's action is simply "statutory interpretation."⁸⁸

These decisions are suggestive, but hardly decisive, of a *Chevron* Step One rule that removes major issues from *Chevron*'s reach. Some have suggested that such a rule is really a "nondelegation canon," providing a workable alternative to the largely unworkable, constitutionally-based nondelegation doctrine.⁸⁹ That doctrine holds that, by virtue of the Constitution's vesting clause in Article I, section 1, Congress may not delegate "legislative power" to an administrative agency (or anyone else, for that matter).⁹⁰ At the same time, the Court has stressed that it has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."⁹¹ And indeed, that "almost never" quip by the Court has become in practice a rather firm "never."⁹² As a consequence, the nondelegation doctrine as a constitutional limit on

84. *Id.* at 529 n.26.

85. *Id.* at 511–12.

86. *Massachusetts*, 549 U.S. at 534.

87. *Id.* at 528 (quoting 42 U.S.C. § 7607(d)(9) (2006)).

88. See Foote, *supra* note 22, at 717 ("[A]gencies are not surrogates for courts, nor are courts surrogates for agencies[.]"); Herz, *supra* note 23, at 190 ("*Chevron* does not make agency 'interpretations' of statutes binding on the courts; it does require judicial acceptance of agency lawmaking.").

89. See Sunstein, *supra* note 15, at 244–45; Loshin & Nielson, *supra* note 51, at 22–23.

90. Loshin & Nielson, *supra* note 51, at 53–54.

91. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474–75 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

92. Loshin & Nielson, *supra* note 51, at 55–56.

congressional authority is moribund.⁹³ For those suggesting that the major issues exception to *Chevron* be viewed as a nondelegation canon, the insistence on a clear statement from Congress to support an agency's major regulatory moves provides a "softer," more targeted, version of the nondelegation doctrine, effectively becoming a species (concern about the entrusting agencies with major issues) mimicking another species—i.e., the avoidance canon.⁹⁴

The problem with this explanation of the major issues exception is that it ignores the "interpretive" aspects of *Chevron* in favor of a broader set of normative assumptions about appropriate institutional arrangements. Viewing the major issues exception as a nondelegation canon treats this carve-out from *Chevron* as a normative judgment about the practices that Congress *ought* to observe. More specifically, the normative idea may be that only Congress should make decisions about major issues of public policy because it, unlike agencies, is directly accountable to the public. Indeed, this very idea—a kind of democracy-forcing norm of constitutional interpretation—is the primary justification for the nondelegation doctrine.⁹⁵

But as an avoidance canon, even a "soft" one, the major issues exception to *Chevron* is anomalous. First, it is not an invitation actually to "interpret" statutory texts to determine the range of permissible meanings or the scope of permissible lawmaking on the part of the agency; it can, instead, function as a device for rejecting otherwise reasonable policy decisions. Second, as *Massachusetts* illustrates, Congress frequently does delegate major policy issues to administrative agencies, and this practice has long been accepted as constitutionally appropriate.⁹⁶ Accordingly, there is no "serious constitutional question" raised with such delegations, and thus no "avoidance" needed to invoke a narrowing interpretive device. Moreover, it is doubtful that Congress itself views such a soft norm as an appropriate way to allocate jurisdictional authority as between the agencies and the courts. Indeed, at this stage in our political and constitutional history, it is probably best to simply reject the normative premises of the nondelegation doctrine and any softer norms that may emanate from those premises.⁹⁷

93. See *id.* at 57.

94. For an example in which the non-delegation doctrine is explicitly linked to the avoidance canon, see *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980).

95. See *id.* at 685 (Rehnquist, J., concurring) (non-delegation doctrine "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will").

96. See, e.g., *Whitman*, 531 U.S. at 475 (upholding delegation to EPA under the Clean Air Act to "set[] air standards that affect the entire national economy").

97. For views that the non-delegation doctrine is anomalous, and not constitutionally-based, see Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive*

Finally, the normative notion that decisions by Congress are more likely to be responsive to the public than those of administrative agencies is not obviously correct, at least in circumstances involving the administration of regulatory programs, as *Chevron* itself hints. Agencies, the *Chevron* court explained, armed with expertise and experience, may be in a "better position" than Congress to accommodate "manifestly competing interests," and in doing so may "properly rely upon the incumbent administration's views of wise policy."⁹⁸ Such reliance carries with it a democratic pedigree of its own: "While agencies are not directly accountable to the people, the Chief Executive is"⁹⁹

A more satisfying explanation for the major issues exception to *Chevron* links up more clearly with the interpretive task to which *Chevron* itself is committed. In particular, the major issues exception need not be based on notions of what Congress *ought* to do, but on what Congress *actually does*.¹⁰⁰ In other words, the major issues exception is simply an interpretive tool based on descriptive aspects of actual congressional legislative practices, and for that reason, provides insights on what a chosen statutory term is likely to have meant or not meant to the Congress that enacted it into law. The point is, as a general matter, Congress does not generally expect an agency to "speak with the force of law" on major issues, unless rather explicitly directed by statute to do so.¹⁰¹ Accordingly, the major issues exception to *Chevron* may simply be a useful way to explain that statutory ambiguity comes in several varieties, and

Delegation, 104 COLUM. L. REV. 2097 (2004); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). On why the doctrine is inconsistent with current norms, see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985). For opposing views, see THEODORE J. LOWI, *THE END OF LIBERALISM* 154–55, 297–99 (2d ed. 1979); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

98. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

99. *Id.*

100. Loshin and Nielson seem to take issue with this descriptive statement, arguing that Congress does, at times, "hide[] elephants in mouseholes, or at least tries to." Loshin & Nielson, *supra* note 51, at 49; see also *id.* at 49–52 (disputing notion that Congress does not intend to make major policy decisions through ambiguous or minor clauses in statutes). I do not doubt that Loshin and Nielson are correct on this point, but the pertinent question is not whether Congress legislates in this way, but rather the frequency of such legislation. After all, the "implicit delegation" theory of *Chevron* is a presumption based on a generalization about what Congress might expect from an agency, not a statement of universal application. Similarly, the "major issues" exception to *Chevron* might be viewed as a counter-presumption, based on the general practices of Congress, not specific pieces of legislation.

101. Elizabeth Foote suggests a more explicit link between the major issues exception to *Chevron* and actual congressional choices. She ties "[t]he practice of carving out an exclusion from *Chevron*'s rules of deference for so called 'major questions'" to choices made by Congress in the federal Administrative Procedure Act's scope of review provisions. See Foote, *supra* note 22, at 717.

while some varieties support a broad rule of deference to agencies, others do not.¹⁰² It is, thus, an interpretive aid, not a normative statement of how power should be allocated as between courts and agencies.

It matters not that this interpretive aid is a “legal fiction.” Nor is it significant that the fiction may be supported by normative commitments of one sort or another. Instead, what matters from an interpretive perspective is whether the fiction credibly bears a close enough resemblance to actual practice to support choices that judges make when confronted with demands to determine, in particular contexts, what an ambiguous statute “means.”¹⁰³ I daresay that a common experience of those who deal with complex, agency-administered regulatory programs is that Congress is not reluctant to trust agencies with major issues, but is usually pretty clear in expressing its decision to do so. For that reason, when such clarity is lacking, the anti-*Chevron* major issues canon meets up with the kind of “common sense” the Court relied on in *Brown & Williamson*.

2. The Avoidance Canon

The avoidance canon is more clearly established in the Court’s decisions than is the major issues exception to *Chevron*, though its scope is subject to considerable variation from case to case. One of the cases most frequently cited in support of the avoidance canon’s displacement of *Chevron* is *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*.¹⁰⁴ In that case, a mall owner filed a complaint with the National Labor Relations Board (NLRB), arguing that a union’s distribution of handbills to mall customers violated the National Labor Relations Act (NLRA).¹⁰⁵ The union handbills urged customers to boycott the mall because of labor practices of a firm hired to construct a store in the mall, even though neither the mall owner nor its tenants had any right to influence the store’s selection of contractors.¹⁰⁶ The NLRB concluded that the handbilling violated a provision in the NLRA making it unlawful for any union “to threaten, coerce, or restrain” any person from doing business with other persons.¹⁰⁷

The Supreme Court reversed the NLRB’s decision. While the Court acknowledged that the NLRB’s interpretation of the NLRA would “normally be entitled to [*Chevron*] deference,” it concluded that “[a]nother rule of

102. See Herz, *supra* note 23, at 204–07 (discussing types of ambiguity).

103. See Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2050 (2011).

104. 485 U.S. 568 (1988).

105. *Id.* at 571–72.

106. *Id.* at 570.

