SUPREME COURT OF THE UNITED STATES

No. 94–859

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS *v.* SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 29, 1995]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

I think it unmistakably clear that the legislation at issue here (1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds *for the acquisition of private lands*, to preserve the habitat of endangered animals. The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use. I respectfully dissent.

The Endangered Species Act of 1973, 16 U. S. C. §1531 *et seq.* (1988 ed. and Supp. V) (Act), provides that "it is unlawful for any person subject to the jurisdiction of the United States to take any [protected] species within the United States." §1538(a)(1)(B). The term "take" is defined as "to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." §1532(19) (emphasis added). The challenged regulation defines "harm" thus:

> "`Harm' in the definition of `take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR §17.3 (1994).

In my view petitioners must lose—the regulation must fall—even under the test of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984), so I shall assume that the Court is correct to apply *Chevron*. See *ante*, at 15–16, and n. 18.

The regulation has three features which, for reasons I shall discuss at length below, do not comport with the statute. First, it interprets the statute to prohibit habitat modification that is no more than the cause-in-fact of death or injury to wildlife. *Any* "significant habitat modification" that in fact produces that result by "impairing essential behavioral patterns" is made unlawful, regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury. See, *e.g.*, *Palila* v. *Hawaii Dept. of Land and Natural Resources (Palila II)*, 852 F. 2d 1106, 1108–1109 (CA9 1988) (sheep grazing constituted "taking" of palila birds, since although sheep do not destroy full-grown mamane trees, they do destroy mamane seedlings, which will not grow to full-grown trees, on which the palila feeds and nests). See also Davison, Alteration of Wildlife Habitat as a Prohibited Taking under the Endangered Species Act, 10 J. Land Use & Envtl. L. 155, 190 (1995) (regulation requires only causation-in-fact).

Second, the regulation does not require an "act": the Secretary's officially stated position is that an *omission* will do. The previous version of the regulation made this explicit. See 40 Fed. Reg. 44412, 44416 (1975) ("`Harm' in the definition of

`take' in the Act means an act or omission which actually kills or injures wildlife . . .”). When the regulation was modified in 1981 the phrase “or omission” was taken out, but only because (as the final publication of the rule advised) “the [Fish and Wildlife] Service feels that `act' is inclusive of either commissions or omissions which would be prohibited by section [1538(a)(1)(B)].” 46 Fed. Reg. 54748, 54750 (1981). In its brief here the Government agrees that the regulation covers omissions, see Brief for Petitioners 47 (although it argues that “[a]n `omission' constitutes an `act' . . . only if there is a legal duty to act”), *ibid*.

The third and most important unlawful feature of the regulation is that it encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species. “Injury” in the regulation includes “significantly impairing essential behavioral patterns, including *breeding*,” 50 CFR §17.3 (1994) (emphasis added). Impairment of breeding does not “injure” living creatures; it prevents them from propagating, thus “injuring” *a population* of animals which would otherwise have maintained or increased its numbers. What the face of the regulation shows, the Secretary's official pronouncements confirm. The Final Redefinition of “Harm” accompanying publication of the regulation said that “harm” is not limited to “direct physical injury to an individual member of the wildlife species,” 46 Fed. Reg. 54748 (1981), and refers to “injury *to a population*,” *id.*, at 54749 (emphasis added). See also *Palila II*, 852 F. 2d, at 1108; Davison, *supra*, at 190, and n. 177, 195; M. Bean, The Evolution of National Wildlife Law 344 (1983).[1]

None of these three features of the regulation can

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[1]The Court and JUSTICE O'CONNOR deny that the regulation has the first or the third of these features. I respond to their arguments in Part III, *infra*.