107. *Id.* at 571–73.

statutory construction is . . . pertinent here.”¹⁰⁸ That rule is the avoidance canon: “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”¹⁰⁹ Concerned that the NLRB’s interpretation of “coercion” might stifle protected speech under the First Amendment, the Court concluded that the NLRA is “open to a construction that obviates” the need to address the constitutional question.¹¹⁰ Accordingly, it refused to defer to the NLRB’s otherwise reasonable interpretation of the NLRA.

The avoidance canon is not without controversy. For example, just how “serious” must a constitutional question be before it may undercut a court’s willingness to defer to otherwise reasonable agency interpretations of the statutes they administer? Indeed, the Court’s modern deployment of the avoidance canon raises difficult issues in which conflicting norms of judicial restraint—those counseling avoidance of constitutional issues and those indulging great deference to congressional judgments—battle for prominence.¹¹¹ The fundamental concern in such circumstances is that if the avoidance canon is applied too broadly, the Court may unnecessarily limit congressional power and/or an agency’s ability to implement a statute in an effective and appropriate (and constitutional) way.¹¹²

B. *Chevron Step Zero and Sweet Home*

In *Sweet Home*, the Court had little hesitation in concluding that *Chevron* deference was appropriately extended to the DOI’s harm rule, though it did reach that conclusion in a curious way. Rather than proceeding according to the two-step analysis dictated by *Chevron*, the Court never said whether Congress had spoken directly to the issue—i.e., it never really performed a *Chevron* Step One analysis. Instead, the Court stated: “We need not decide whether the statutory definition of ‘take’ compels [the DOI’s] interpretation of ‘harm,’ because our conclusions that Congress did not unambiguously manifest its intent to adopt [the challengers’] view and that [the DOI’s] interpretation is reasonable suffice to decide this case.”¹¹³ Moreover, after deciding that *Chevron* applied, the Court stated as a consequence that it owed “some . . . deference” to the DOI’s interpretation.¹¹⁴ The notion of extending “some . . . deference”—and its implicit suggestion that there are degrees of

108. *Id.* at 574–75.

109. *Edward J. DeBartolo*, 485 U.S. at 575.

110. *Id.* at 578.

111. *See Morrison*, *supra* note 52, at 1202–03.

112. *See id.* at 1206–07.

113. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703 (1995).

114. *Id.*

deference under *Chevron*—seems at odds with the more singular and stronger form of deference articulated in *Chevron* itself. Despite these variations on *Chevron*, the Court rather clearly stopped short of saying that the DOI's harm rule was "hard-wired" into the ESA.

Was the Court's application of *Chevron* warranted or appropriate? Or was this a case in which, under either the major issues exception or the avoidance canon, the Court was obligated to determine for itself what the term "harm" means? The answer depends, of course, on whether the DOI's harm rule amounts to a major issue and/or whether it extends regulatory power dangerously close to constitutional limits. The answers to these questions, in turn, depend on one's understanding of what the regulatory effects of the harm rule actually are.

1. What Does the "Harm" Rule Do?

The "harm" rule promulgated by the DOI seems straightforward enough. Its initial version seemed to be a rather modest step toward securing greater protection from predation for endangered species. It provided that the term "harm," which is included in the ESA's definition of "take,"¹¹⁵

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[]'¹¹⁶

The preamble to the rule devoted a scant four paragraphs to the harm rule, none of which suggested a significant departure from pre-existing law.¹¹⁷ Moreover, the circumstances surrounding its adoption tended to reinforce the notion that it was not a very significant change to the regulatory program, but rather a simple gap-filler designed to deal with rather uncontroversial applications of the take prohibition. For example, few would doubt that a person "takes" an endangered species of fish when that person drains a pond that is the only remaining habitat for the species.

There also seems to have been little thought on the agency's part that the rule would provoke controversy. The initial rule was included in a package of proposals, the primary focus of which was removing endangered or threatened status classifications for the American alligator.¹¹⁸ The relative significance of the regulation, even from the perspective of its authors, was summed up by Professor Houck: "At the time (1975) few people—including the [Fish and

115. 16 U.S.C. § 1532(19) (2006).

116. Endangered and Threatened Wildlife and Plants, 40 Fed. Reg. 44,412, 44,416 (Sept. 26, 1975).

117. *See id.* at 44,413.

118. *See id.* at 44,412.

Wildlife Service, which was the agency within the DOI responsible for the rule]—realized the implications of what had been done, and even those who did could not predict what the courts would do with it.”¹¹⁹

The 1981 revision to the harm rule—which the agency described as clarifying that “habitat modification alone without any attendant death or injury of the protected wildlife” does not constitute a “take”¹²⁰—brought the significance of the harm rule into greater relief.¹²¹ While the actual revision to the rule turned out to be insignificant,¹²² the target of the revision was not. The proposed rule would have eliminated habitat modification from the definition of “harm” entirely, replacing the 1975 rule with one that simply provided that “harm” “means an act or omission which injures or kills wildlife.” The rulemaking was largely devoted to an effort to undo, for regulatory purposes, the decision in *Palila v. Hawaii Department of Land and Natural Resources*¹²³—a case that, as we shall see, applied the harm rule in an intuitively appealing, but not obvious way. A memo accompanying the 1981 proposed rule described the case as “erroneously support[ing] the view that habitat modifications alone may constitute ‘harm.’”¹²⁴ This result, the memo concluded, “exceeds the statutory authority conferred by Section 9 of the Act.”¹²⁵ Ultimately, however, due to an outpouring of opposition to the proposed changes, the rulemaking retained the 1975’s inclusion of habitat modification, simply making clear that when the 1975 rule said “harm” required a showing of “actual injury or death,” it meant it.¹²⁶

If the 1981 amendments to the harm rule were meant to limit the decision in *Palila*, they failed. Later litigation involving the same parties reaffirmed the initial decision, and arguably, expanded it to provide even greater protection for endangered species from the effects of habitat modification.¹²⁷ Indeed, the *Palila* cases provide a peek through an opening door at the potential breadth and significance of the regulatory structure created by the harm rule.

119. Houck, *supra* note 32, at 411.

120. Endangered and Threatened Wildlife and Plants; Final Redefinition of “Harm,” 46 Fed. Reg. 54,748, 54,748 (Nov. 4, 1981) (to be codified at 50 C.F.R. pt. 17.3).

121. For discussion of the rulemaking, see Houck, *supra* note 32, at 415–16.

122. Professor Houck concludes that the 1981 rule change “was almost no change at all.” *Id.* at 416.

123. 471 F. Supp. 985 (D. Haw. 1979), *aff’d*, 639 F.2d 495 (9th Cir. 1981).

124. Endangered and Threatened Wildlife and Plants; Proposed Redefinition of “Harm,” 46 Fed. Reg. 29,490, 29,492 (June 2, 1981) (to be codified at 50 C.F.R. pt. 17.3) (Memorandum of Assoc. Solicitor, Conservation & Wildlife, J. Roy Spradley, Jr. to Dir., Fish and Wildlife Serv.).

125. *Id.*

126. Endangered and Threatened Wildlife and Plants; Final Redefinition of “Harm,” 46 Fed. Reg. 54,748, 54,750 (Nov. 4, 1981) (to be codified at 50 C.F.R. pt. 17.3).

127. See *Palila v. Haw. Dep’t of Land and Natural Res.*, 649 F. Supp. 1070, 1077, 1082 (D. Haw. 1986), *aff’d*, 852 F.2d 1106 (9th Cir. 1988).

In the first *Palila* iteration, the Sierra Club claimed that the Hawaii Department of Land and Natural Resources was violating the take prohibition by maintaining populations of feral goats and sheep in an area designated as critical habitat for the endangered Palila, a six-inch long finch-billed member of the Hawaiian Honeycreeper family of birds.¹²⁸ Invoking the citizen's suit provision of the ESA, the Sierra Club sought declaratory and injunctive relief requiring the state agency to remove the offending populations of grazing animals. Relying on the harm rule, the claim was straightforward: the grazing animals were destroying the last remaining habitat of the Palila, impairing the species' prospects and threatening extinction.¹²⁹ This clearly "harmed" the species. Nonetheless, the case raised a number of significant questions, including (1) whether and under what circumstances the ESA authorizes actions seeking prospective injunctive relief against threatened "takes"; (2) whether the harm rule requires proof that injury to, or the death of, an individual member of an endangered species is imminently threatened by the defendant's conduct, or whether longer-term effects on an endangered population are sufficient; (3) whether the take prohibition requires a demonstration that the defendant's conduct is the proximate cause of an actual or potential taking; and (4) whether defendant's conduct must be intentional.¹³⁰ The district court did not explicitly address any of these issues, concluding simply that the "acts and omissions of defendants" were "clearly within these definitions" of "take" as elaborated in the harm rule.¹³¹

The initial *Palila* case also raised questions about whether a state's exercise of regulatory authority may be challenged as a "take"—a question with Tenth and Eleventh Amendment implications—and whether a broad interpretation of the ESA may outstrip Congress's constitutionally-conferred legislative authority.¹³² In *Palila I*, the district court addressed these issues, rejecting constitutional challenges to the harm rule.¹³³ These constitutional issues were not addressed on appeal to the Ninth Circuit. Instead, the court of appeals, in a brief opinion, simply concluded that "[t]he defendants' action in maintaining feral sheep and goats in the critical habitat is a violation of the Act since it was shown that the Palila was endangered by the activity."¹³⁴

128. *Palila*, 471 F. Supp. at 987.