be found in the statutory provisions supposed to authorize it. The term "harm" in §1532(19) has no legal force of its own. An indictment or civil complaint that charged the defendant with "harming" an animal protected under the Act would be dismissed as defective, for the only *operative* term in the statute is to "take." If "take" were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself. To "take," when applied to wild animals, means to reduce those animals, by killing or capturing, to human control. See, *e.g.*, 11 Oxford English Dictionary (1933) ("Take . . . To catch, capture (a wild beast, bird, fish, etc.)"); Webster's New International Dictionary of the English Language (2d ed. 1949) (take defined as "to catch or capture by trapping, snaring, etc., or as prey"); *Geer* v. *Connecticut*, 161 U. S. 519, 523 (1896) ("[A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them") (quoting the Digest of Justinian); 2 W. Blackstone, Commentaries 411 (1766) ("Every man . . . has an equal right of pursuing and taking to his own use all such creatures as are *ferae naturae*"). This is just the sense in which "take" is used elsewhere in federal legislation and treaty. See, *e.g.,* Migratory Bird Treaty Act, 16 U. S. C. §703 (1988 ed., Supp. V) (no person may "pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill" any migratory bird); Agreement on the Conservation of Polar Bears, Nov. 15, 1973, Art. I, 27 U. S. T. 3918, 3921, T. I. A. S. No. 8409 (defining "taking" as "hunting, killing and capturing"). And that meaning fits neatly with the rest of §1538(a)(1), which makes it unlawful not only to take protected species, but also to import or export them (§1538(a)(1)(A)); to possess, sell, deliver, carry, transport, or ship any taken species (§1538(a)(1)(D)); and to transport, sell, or offer to sell them in interstate or foreign commerce (§§1538(a)(1)(E), (F).

The taking prohibition, in other words, is only part of the regulatory plan of §1538(a)(1), which covers all the stages of the process by which protected wildlife is reduced to man's dominion and made the object of profit. It is obvious that "take" in this sense—a term of art deeply embedded in the statutory and common law concerning wildlife—describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).

The Act's definition of "take" does expand the word slightly (and not unusually), so as to make clear that it includes not just a completed taking, but the process of taking, and all of the acts that are customarily identified with or accompany that process ("to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"); and so as to include attempts. §1532(19). The tempting fallacy—which the Court commits with abandon, see *ante*, at 9, n. 10—is to assume that *once defined*, "take" loses any significance, and it is only the definition that matters. The Court treats the statute as though Congress had directly enacted the §1532(19) definition as a self-executing prohibition, and had not enacted §1538(a)(1)(B) at all. But §1538(a)(1)(B) *is* there, and if the terms contained in the definitional section are susceptible of two readings, one of which comports with the standard meaning of "take" as used in application to wildlife, and one of which does not, an agency regulation that adopts the latter reading is necessarily unreasonable, for it reads the defined term "take"—the only operative term—out of the statute altogether.[2]

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[2]The Court suggests halfheartedly that "take" cannot refer to the taking of particular animals, because §1538(a)(1)(B) prohibits "tak[ing] any [endangered] *species*." *Ante*, at 9, n. 10. The suggestion is halfhearted because that reading obviously contradicts the statutory intent. It

That is what has occurred here. The verb "harm" has a *range* of meaning: "to cause injury" at its broadest, "to do hurt or damage" in a narrower and more direct sense. See, *e.g.,* 1 N. Webster, An American Dictionary of the English Language (1828) ("Harm, *v.t.* To hurt; to injure; to damage; *to impair soundness of body, either animal* or vegetable") (emphasis added); American College Dictionary 551 (1970) ("harm . . . *n.* injury; damage; hurt: *to do him bodily harm*"). In fact the more directed sense of "harm" is a somewhat more common and preferred usage; "*harm* has in it a little of the idea of specially focused hurt or injury, as if a personal injury has been anticipated and intended." J. Opdycke, Mark My Words: A Guide to Modern Usage and Expression 330 (1949). See also American Heritage Dictionary of the English Language (1981) ("*Injure* has the widest range. . . . *Harm* and *hurt* refer principally to what causes physical or mental distress to living things"). To define "harm" as an act or omission that, however remotely, "actually kills or injures" a population of wildlife through habitat modification, is to choose a meaning that makes nonsense of the word that "harm" defines—requiring us to accept that a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby "impairs [the] breeding" of protected fish, has "taken" or "attempted to take" the fish. It should take the strongest evidence to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense.

Here the evidence shows the opposite. "Harm" is

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would mean no violation in the intentional shooting of a single bald eagle—or, for that matter, the intentional shooting of 1,000 bald eagles out of the extant 1,001. The phrasing of §1538(a)(1)(B), as the Court recognizes elsewhere, see, *e.g.*, *ante*, at 7, is shorthand for "take any *member of* [an endangered] species."

merely one of 10 prohibitory words in §1532(19), and the other 9 fit the ordinary meaning of "take" perfectly. To "harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect" are all affirmative acts (the provision itself describes them as "conduct," see §1532(19)) which are directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals. The Court points out that several of the words ("harass," "pursue," "wound," and "kill") "refer to actions or effects that do not require direct *applications of force*." *Ante*, at 13 (emphasis added). That is true enough, but force is not the point. Even "taking" activities in the narrowest sense, activities traditionally engaged in by hunters and trappers, do not all consist of direct applications of force; pursuit and harassment are part of the business of "taking" the prey even before it has been touched. What the nine other words in §1532(19) have in common—and share with the narrower meaning of "harm" described above, but not with the Secretary's ruthless dilation of the word—is the sense of affirmative conduct intentionally directed against a particular animal or animals.

I am not the first to notice this fact, or to draw the conclusion that it compels. In 1981 the Solicitor of the Fish and Wildlife Service delivered a legal opinion on §1532(19) that is in complete agreement with my reading:

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

of April 17, 1981, reprinted in 46 Fed. Reg. 29490, 29491 (emphasis in original).

I would call it *noscitur a sociis*, but the principle is much the same: the fact that "several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well," *Beecham* v. *United States*, 511 U. S. ___, ___ (1994) (slip op., at 3). The Court contends that the canon cannot be applied to deprive a word of all its "independent meaning," *ante,* at 14. That proposition is questionable to begin with, especially as applied to long lawyers' listings such as this. If it were true, we ought to give the word "trap" in the definition its rare meaning of "to clothe" (whence "trappings")—since otherwise it adds nothing to the word "capture." See *Moskal* v. *United States*, 498 U. S. 103, 120 (1990) (SCALIA, J., dissenting). In any event, the Court's contention that "harm" in the narrow sense adds nothing to the other words underestimates the ingenuity of our own species in a way that Congress did not. To feed an animal poison, to spray it with mace, to chop down the very tree in which it is nesting, or even to destroy its entire habitat in order to take it (as by draining a pond to get at a turtle), might neither wound nor kill, but would directly and intentionally harm.

The penalty provisions of the Act counsel this interpretation as well. Any person who "knowingly" violates §1538(a)(1)(B) is subject to criminal penalties under §1540(b)(1) and civil penalties under §1540(a)(1); moreover, under the latter section, any person "who otherwise violates" the taking prohibition (*i.e.*, violates it *un*knowingly) may be assessed a civil penalty of $500 for each violation, with the stricture that "[e]ach such violation shall be a separate offense." This last provision should be clear warning that the regulation is in error, for when combined with the regulation it produces a result that no legislature could reasonably be thought to have intended: A

large number of routine private activities—farming, for example, ranching, roadbuilding, construction and logging—are subjected to strict-liability penalties when they fortuitously injure protected wildlife, no matter how remote the chain of causation and no matter how difficult to foresee (or to disprove) the "injury" may be (*e.g.*, an "impairment" of breeding). The Court says that "[the strict-liability provision] is potentially sweeping, but it would be so with or without the Secretary's `harm' regulation." *Ante*, at 8, n. 9. That is not correct. Without the regulation, the routine "habitat modifying" activities that people conduct to make a daily living would not carry exposure to strict penalties; only acts directed at animals, like those described by the other words in §1532(19), would risk liability.

The Court says that "[to] read a requirement of intent or purpose into the words used to define `take' . . . ignore[s] [§1540's] express provision that a `knowing' action is enough to violate the Act." *Ante*, at 13. This presumably means that because the reading of §1532(19) advanced here ascribes an element of purposeful injury to the prohibited acts, it makes superfluous (or inexplicable) the more severe penalties provided for a "knowing" violation. That conclusion does not follow, for it is quite possible to take protected wildlife purposefully without doing so knowingly. A requirement that a violation be "knowing" means that the defendant must "know the facts that make his conduct illegal," *Staples* v. *United States*, 511 U. S. ___, ___ (1994) (slip op., at 6). The hunter who shoots an elk in the mistaken belief that it is a mule deer has not knowingly violated §1538(a)(1)(B)—not because he does not know that elk are legally protected (that would be knowledge of the law, which is not a requirement, see *ante*, at 8, n. 9), but because he does not know what sort of animal he is shooting. The hunter has nonetheless committed a purposeful taking of protected wildlife, and would

therefore be subject to the (lower) strict-liability penalties for the violation.