129. *Id.* at 987–88.

130. For a discussion of these and other issues raised by the ESA's prohibition on takings, see Paul Boudreaux, *Understanding "Take" in the Endangered Species Act*, 34 ARIZ. ST. L. J. 733 (2002).

131. *Palila*, 471 F. Supp. at 995.

132. *Id.* at 995–96.

133. *Id.* at 992–99.

134. *Palila v. Haw. Dep't of Land & Natural Res.*, 639 F.2d 495, 497 (9th Cir. 1981).

The *Palila* litigation resumed when the endangered bird's habitat became threatened by another grazing species, mouflon sheep.¹³⁵ In this iteration of the litigation, the district court rejected the state's contentions that the 1981 amendments to the harm rule required proof of actual injury to a member of the endangered species, or at the least, a demonstration that the affected population had declined as a result of the challenged habitat modification.¹³⁶ Instead, the court held that a "take" is established upon proof that the defendant's activity, modifying the habitat, "prevents the [endangered] population from recovering."¹³⁷ In the court's view, such habitat modification constitutes an "injury" sufficient to support a finding that a prohibited "take" has occurred.¹³⁸ This view of the harm rule comes very close to equating the take prohibition in section 9 with the "jeopardy" prohibitions and "critical habitat" protections of section 7, but those provisions apply only to actions of the federal government, not private parties.¹³⁹ The Ninth Circuit affirmed on the more limited rationale that the finding of a "take" was supported by proof of habitat destruction that threatens extinction, declining to address whether the harm rule embraces habitat modification that retards a species' recovery.¹⁴⁰

The *Palila* litigation and other cases provoked great concern among property owners, developers, and state and local government officials. In their view, these cases equated harm with habitat modification that merely increased risk to specific, identified populations of endangered species or, more broadly, to populations that biologists predicted were likely to use the modified habitat.¹⁴¹ But this was wrong: "As far as they were concerned, take should never have been extended beyond its historical meaning, and if habitat modification had to be the standard, at least [those alleging a "take" under the harm rule] ought to prove that the habitat modification had actually killed or injured some identifiable animal."¹⁴² But if *Palila* raised concern among these potentially affected entities, more fundamental, and still broader, implications of the harm rule would ignite a large-scale political backlash. By the early 1990s, it was becoming increasingly clear that the rule had the potential to

135. *Palila v. Haw. Dep't of Land & Natural Res.*, 649 F. Supp. 1070, 1071 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

136. *Id.* at 1075.

137. *Id.* at 1077.

138. *Id.*

139. See Albert Gidari, *The Endangered Species Act: The Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419, 464–80 (1994) (discussing *Palila* litigation and the changes it spurred).

140. *Palila v. Haw. Dep't of Land & Natural Res.*, 852 F.2d 1106, 1110–11 (9th Cir. 1988).

141. James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENVTL. L. 595, 603 (2003).

142. *Id.* at 604.

transform an apparently simple statutory prohibition, enforced on a case-by-case basis, into a far-reaching regulatory program.¹⁴³

As written, the ESA has been described as having a “differentness” from most other environmental statutes: “the ESA imposed no regulatory prohibitions of any obvious command-and-control scope and weight, did not employ a cooperative federalism structure to enlist state involvement, erected no extensive enforcement mechanisms, had no statutorily defined geographic domain, and was drafted in generalized policy terms, not detailed regulatory script.”¹⁴⁴ But the harm rule proved to be “the lynchpin” in the ESA’s transformation from such “differentness”—one that supported a few isolated and episodic interventions on a “one creek, one spring, one cave” basis—“into a statute of immense regulatory power and geographic reach”¹⁴⁵ rivaling (or exceeding) that of environmental statutes more clearly recognized as “regulatory,” such as the Clean Air Act¹⁴⁶ and Clean Water Act.¹⁴⁷

This transformation was gaining steam at the time *Sweet Home* was decided. Under the leadership of Secretary of the Interior Bruce Babbitt, not to mention growing citizen activism, a number of complex policies and practices were taking shape. The opening wedge for this transformation, as Professor Ruhl has demonstrated, was the agency’s commitment to “ecosystem management” coupled with a plan for “effective conservation of endangered and threatened species and fairness to people through innovative, cooperative, and comprehensive approaches.”¹⁴⁸ Recognizing that the fate of an increasing number of endangered species was intimately connected with a growing and largely unaddressed sweeping loss of biodiversity through habitat modification, the agency began to place much greater emphasis on the statute’s objective “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved”¹⁴⁹

A key component of the emerging comprehensive approach to species protection through ecosystem management relied on an invigorated section

143. For a discussion of the significance of the *Palila* cases, see Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605, 610–14 (1991).

144. J.B. Ruhl, *The Endangered Species Act’s Fall From Grace in the Supreme Court*, 36 HARV. ENVTL. L. REV. 487, 518 (2012) [hereinafter Ruhl, *Fall From Grace*].

145. *Id.* at 521, 518 (internal citations omitted).

146. 42 U.S.C. §§ 7401 *et seq.* (2006).

147. 33 U.S.C. §§ 1251 *et seq.* (2006).

148. J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367, 373 (1998) [hereinafter Ruhl, *Who Needs Congress*] (quoting U.S. FISH AND WILDLIFE SERV., U.S. DEP’T OF INTERIOR, PROTECTING AMERICA’S LIVING HERITAGE: A FAIR, COOPERATIVE AND SCIENTIFICALLY SOUND APPROACH TO IMPROVING THE ENDANGERED SPECIES ACT 1 (1995)).

149. 16 U.S.C. § 1531(b).

10(a) permit program. Section 10(a) of the ESA authorizes the agency to permit, "under such terms and conditions [the agency] shall prescribe . . . any taking otherwise prohibited [by section 9] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."¹⁵⁰ The permit program supported the development and implementation of "habitat conservation plans," or "HCPs,"¹⁵¹ on private lands—a move critically dependent on the "regulatory leverage" provided by the harm rule.¹⁵²

The section 10 permitting authority was conferred on the agency by amendments to the ESA in 1982, but the HCP program did not become a significant tool until the early 1990s. Indeed, as of January 1991, only five section 10 permits including HCPs had been approved by the agency.¹⁵³ Nonetheless, the sweeping potential of the harm rule, coupled with the section 10 permitting program became clear even years before *Sweet Home* arrived at the Court. Some regional offices of the Fish and Wildlife Service interpreted the *Palila* case series and other court decisions broadly. They confronted local government officials with claims that development activities permitted under local authority could expose the officials to civil and criminal liability if a "take" resulted from those development activities.¹⁵⁴ Through such actions, the

150. 16 U.S.C. § 1539(a)(1)(B).

151. Section 10(a)(2) conditions an incidental take permit on the applicant's submission of a "conservation plan" that meets specific requirements. *See id.* § 1539(a)(2). These plans have become known as "habitat conservation plans." For an overview, see U.S. FISH & WILDLIFE SERV., *Endangered Species Permits, Habitat Conservation Plans (HCPs) and Incidental Take Permits*, <http://www.fws.gov/midwest/endangered/permits/hcp/index.html> (last updated Oct. 24, 2012). *See also* Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279 (1998) (discussing the addition and purpose of the HCP provisions to the ESA). Shortly after *Sweet Home* was decided, the Fish and Wildlife Service released an "Endangered Species Habitat Conservation Planning Handbook" which integrates aspects of the ecosystems management approach being developed by the agency. *See* Ruhl, *Who Needs Congress*, *supra* note 148, at 382–84. The handbook is online at <http://www.fws.gov/midwest/endangered/permits/hcp/hcpandbook.html>.

152. Ruhl, *Fall From Grace*, *supra* note 144, at 521.

153. Thornton, *supra* note 143, at 626.

154. *See id.* at 613. Professor Thornton provides an example of a letter sent to local officials by the Fish and Wildlife Service:

Section 9 of the Endangered Species Act of 1973 . . . makes it unlawful for any person to take an endangered species without a permit Section 11 of the Act prescribes civil penalties of up to \$10,000 . . . or imprisonment for up to one year, or both, for knowingly violating any provision of the Endangered Species Act

. . . [W]e must advise you, unless you first secure a section 10(a) permit authorizing the incidental take . . . the approval and implementation of the proposed action may subject . . . city officials to investigation by our law enforcement branch regarding potential violations of the Endangered Species Act.