So far I have discussed only the immediate statutory text bearing on the regulation. But the definition of "take" in §1532(19) applies "[f]or the purposes of this chapter," that is, it governs the meaning of the word *as used everywhere in the Act*. Thus, the Secretary's interpretation of "harm" is wrong if it does not fit with the use of "take" throughout the Act. And it does not. In §1540(e)(4)(B), for example, Congress provided for the forfeiture of "[a]ll guns, traps, nets, and other equipment . . . used to aid the taking, possessing, selling, [etc.]" of protected animals. This listing plainly relates to "taking" in the ordinary sense. If environmental modification were part (and necessarily a major part) of taking, as the Secretary maintains, one would have expected the list to include "plows, bulldozers, and back-hoes." As another example, §1539(e)(1) exempts "the taking of any endangered species" by Alaskan Indians and Eskimos "if such taking is primarily for subsistence purposes"; and provides that "[n]on-edible byproducts of species taken pursuant to this section may be sold . . . when made into authentic native articles of handicrafts and clothing." Surely these provisions apply to taking only in the ordinary sense, and are meaningless as applied to species injured by environmental modification. The Act is full of like examples. See, *e.g.,* §1538(a)(1)(D) (prohibiting possession, sale, and transport of "species taken in violation" of the Act). "[I]f the Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout," *Gustafson* v. *Alloyd Co.*, 513 U. S. ___, ___ (1995) (slip op., at 6), the regulation must fall.

The broader structure of the Act confirms the unreasonableness of the regulation. Section 1536 provides:

> "Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or *result in the destruction or adverse modification of habitat* of such species which is determined by the Secretary . . . to be critical." 16 U. S. C. §1536(a)(2) (emphasis added).

The Act defines "critical habitat" as habitat that is "essential to the conservation of the species," §§1532(5)(A)(i), (A)(ii), with "conservation" in turn defined as the use of methods necessary to bring listed species "to the point at which the measures provided pursuant to this chapter are no longer necessary." §1532(3).

These provisions have a double significance. Even if §§1536(a)(2) and 1538(a)(1)(B) were totally independent prohibitions—the former applying only to federal agencies and their licensees, the latter only to private parties—Congress's explicit prohibition of habitat modification in the one section would bar the inference of an implicit prohibition of habitat modification in the other section. "[W]here Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp.* v. *United States*, 508 U. S. ___, ___ (1993) (slip op., at 7–8) (internal quotation marks omitted). And that presumption against implicit prohibition would be even stronger where the one section which uses the language carefully defines and limits its application. That is to say, it would be passing strange for Congress carefully to define "critical habitat" as used in §1536(a)(2), but leave it to the Secretary to evaluate, willy-nilly, impermissible "habitat modification" (under the guise of "harm") in §1538(a)(1)(B).

In fact, however, §§1536(a)(2) and 1538(a)(1)(B) do *not* operate in separate realms; federal agencies are subject to *both*, because the "person[s]" forbidden to take protected species under §1538 include agencies and departments of the Federal Government. See §1532(13). This means that the "harm" regulation also contradicts another principle of interpretation: that statutes should be read so far as possible to give independent effect to all their provisions. See *Ratzlaf* v. *United States*, 510 U. S. ___, ___ (slip op., at 6–8). By defining "harm" in the definition of "take" in §1538(a)(1)(B) to include significant habitat modification that injures populations of wildlife, the regulation makes the habitat-modification restriction in §1536(a)(2) almost wholly superfluous. As "critical habitat" is habitat "essential to the conservation of the species," adverse modification of "critical" habitat by a federal agency would also constitute habitat modification that injures a population of wildlife.

Petitioners try to salvage some independent scope for §1536(a)(2) by the following contortion: because the definition of critical habitat includes not only "the specific areas within the geographical area occupied by the species [that are] essential to the conservation of the species," §1532(5)(A)(i), but also "specific areas outside the geographical area occupied by the species at the time it is listed [as a protected species] . . . [that are] essential to the conservation of the species," §1532A(5)(ii), there may be some agency modifications of critical habitat which do *not* injure a population of wildlife. See Brief for Petitioners 41, and n. 27. This is dubious to begin with. A principal way to injure wildlife under the Secretary's own regulation is to "significantly impai[r] . . . breeding," 50 CFR §17.3 (1994). To prevent the natural increase of a species by adverse modification of habitat suitable for expansion assuredly impairs breeding. But even if true, the argument only narrows the

scope of the superfluity, leaving as so many wasted words the §1532(a)(5)(i) definition of critical habitat to include currently *occupied* habitat essential to the species' conservation. If the Secretary's definition of "harm" under §1538(a)(1)(B) is to be upheld, we must believe that Congress enacted §1536(a)(2) solely because in its absence federal agencies would be able to modify habitat in currently *unoccupied* areas. It is more rational to believe that the Secretary's expansion of §1538(a)(1)(B) carves out the heart of one of the central provisions of the Act.