Id. at 613–14 (quoting Letter from Gail Kobetich, Field Supervisor, Sacramento FWS, to Peter Chamberlin, Sand City Planning Dir. (Nov. 28, 1986)); *see also* Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 60 (1997) ("[T]he ESA's ban on adverse habitat

agency was able to enlist the institutional support of state and local regulatory programs in its efforts to protect species and their habitats.¹⁵⁵ Over time, a substantial number of “regional” HCPs were put in place, some covering large metropolitan areas.¹⁵⁶ These HCPs allowed local governments and states to avoid confrontations with the ESA through “megapermits.”¹⁵⁷ These efforts were designed to “induce landowners and local officials to protect blocks of remaining habitat and corridors for multiple species while in turn releasing other areas needed for development.”¹⁵⁸ Thus, with the participation of state and local governments, a sort of “cooperative federalism” program regulating local, private land use on a broad scale was born from a simple change in the definition of a statutory term and a somewhat ambiguous grant of authority to issue “incidental take” permits.¹⁵⁹ As William Pedersen puts it, though “loosely reflected in the statutory language,” the section 10 authority for incidental take permits has been coupled with “the statutory takings bar [to provide] a bargaining entitlement tradable for actions that the government could not otherwise command.”¹⁶⁰ The growth of HCPs in the early and mid-1990s was dramatic.¹⁶¹ By 1995, the agency reported that it had recently completed incidental take permits with HCPs that involved “relatively large planning areas (30,000 to 380,000 acres).”¹⁶² Moreover, some of the HCPs

modification gives the government a powerful club to hold over the heads of would-be developers and local officials[.]”). For an example of such official “vicarious” liability for a taking, see *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) (“[A] governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.”), *cert. denied*, 525 U.S. 978 (1998).

155. See, e.g., Thornton, *supra* note 143, at 614 (providing example where the Fish and Wildlife Service sent warnings of a potential ESA violation to county officials in Riverside, California, after which appropriate permits were obtained by the county).

156. See Ruhl, *Who Needs Congress*, *supra* note 148, at 382 (“One of the most sweeping movements in ESA administrative policy is [the agency’s] promotion of habitat conservation planning processes under section 10(a)(1) of the ESA, particularly at regional scales.”).

157. Ruhl, *Fall From Grace*, *supra* note 144, at 520.

158. John F. Turner & Jason C. Rylander, *The Private Lands Challenge: Integrating Biodiversity Conservation and Private Property*, in *PRIVATE PROPERTY AND THE ENDANGERED SPECIES ACT 92*, 100 (Jason F. Shogren ed., 1998).

159. Ruhl, *Fall From Grace*, *supra* note 144, at 520. For a more comprehensive discussion of how the ESA’s take prohibition has evolved from a strict prohibition to support a broadened regulatory program with forms of cooperative federalism, see Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 207–29 (2005).

160. William F. Pedersen, *Using Federal Environmental Regulations to Bargain for Private Land Use Control*, 21 YALE J. ON REG. 1, 35 (2004).

161. See Ruhl, *Who Needs Congress*, *supra* note 148, at 382 n.58 (“From 1983 through 1992, only 14 HCP permits were issued; whereas by the end of January 1997 over 210 HCP permits had been issued and about 200 HCPs were under development.”).

162. U.S. FISH & WILDLIFE SERV., U.S. DEP’T. OF THE INTERIOR REPORT TO CONGRESS: RECOVERY PROGRAM, ENDANGERED AND THREATENED SPECIES 23 (1994).

leveraged the harm rule to achieve broader environmental objectives, such as watershed quality goals in areas prone to increased sedimentation in streams as a result of economic and development activities.¹⁶³ In 1996, the DOI was considering twenty-five proposed HCPs that would apply to areas in excess of 100,000 acres; an additional eighteen HCPs under development by the agency would apply to areas in excess of 500,000 acres.¹⁶⁴ Clearly, by the time *Sweet Home* reached the Court, "the ESA was about far more than stopping a . . . project here and there—the 'one creek' had gone viral, the ESA had gone nationwide, and the regulatory burden had gone private."¹⁶⁵

Moreover, at the time of decision in *Sweet Home*, a number of complex policies, initiated under the leadership of Secretary of the Interior Bruce Babbitt, were beginning to take shape. Included among them were "safe harbor" and "no surprises" rules that were intended to induce private actors to participate in habitat conservation efforts by reducing some of the more severe regulatory consequences of the harm rule and its impact on property rights.¹⁶⁶ The rules also directly addressed some of the perverse incentives and unintended consequences of the harm rule. Without regulatory safe harbors, potentially affected private parties may act to reduce the risk that economic

163. John F. Turner & Jason C. Rylander, *Conserving Endangered Species on Private Lands*, 32 LAND & WATER L. REV. 571, 578 (1997).

164. Sheldon, *supra* note 151, at 301. In 1996, Albert Lin reported that "HCPs range in form from a set of conservation measures to be taken by a small lot owner to a comprehensive regional land management plan, and have been approved for land areas ranging from less than one acre to several hundred thousand acres." Albert C. Lin, *Participants' Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 ECOLOGY L.Q. 369, 372 (1996) (citing U.S. FISH & WILDLIFE SERV., STATUS OF HABITAT CONSERVATION PLANS (Sept. 30, 1995)).

165. Ruhl, *Fall From Grace*, *supra* note 144, at 519.

166. The "safe harbors" policy was officially announced in 1997. Announcement of Draft Safe Harbor Policy, 62 Fed. Reg. 32,178, 32,178 (June 12, 1997). The policy was, however, incorporated in HCPs as early as early 1995. News Release, U.S. Fish and Wildlife Serv., U.S. Dep't of the Interior, Woodpeckers, Private Landowners Share Homes Under New "Safe Harbor" Conservation Plan (Mar. 1, 1995), <http://www.fws.gov/news/historic/1995/19950301.pdf>. According to this news release, Secretary Babbitt cited the "flexibility of the current Endangered Species Act," as a way to "offer[] private landowners an incentive to be good stewards of their land and provide habitat for endangered and threatened species," while offering an "ironclad guarantee that they will not be subject to restrictions later on if they succeed in attracting endangered species to their land." *Id.* The "no surprises" policy was first announced with the release of the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process in 1996. 61 Fed. Reg. 63,854 (Dec. 2, 1996). The policy provided that "under no circumstances, including extraordinary circumstances, shall an HCP permittee who is abiding by the terms of their HCP be required to provide a greater financial commitment or accept additional land use restrictions on property available for economic use or development." *Id.* at 63,857. The policy was sustained in *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 44 (D.D.C. 2007).

and development activities may be halted by choosing to “shoot, shovel, and shut up,” eliminating protected species from their properties or destroying habitats of species that may be listed in the future.¹⁶⁷ The new policies provided assurances to property owners that their cooperation in protecting valuable habitats would neither expose them to unexpected liabilities nor escalating restrictions on the use of their property, so long as plans to mitigate risks to endangered wildlife were observed. Aware of the potential breadth of regulation associated with the harm rule, the agency began to consider other ways to minimize its impact. For example, the DOI proposed a rule that would “creat[e] a new set of presumptions which would exempt certain small landowners and categories of small-scale or negligible-impact activities from possible incidental take liability for threatened species.”¹⁶⁸ The actual effect of this exemption might be small; it would apply only to threatened, not endangered, species.¹⁶⁹ For endangered species, the agency simply lacks statutory authority to provide such exemptions.¹⁷⁰ Nonetheless, it sent a signal to landowners that the agency was willing to moderate the sometimes severe effects of the harm rule on pre-existing property rights.

2. *Sweet Home* and Closeting

By any measure, at the time of *Sweet Home*, the harm rule was a “major issue” in the implementation of the ESA and fundamentally altered the scope of the DOI’s regulatory authority. Yet, even a close reading of Justice Stevens’ opinion in *Sweet Home* provides few hints of the rule’s dramatic effects. To be sure, the Court acknowledged in closing that “the Act encompasses a vast

167. Lin, *supra* note 164, at 382. The phrase “shoot, shovel, and shut up,” as Professor Eskridge notes, traces to Chuck Cushman, Executive Director of the American Land Rights Association. Eskridge, *supra* note 3, at 902–03 (citing Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825, 826 (1997)). For discussion of the “perverse incentives” associated with strict ESA enforcement, see Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights & Environmental Protection*, 1 N.Y.U.J.L. & LIBERTY 987, 1006–09 (2005); Amara Brook et al., *Landowners’ Responses to an Endangered Species Act Listing and Implications for Encouraging Conservation*, 17 CONSERVATION BIOLOGY 1638 (2003).

168. Endangered and Threatened Wildlife and Plants; Proposed Rule Exempting Certain Small Landowners and Low-Impact Activities from Endangered Species Act Requirements for Threatened Species, 60 Fed. Reg. 37,419, 37,420 (proposed Jul. 20, 1995) (to be codified at 50 C.F.R. pt. 17).

169. *Id.* at 37,419.

170. Ruhl, *Who Needs Congress*, *supra* note 148, at 395–96 (“FWS is authorized to fashion exemptions only for threatened species because these species do not automatically receive the take prohibition extended to endangered species. Moreover, since no authority for deviating from the take prohibition and incidental take permitting structure of the statute exists, FWS can not extend the exemption to listed endangered species.”).

range of economic and social enterprises and endeavors,"¹⁷¹ but there is little else in the opinion that alerts the reader to the importance of the issue under consideration. In fact, in the few instances in which the potential application of the harm rule is discussed, its reach seems to be descriptively minimized by the Court, effectively closeting significant legal issues from view.

For example, the Court evokes the "one creek" view of the ESA when it describes the consequences of striking down the harm rule, noting that the agency would be powerless to respond "when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat."¹⁷² But the Court neither mentions nor considers the larger ramifications of the rule, which was increasingly used to leverage the development of HCPs encompassing large geographic areas and multiple species. Similarly, the Court discusses only criminal and civil enforcement of the rule's prohibition, entirely ignoring its deployment in support of large-scale, agency-centered regulatory initiatives.¹⁷³

Indeed, the Court, in contrasting the take prohibition with other provisions of the ESA, provided a deceptively narrow description of the ways in which the harm rule may be deployed by the agency. It said that, unlike the government's ability to protect endangered species through habitat purchases under section 5 of the ESA, "the Government cannot enforce the [take] prohibition until an animal has actually been killed or injured."¹⁷⁴ The assertion has proven to be both incorrect and incomplete. It is incorrect because, as post-*Sweet Home* cases confirm, a plaintiff may seek to enjoin conduct that is expected to result in an imminent "take" of an endangered species.¹⁷⁵ It is incomplete because it ignores that it is "*citizen* suit litigation,

171. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995).

172. *Id.* at 699–700.

173. *See id.* at 702.

174. *Id.* at 703.

175. *See Marbled Murrelet v. Pac. Lumber Co.*, 83 F.3d 1060, 1066 (9th Cir. 1996) ("A reasonably certain threat of imminent harm to a protected species is sufficient for the issuance of an injunction under section 9 of the ESA."). The burden that a private party or the government must shoulder in support of a claim for injunctive relief for a prospective "take" of endangered species remains a controversial issue before the courts. Compare the results in *Marbled Murrelet* with the First Circuit's decision in *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993) ("[C]ourts have granted injunctive relief only where petitioners have shown that the alleged activity has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species."). The proof that a take will occur also serves as a predicate for the issuance of an incidental take statement or permit. *See Ariz. Cattle Growers Ass'n. v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1242 (9th Cir. 2001) ("[A]bsent rare circumstances such as those involving migratory species, it is arbitrary and capricious to issue an Incidental Take Statement when the Fish and Wildlife Service has no rational basis to conclude that a take will occur incident to the otherwise lawful activity."). For discussion of the burden of proof question, see Boudreaux, *supra* note 130, at 750–56; James R. Rasband, *supra* note 141, at 608–18.

not governmental action, that forms the bulk of suits for injunctive relief under the ESA.”¹⁷⁶ As Paul Boudreaux notes, “[t]he teeth of the [take prohibition] are found in its empowerment of plaintiffs to enjoin conduct *before* it occurs,” which “places within the target of plaintiffs all private economic activity that disturbs the environment and threatens protected species.”¹⁷⁷ Even more significantly, this statement closets the combined effect of the harm rule and the agency’s section 10 permitting authority and the potentially vast regulatory scope of the emerging HCP policies.

It is not as if the Court was not informed about the agency’s activities under the harm rule. The extensive briefing in the case highlighted the vast scope, sometimes severe consequences, and perverse incentives associated with the implementation of the rule.¹⁷⁸ Indeed, the D.C. Circuit, in striking down the rule, cited the large-scale implications of the rule as a basis for suggesting an “improbable relation to congressional intent”¹⁷⁹—a veritable plea for applying the major issues exception to the rule of *Chevron* deference.

In like fashion, the Court’s opinion offers no suggestion that the broad sweep of the harm rule might raise serious constitutional issues, perhaps issues serious enough to support invocation of the avoidance canon. The singular reference to an issue of potential constitutional significance in the opinion is a footnote in which the Court rejected a plea for applying the rule of lenity in support of a narrow interpretation of the ESA.¹⁸⁰

Like the major issues themes, the absence of any discussion of possible constitutional objections to the harm rule cannot be explained on the simple ground that none were raised in briefs before the Court. Arizona’s brief noted

176. Boudreaux, *supra* note 130, at 751 n.101.

177. *Id.* at 750.

178. See Brief Amicus Curiae of Pac. Legal Found., et al. in Support of Respondents at *1, *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (No. 94-859), 1994 U.S. Briefs 859, 1995 U.S. S. Ct. Briefs LEXIS 226 (“[The] ‘harm’ regulation as applied in this state forbids most types of otherwise permissible, ordinary land use activities on millions of acres of private land.”); Brief Amicus Curiae of Mountain States Legal Found., et al. in Support of Respondents at *19, *Sweet Home*, 515 U.S. 687 (No. 94-859), 1994 U.S. Briefs 859, 1995 U.S. S. Ct. Briefs LEXIS 234 (“[T]he ‘harm’ regulation has become a bureaucratically-minted tool for the federal land use management of private property.”); Brief of Amicus Curiae State of Texas in Support of Affirmance at *6, *Sweet Home*, 515 U.S. 687 (No. 94-859), 1994 U.S. Briefs 859, 1995 U.S. S. Ct. Briefs LEXIS 191 (“Using the overexpansive ‘harm’ regulation, the FWS has . . . seized control over land use planning throughout large sections of the state from Texas and its local governments.”); Brief of the Inst. of Justice as Amicus Curiae in Support of Respondents at *37–*38, *Sweet Home*, 515 U.S. 687 (No. 94-859), 1994 U.S. Briefs 859, 1995 U.S. S. Ct. Briefs LEXIS 229 (arguing that the incentive effects of the rule will lead to greater habitat destruction).

179. *Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt*, 17 F.3d 1463, 1465 (D.C. Cir. 1994), *rev’d* 515 U.S. 687 (1995).

180. *Sweet Home*, 515 U.S. at 704 n.18.

that "[s]ignificant questions exist as to whether the federal government has authority under the United States Constitution to" regulate private uses of land.¹⁸¹ Invoking the Tenth Amendment, the State also argued:

Considering the long history of congressional deference to states in the management of nonfederal lands and natural resources, which is reiterated in the act, it is inconceivable that Congress would so radically alter that policy by the use of a single word in a section of the Act that does not even mention habitat modification.¹⁸²

Similarly, Texas's brief directly addressed the applicability of the avoidance canon and *Chevron*. The State argued that deference under *Chevron* was "inappropriate because the challenged agency regulation intrudes into areas of constitutionally-protected state authority without a plain statement from Congress."¹⁸³

What is most striking about the Court's silence on potential constitutional objections to the harm rule is that within ten days of oral argument in *Sweet Home*, the Court handed down its decision in *United States v. Lopez*.¹⁸⁴ The dramatic decision in *Lopez* spawned serious questions about just how far the Court was willing to go in ending its decades-long acquiescence in expansive exercises by Congress of that institution's constitutional authority to regulate commerce among the several states. And, of course, it is the commerce power that provides the constitutional warrant for Congress's enactment of the ESA.¹⁸⁵ In *Lopez*, the Court concluded that the Gun Free School Zones Act exceeded the limits of the commerce power, principally because it was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise."¹⁸⁶ The Court also expressed considerable concern that the legislation placed a national footprint in an area "where States historically have been sovereign."¹⁸⁷

And what of the section 9 take prohibition in the ESA, as implemented by the harm rule? Could it not plausibly be described in precisely the same terms as the legislation struck down in *Lopez*? Undoubtedly, many, if not most, instances of "habitat modification" can easily be described as "economic activity," but the harm rule does not specifically target such activities, nor by its terms is the rule limited to such instances.¹⁸⁸ Moreover, the Court had

181. Brief of Amicus Curiae State of Arizona et al. in Support of Respondents at *30, *Sweet Home*, 515 U.S. 687 (No. 94-859), 1994 U.S. Briefs 859, 1995 U.S. S. Ct. Briefs LEXIS 178.

182. *Id.* at *39.

183. Brief for State of Texas, *supra* note 178, at *4.

184. *United States v. Lopez*, 514 U.S. 549 (1995).

185. *See* 40 Fed. Reg. 44,412.

186. *Lopez*, 514 U.S. at 561.

187. *Id.* at 564.

188. *See* Karkkainen, *supra* note 154, at 78 n.430 ("I am prohibited from destroying the habitat of a nesting pair of bald eagles whether I do it for the commercial purpose of building a

recently emphasized that land use regulation—the primary target of the harm rule—is “a function traditionally performed by local governments.”¹⁸⁹ While, as we shall see, the ESA has been able to withstand constitutional challenges under the commerce clause, is it not fairly obvious that the harm rule at the least raises a “serious constitutional question” that might warrant invocation of the avoidance rule? And if so, what explains the Court’s silence on the question, particularly given the release of the *Lopez* decision?

The puzzlement becomes greater when one considers the Court’s later decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (SWANCC).¹⁹⁰ In that case, the Court refused to extend *Chevron* deference to an agency rule defining the geographic scope of the Clean Water Act.¹⁹¹ The rule in question defined “waters of the United States” to include “waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce”¹⁹² The Corps of Engineers had interpreted this regulation to confer jurisdiction on the agency over intrastate waters that served as habitat for migratory birds or endangered species—an interpretation that became known as the Migratory Bird Rule.¹⁹³ In SWANCC, the Corps relied on the rule to assert jurisdiction over an “isolated water”—an abandoned gravel mining site that had, through natural processes, become scattered with permanent and seasonal ponds of varying sizes and depths.¹⁹⁴ The waters within the site were found to provide habitat for over 120 species of migratory birds.¹⁹⁵ Having established its jurisdiction, the Corps demanded that a regional solid waste management agency, which planned to use the site as a landfill, secure a Clean Water Act permit before placing any fill material in the protected waters.¹⁹⁶ The agency’s permit application was ultimately denied by the Corps, which found that the solid waste agency’s activities would have a variety of undesirable environmental effects.¹⁹⁷

On review of the agency’s action, the Court held that the Migratory Bird Rule exceeded the Corps’ authority under the Clean Water Act. While the

shopping center, or for the noncommercial use I plan to make of the land for my own aesthetic enjoyment.”).

189. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

190. 531 U.S. 159 (2001).

191. *Id.* at 172.

192. *Id.* at 163 (quoting 33 C.F.R. § 328.3(a)(3)(1999)).

193. *Id.* at 164 (citing 51 Fed. Reg. 41,217).

194. *Id.* at 162–63.

195. SWANCC, 531 U.S. at 164.

196. *Id.* at 163–64.

197. *Id.* at 165.

Court found the statute to be "clear" in denying the Corps such authority, it held that even if it concluded otherwise, it would not have extended *Chevron* deference to the Corps' action.¹⁹⁸ The Court said, "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."¹⁹⁹ Noting its concern to avoid constitutional issues, and an "assumption that Congress does not casually authorize administrative agencies . . . to push the limit of congressional authority," the Court added that this concern is "heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."²⁰⁰

Invoking *Lopez*, the Court expressed doubt about whether the Migratory Bird Rule could be characterized as regulating activities that are "plainly of a commercial nature," noting that this characterization was a "far cry, indeed, from the . . . 'waters of the United States' to which the statute by its terms extends."²⁰¹ Furthermore, the rule "would result in a significant impingement of the States' traditional and primary power over land and water use," altering "the federal-state balance" in derogation of the statute's stated purpose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources"²⁰²

The parallels between the regulation struck down in *SWANCC* and the harm rule at issue in *Sweet Home* are striking. Both directly impact state and local governments' "traditional and primary power over land and water use."²⁰³ And whether, as a criminal prohibition, the take prohibition addresses "economic" or "commercial" activity is a difficult question to resolve, and depends to some extent on the very same sort of characterization problems noted in *SWANCC*.

In the wake of *Lopez*, several challenges to the harm rule under the commerce clause were initiated, all of which were obviously regarded by the respective reviewing courts as raising serious constitutional questions. For example, in *National Ass'n of Home Builders v. Babbitt*, a three-judge panel of the D.C. Circuit divided three ways, with one dissent, in upholding the harm rule as applied to development activities that would "take" by habitat modification members of the endangered Delhi Sands Flower-Loving Fly population.²⁰⁴ Echoing the "characterization" problem alluded to in *SWANCC*,

198. *Id.* at 172.

199. *Id.*

200. *SWANCC*, 531 U.S. at 172–73.

201. *Id.* at 173.

202. *Id.* at 174 (quoting 33 U.S.C. § 1251(b)).

203. *Id.* at 174.

204. 130 F.3d 1041 (D.C. Cir. 1997).

none of the judges could agree on precisely what the relevant “regulated activity” was that might be said to “substantially affect interstate commerce.”²⁰⁵

When the issue came before the same court again in 2003, the problem persisted. In *Rancho Viejo, LLC v. Norton*, the court held that the “precise activity that is regulated in this case . . . is Rancho Viejo’s planned commercial development, not the arroyo toad that it threatens.”²⁰⁶ Chief Judge Ginsburg filed a concurring opinion, stressing that it was the “large-scale residential development” that was the relevant regulated activity.²⁰⁷ He concluded it is “[j]ust as important, however, [that] the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.”²⁰⁸ Dissenting from the denial of a petition for rehearing en banc, two judges in the circuit took issue with this characterization of the regulated activity. Judge Sentelle, adhering to the view expressed in *National Home Builders*, insisted the regulated activity was the “taking” of a “purely local toad” and that that activity “does not have any substantial relationship to interstate commerce.”²⁰⁹ Likewise, then-judge, now Chief Justice Roberts objected that it was not the development that should be considered, but whether prohibiting “the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating ‘Commerce [] among the several States.’”²¹⁰

Other courts of appeals have also struggled with commerce clause challenges to the ESA’s harm rule. In *Gibbs v. Babbitt*, a divided Fourth Circuit panel upheld a rule extending the take prohibition to an experimental population of wolves that had been reintroduced into North Carolina and Tennessee.²¹¹ Judge Luttig filed a spirited dissent, concluding,

[W]e are confronted here with an administrative agency regulation of an activity that implicates but a handful of animals, if even that, in one small

205. See *id.* at 1054 (Wald, J., plurality opinion) (describing the regulated activity as the “taking” of endangered animals”); *id.* at 1059 (Henderson, J., concurring) (“Insofar as application of section 9(a)(1) of ESA here acts to regulate commercial development of the land inhabited by the endangered species,” it is within the commerce power); *id.* at 1065 (Sentelle, J., dissenting) (concluding that “[t]here is no showing . . . that a reduction or even complete destruction of the viability of the Delhi Sands Flower-Loving Fly will in fact” affect interstate commerce). For a discussion of the problem of identifying the “regulated activity” for purposes of commerce clause analysis, see John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 208–14 (1998).

206. 323 F.3d 1062, 1072 (D.C. Cir. 2003).

207. *Id.* at 1080 (Ginsburg, C.J., concurring).

208. *Id.*

209. *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1158–59 (D.C. Cir. 2003) (Sentelle, J., dissenting).

210. *Id.* at 1160 (Roberts, J., dissenting) (quoting U.S. CONST. art. I, § 8, cl. 3).

211. 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom.*, 531 U.S. 1145 (2001).

region of one state. An activity that not only has no current economic character, but one that concededly has had no economic character for well over a century now. An activity that has no foreseeable economic character at all, except upon the baldest . . . of speculation²¹²

Similarly, in *GDF Realty Investments, Ltd. v. Norton*, the Fifth Circuit sustained a commerce clause attack on the ESA's taking prohibition as applied to six species of invertebrate cave species found only in two counties in Texas.²¹³ Six circuit judges dissented from the denial of a petition for rehearing en banc. Writing for the dissenters, Judge Jones argued that the panel's decision "crafted a constitutionally limitless theory of federal protection. Their opinion lends new meaning to the term *reductio ad absurdum*."²¹⁴ In the dissenters' view, "there is no link . . . between Cave Species takes and any sort of commerce"²¹⁵ The constitutionality of the ESA's take prohibition under the commerce clause has also generated a substantial scholarly literature.²¹⁶

Prima facie, then, *Sweet Home* presented a strong case for applying either the major issues or avoidance canon exceptions to *Chevron*. Yet, nowhere in the Court's opinion is there even the slightest hint that the application of *Chevron* might be problematic. In the next Part, I offer some suggestions in support of the Court's decision and defend the application of *Chevron* in *Sweet Home*.

II. *CHEVRON*, ADMINISTRATIVE LAW-MAKING, AND CONGRESSIONAL DELEGATION

What may explain the Court's reluctance to consider directly whether, due to the great significance of, or to the serious constitutional issues raised by, the harm rule, *Chevron* might properly be invoked? Part of the explanation may lie in conventional doctrinal terms. The Court reminded us that the challenge to the rule was a "facial challenge," requiring the Court to consider only whether the regulation would be inconsistent with the ESA in all of its possible applications.²¹⁷ Surely, there are at least some applications of the harm rule

212. *Id.* at 508–09 (Luttig, J., dissenting).

213. 326 F.3d 622, 624 (5th Cir. 2003), *rehearing en banc denied*, 362 F.3d 286 (5th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005).

214. *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 287 (5th Cir. 2004) (denial of rehearing en banc) (Jones, J., dissenting).

215. *Id.* at 291.

216. For a sampling, see Michael C. Blumm & George Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 ENVTL. L. 309 (2004); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723 (2002); Nagle, *supra* note 206.

217. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 699–700 (1995).

that would be considered a “take,” even by Justice Scalia’s more demanding interpretation of the term, and just as surely, some of these undoubted “takes” would clearly have a “significant effect” on interstate commerce so as to survive a challenge under the commerce clause. Under the terms of the “facial challenge,” the more controversial and expansive applications of the harm rule could legitimately be ignored by the Court. For the more uncontroversial applications of the rule, the agency’s action would appear more in the nature of an “interstitial,” gap-filling exercise of delegated authority that does not push the boundaries of constitutional authority.

This explanation, while reasonable, is not entirely satisfying. And, indeed, as we shall see, the Court itself does not completely honor it. A careful review of the various opinions in *Sweet Home* makes clear that the question of whether “habitat modification” may “harm” an endangered or threatened animal, and thus, constitute a “take,” was largely a red herring. Given the 1982 amendments to the ESA, and the supporting legislative history, there can be little question that any attempt by the DOI to completely exclude habitat modification on private lands from the scope of the ESA’s protections for endangered and threatened wildlife would be treated as inconsistent with the agency’s statutory responsibilities. In this sense, the harm rule, or perhaps a more limited version of it, was “hard-wired” into the ESA. But this was not the target of those who challenged the harm rule in *Sweet Home*. Instead, the critical issue in the case, and one on which the challengers of the rule focused their energy, was the rule’s application to “private land use activities indirectly affecting listed wildlife, but in no respect directed at wildlife or directly injuring specific animals.”²¹⁸ In other words, the critical question was just how broadly the implementing agency might (or might continue to) apply a rather ambiguous agency regulation.

Consider, first, Justice Scalia’s dissent. He objected that the harm rule “has three features which . . . do not comport with the statute,”²¹⁹ but importantly, none of his “three features” targeted the simple inclusion of “habitat modification” as means of “harming” protected animals.²²⁰ Instead, Justice Scalia first found objectionable that the rule prohibits “habitat modification *that is no more than the cause-in-fact of death or injury to wildlife.*”²²¹ The second objectionable feature for the Justice was that the rule “does not require an ‘act,’” because it “covers omissions.”²²² Finally, and “most important,” Justice Scalia found that the rule “encompasses injury inflicted, not only upon

218. Brief for Respondents at *8, *Sweet Home*, 515 U.S. 687 (1995) (No. 94-859), 1995 WL 13051.

219. *Sweet Home*, 515 U.S. at 715 (Scalia, J., dissenting).

220. *Id.*

221. *Id.* (emphasis added).

222. *Id.* at 716.

individual animals, but upon populations of the protected species.”²²³ While Justice Scalia focused his attack on the rule, it seems that a better description of his target of attack was the harm regulation *as interpreted in the Palila cases*. Indeed, the regulation itself does not explicitly adopt any of the “objectionable” features upon which Justice Scalia relied to conclude that the rule lacked supporting authorization in the ESA.

The Court majority may have responded to Justice Scalia’s arguments by treating them simply as potential applications or interpretations of the rule that can, and should, be ignored when considering a facial attack. But it did not. Instead, the Court replied that the dissent had simply read the rule too broadly. With no mention of *Chevron*, (or better yet, *Seminole Rock*²²⁴) the Court stated that “we do not agree with the dissent that the regulation covers results that are not ‘even foreseeable . . . no matter how long the chain of causality between modification and injury.’”²²⁵ Instead, the Court noted, the rule incorporates “ordinary requirements of proximate causation and foreseeability” that limit the scope of its application.²²⁶ Likewise, the Court noted that the terms of the rule “obviously require” a demonstration of “‘but for’ causation” and actual injury or death to a protected species.²²⁷ While not going quite as far as Justice O’Connor’s concurrence, these observations certainly cast some doubt on the continuing viability of the *Palila* cases, which Justice O’Connor declared to be “wrongly decided.”²²⁸ To be sure, the Court equivocated a bit, noting that “[i]n the elaboration an enforcement of the ESA, the Secretary . . . will confront difficult questions of proximity and degree[.]” suggesting some room for continuing agency discretion regarding the scope of the regulation.²²⁹ And it was this equivocation that likely explains Justice Scalia’s dissent.

The Court’s conclusions have proven to have some significant effects on the scope of the harm rule. Professor Rasband notes that “the post-*Sweet Home* case law appears to be taking a narrower view of when habitat modification

223. *Id.*

224. The *Seminole Rock* doctrine holds that an agency’s interpretation of its regulation will be upheld by the courts “unless it is plainly erroneous or inconsistent with the regulation.” *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

225. *Sweet Home*, 515 U.S. at 696 n.9.

226. *Id.* at 700 n.13. The Court also suggested that Justice Scalia misinterpreted the rule in claiming that it does not require proof of injury to particular animals. It noted that “every term in the regulation’s definition of ‘harm’ is subservient to the phrase ‘an act which actually kills or injures wildlife.’” *Id.*

227. *Id.*

228. *Id.* at 714 (O’Connor, J., concurring). Justice O’Connor also interpreted the harm rule to “require[] demonstrable effect (*i.e.*, actual injury or death) on actual, individual members of the protected species.” *Id.* at 711.

229. *Id.* at 708 (Stevens, J., majority opinion).

will be considered the proximate cause of harm to a protected species.”²³⁰ Professor Ruhl is less equivocal in his assessment of the effects of the Court’s foray into issues of causation and effect; he describes the decision as one that “substantially undercuts the take prohibition” and as a “stunning blow to the statute’s vitality.”²³¹ Even those who challenged the rule, and lost, claimed something of a victory from the Court’s decision, concluding that *Sweet Home* “narrowly construed” the harm regulation.²³²

The Court’s brief peek into, and consideration of, possible applications of the rule were, indeed, responsive to the challengers’ primary concerns about the harm rule, but they also underscore the intensely factual and policy-driven nature of the issues surrounding the rule. The Court’s brief discussion also tends to reflect the relative infrequency of prior litigation over the rule from which clear agency policy choices could be gleaned. Indeed, at the time of decision there were few reported cases involving government prosecutions for criminal or civil penalties for violations of the rule.²³³ Much of the “law” governing the harm rule remained, and still remains, to be made.

In these circumstances, the Court’s invocation of *Chevron* and its refusal to say that the ESA either prohibited or compelled the agency to treat habitat modification as a “take” seem appropriate. To be sure, the closeted major issues and avoidance canon exceptions to *Chevron* might have, and could have, supported a different approach, but their application in *Sweet Home* was not clearly warranted. Indeed, the restraint exercised by the Court in *Sweet Home* underscores precisely why this was a harder “hard” case. In *Sweet Home*, the Court confronted the limits of *Chevron* and the possibility that in *Chevron*, it had made a serious category mistake.

The *Chevron* doctrine was born out of a long-standing, and sometimes strident, dispute between various interest groups about how the Clean Air Act should be implemented in areas that were failing to attain air quality standards. These disputes were, in turn, part of a larger debate on the effectiveness and

230. Rasband, *supra* note 141, at 618; *see also* Federico Cheever & Michael Balster, *The Take Prohibition in Section 9 of the Endangered Species Act: Contradictions, Ugly Ducklings, and Conservation of Species*, 34 ENVTL. L. 363, 366 (2004) (“nine years after *Sweet Home*, the federal courts have yet to put jurisprudential flesh on the statutory bones of the section 9 take prohibition. Issues regarding burden of proof have remained stalled at a rudimentary level.”); Houck, *supra* note 32, at 425–26 (discussing the pro-environmentalist leveraging power that exists as an effect of *Sweet Home*).

231. Ruhl, *Fall From Grace*, *supra* note 144, at 502.

232. Steven P. Quarles et al., *Sweet Home and the Narrowing of Wildlife “Take” Under Section 9 of the Endangered Species Act*, 26 ENVTL. L. REP. 10003, 10017 (1996). The authors of this article represented the respondents in *Sweet Home*.

233. *See id.* at 10005.

wisdom of federally enforced "command and control" regulation.²³⁴ Some maintained that strict, inflexible emissions limitations on sources were needed to protect public health and welfare, and that "new" sources should be subject to especially strict, state of the art pollution controls.²³⁵ Others argued that such an approach was too costly and inhibited capital investment in "dirty air" areas or in newer, cleaner plant and equipment, effectively extending the lives of older, dirtier sources and contributing to persistent air quality problems.²³⁶ The latter, "unintended consequences" of strict pollution controls were particularly acute for sources in so-called nonattainment areas. Any "modification" of such a source that caused an "increase" in air pollutants would legally convert the existing source into a "new" source, subjecting it to expensive and time-consuming permitting procedures and stringent, technology-based emission limitations.

Faced with these contending arguments, and eager to implement a new administration's commitment to reducing the burdens of federal regulation, the Environmental Protection Agency promulgated the so-called "bubble" rule.²³⁷ In essence, the rule permitted regulated entities to aggregate all of the various air pollutant emitting equipment together on a plant-wide basis and to treat the aggregated emissions as emanating from a single source, encasing the entire plant as if it were within a "bubble."²³⁸ If one piece of equipment within the bubble was modified in a way that increased pollution from baseline levels for that equipment, that increase could be offset by reducing emissions from any other emission point within the bubble.²³⁹ If the offset kept total emissions within the bubble at, or better yet, below pre-modification levels, the time-consuming permit procedures and stringent emissions controls could be avoided because there would be no increase in total emissions.²⁴⁰ For the EPA, the vehicle for achieving this significant policy innovation was to redefine the term "stationary source" to include "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person."²⁴¹

234. Richard B. Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 HARV. ENVTL. L. REV. 1, 1-3 (1985).

235. *Id.* at 2-3.

236. See, e.g., Laurens H. Rhinelander, *The Bubble Concept: A Pragmatic Approach to Regulation Under the Clean Air Act*, 1 VA. J. NAT. RESOURCES L. 177, 224 (1981).

237. See, e.g., Foote, *supra* note 22, at 680.

238. Requirements for Preparation, Adoption and Submittal of Implementation Plans, 44 Fed. Reg. 3,274, 3,276 (Jan. 16, 1979) (to be codified at 40 C.F.R. pt. 51).

239. *Id.* at 3,277.

240. *Id.*

241. 40 C.F.R. §§ 51.18(j)(1)(i)-(ii) (1983).

The redefinition of the term “stationary source” was not driven, of course, by an exercise of “statutory interpretation,” though the agency did offer “legal” reasons in support of its action.²⁴² Rather, the rule was a complex policy choice that the agency, consistent with the views of the existing administration, believed could best meet its obligations under delegated statutory authority. It was, in other words, the product of a process “of bureaucratic implementation to meet administrative goals.”²⁴³ The rule did not answer all questions that would likely arise in its application—for example, what does “adjacent” or “contiguous” mean? So there remained a considerable amount of interstitial and complex lawmaking to be done as the agency went about its responsibilities. But when challenged, the question posed to the Court was not whether the agency’s choice was a reasonable one, given the complex policy options available to the agency.²⁴⁴ Instead, the question was posed as whether the agency had correctly “interpreted” the Clean Air Act’s statutory language.²⁴⁵

And the Court in *Chevron* bought that characterization of the issue, positing the issue as one involving review of “an agency’s construction of the statute which it administers.”²⁴⁶ Ultimately, however, the Court affirmed the agency’s action on grounds that had little to do with interpretation and a lot more to do with sound administrative governance. The Court held that the agency’s action “represent[ed] a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.”²⁴⁷ This is precisely the sort of judgment courts had been making when reviewing agency action under the “arbitrary and capricious” standard codified by the Administrative Procedure Act.²⁴⁸ In promulgating the new “source” rule, the agency was not engaged in a process of “statutory interpretation;” it was, instead, engaged in a process of lawmaking.²⁴⁹

The Court’s conclusion in *Chevron* is, moreover, like the Administrative Procedure Act itself, predicated in large measure on the choices Congress evidently made in the statutory scheme about how the respective jurisdictions

242. Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 16,280, 16,281 (Mar. 12, 1981) (to be codified at 40 C.F.R. pts. 51 and 52).

243. Foote, *supra* note 22, at 685.

244. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840, 845 (1984).

245. *Id.* at 840.

246. *Id.* at 842.

247. *Id.* at 865 (internal citations omitted).

248. See, e.g., *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 413–14 (1971) (discussing arbitrary and capricious standard).

249. See *Chevron*, 467 U.S. at 865–66.

of the courts and agency should be allocated and defined. In *Chevron*, the Court acknowledged that in some cases the courts must "reconcile competing political interests," but when Congress has delegated to an agency the authority to implement a statutory program, "federal judges . . . have a duty to respect the legitimate choices made by" the agency.²⁵⁰

Turning to *Sweet Home*, we can now readily see the poverty in casting the issue before the Court as one of reviewing an agency's exercise of "statutory interpretation." To be sure, the question whether a "taking" could be effected through "habitat modification" is a question that implicates the scope of the agency's statutory authority. But at the time of decision, the agency was faced not with demands about how the statute should be interpreted, but rather with conflicting demands about just how aggressively the harm rule should be implemented. And, as we have seen, it was precisely this issue that commanded the Court's attention. Yet, the answer to that question was at the time open to considerable doubt. The agency faced a serious policy challenge. In the face of *Palila* and like decisions, and limited resources, the agency knew that it needed to provide assurances to potentially regulated parties that their responsibilities under the ESA would not place unreasonable demands upon them or unnecessarily restrict the uses that could be made of their property or the scope of their economic activities. Without such assurances, the agency understood that the incentive structure of the existing state of affairs might dramatically increase the incidence of "shoot, shovel, and shut up" behavior, with the resulting loss of valuable habitat and biodiversity that regulated parties might otherwise be willing to protect.

The agency was just beginning to respond to these policy challenges at the time of *Sweet Home*. The harm rule, coupled with the agency's section 10 incidental take permitting authority and its "safe harbor" and "no surprises" initiatives, provided the agency with leverage to bring interested parties into a conversation about how the "technical and complex" regulatory program might be molded in ways such that "manifestly competing interests" might be reconciled.²⁵¹ This intensively policy-driven process of lawmaking had little to do with "statutory interpretation" and a lot more to do with law-making. As in *Chevron*, the Court concluded that the agency should be permitted to engage such a process, so long as it proceeded in a "reasonable" manner. This is an eminently defensible, and appropriate, application of *Chevron*, even if *Chevron* itself may be faulted for failing to distinguish between acts of interpretation and acts of policymaking.

250. *Id.*

251. *Id.* at 865.

CONCLUSION

In an influential essay published nearly three decades ago, Robert Cover spoke of an imagined world of “jurisgenerative” processes in which “communities of mutually committed individuals,” sometimes “split over major issues of interpretation,” “create law and . . . give meaning to law through their narratives and precepts, their somewhat distinct *nomos*.”²⁵² He recognized that in the “real” world, the jurisgenerative process “takes place in the shadow of violence.”²⁵³ The agents of such violence may be varied, but courts are sometimes assigned a “special role” in effecting such violence: “Courts, at least the courts of the state, are characteristically ‘jurispathic.’”²⁵⁴ His insight is that, in many circumstances, the “origin of and justification for a court is . . . understood to suppress law, to choose between two or more laws, to impose upon laws a hierarchy.”²⁵⁵ In this fashion, “the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities.”²⁵⁶ These jurispathic actions may sometimes be necessary to curtail open conflict, and potential violence, among competing private factions. But Professor Cover openly questioned just how “jurispathic” courts must be to ensure that the minimum conditions for communal living are satisfied. He ended his essay with the claim that “[l]egal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power.”²⁵⁷ To support a broad range of “legal meaning,” and ongoing jurisgenerative processes, Professor Cover made a plea to the courts “to stop circumscribing the *nomos*; we ought to invite new worlds.”²⁵⁸

The abstraction of Professor Cover’s notions of “jurisgenerative” processes that enlarge and enrich the “*nomos*” may seem far afield from the problem presented in *Sweet Home*. But a moment’s reflection may reveal some important parallels. In *Sweet Home*, we can, and properly should, view the position of the challengers and of Justice Scalia as one enlisting the Court’s authority to violently shut down the lawmaking (jurisgenerative) processes in which the agency was then engaged. We may similarly view any decision by the Court that the harm rule was “hard-wired” into the ESA as an act authorizing the agency to violently suppress the conflicting “law” under which those opposed to the rule were committed. But there is a third possibility, and *Chevron* provides it: it authorizes the agency to engage these conflicting “laws,” reconcile them, and create a “new world.” The Court was right to resist

252. Cover, *supra* note 24, at 40.

253. *Id.* at 50 n.137.

254. *Id.* at 40.

255. *Id.*

256. *Id.* at 44.

257. Cover, *supra* note 24, at 68.

258. *Id.*

the demand for more definitive action; better to let Congress's delegate assess the "manifestly competing interests," and use its expertise and accountability to fashion appropriate reconciling policies. Yes, *Sweet Home* was a harder "hard case," but not, or not only, for the reasons expressed by Professor Eskridge.