The Court makes four other arguments. First, "the broad purpose of the [Act] supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid." *Ante*, at 10. I thought we had renounced the vice of "simplistically . . . assum[ing] that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 526 (1987) *(per curiam)* (emphasis in original). Deduction from the "broad purpose" of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or in this case, the quite simple one) of reading the whole text. "The Act must do everything necessary to achieve its broad purpose" is the slogan of the enthusiast, not the analytical tool of the arbiter.[3]

[3]This portion of the Court's opinion, see *ante*, at 11, n. 12, discusses and quotes a footnote in *TVA* v. *Hill*, 437 U. S. 153, 184–185, n. 30 (1978), in which we described the then-current version of the Secretary's regulation, and said that the habitat modification undertaken by the federal agency in the case would have violated the regulation. Even if we had said that the Secretary's

Second, the Court maintains that the legislative history of the 1973 Act supports the Secretary's definition. See *ante*, at 16–18. Even if legislative history were a legitimate and reliable tool of interpretation (which I shall assume in order to rebut the Court's claim); and even if it could appropriately be resorted to when the enacted text is as clear as this, but see *Chicago* v. *Environmental Defense Fund*, 511 U. S. ___, ___ (1994) (slip op., at 9–10); here it shows quite the opposite of what the Court says. I shall not pause to discuss the Court's reliance on such statements in the Committee Reports as "`[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can `take' or attempt to `take' any fish or wildlife.'" S. Rep. No. 93–307, p. 7 (1973) (quoted *ante*, at 17). This sort of empty flourish—to the effect that "this statute means what it means all the way"—counts for little even when enacted into the law itself. See *Reves* v. *Ernst & Young*, 507 U. S. ___, ___ (1993) (slip op., at 13–14).

Much of the Court's discussion of legislative history is devoted to two items: first, the Senate floor manager's introduction of an amendment that added the word "harm" to the definition of "take," with the observation that (along with other amendments) it would "help to achieve the purposes of the bill"; second, the relevant Committee's removal from the definition of a provision stating that "take" includes "the destruction, modification or curtailment of [the] habitat or range" of fish and wildlife. See *ante*, at 17–18. The Court inflates the first and belittles the

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regulation was *authorized* by §1538, that would have been utter dictum, for the only provision at issue was §1536. See 437 U. S., at 193. But in fact we simply opined on the effect of the regulation while assuming its validity, just as courts always do with provisions of law whose validity is not at issue.

second, even though the second is on its face far more pertinent. But this elaborate inference from various pre-enactment actions and inactions is quite unnecessary, since we have *direct* evidence of what those who brought the legislation to the floor thought it meant—evidence as solid as any ever to be found in legislative history, but which the Court banishes to a footnote. See *ante*, at 18–19, n. 19.

Both the Senate and House floor managers of the bill explained it in terms which leave no doubt that the problem of habitat destruction on private lands was to be solved principally by the land acquisition program of §1534, while §1538 solved a different problem altogether— the problem of takings. Senator Tunney stated:

> "*Through [the] land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.*
>
> "Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to *predation by man for commercial, sport, consumption, or other purposes*. The provisions of [the bill] would prohibit the commerce in or the importation, exportation, or taking of endangered species . . . ." 119 Cong. Rec. 25669 (1973) (emphasis added).

The House floor manager, Representative Sullivan, put the same thought in this way:

> "[T]he principal threat to animals stems from destruction of their habitat. . . . [*The bill] will meet this problem by providing funds for acquisition of critical habitat*. . . . It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, *but who are understandably unwilling to do so at excessive cost to themselves*. Another hazard to endangered

> species arises from those who would *capture or kill them for pleasure or profit*. There is no way that Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so." *Id.,* at 30162 (emphasis added).

Habitat modification and takings, in other words, were viewed as different problems, addressed by different provisions of the Act. The Court really has no explanation for these statements. All it can say is that "[n]either statement even suggested that [the habitat acquisition funding provision in §1534] would be the Act's exclusive remedy for habitat modification by private landowners or that habitat modification by private landowners stood outside the ambit of [§1538]." *Ante*, at 18–19, n. 19. That is to say, the statements are not as bad as they might have been. Little in life is. They are, however, quite bad enough to destroy the Court's legislative-history case, since they display the clear understanding (1) that habitat modification is separate from "taking," and (2) that habitat destruction on private lands is to be remedied by public acquisition, and *not* by making particular unlucky landowners incur "excessive cost to themselves." The Court points out triumphantly that they do not display the understanding (3) that the land acquisition program is "the [Act's] only response to habitat modification." *Ibid*. Of course not, since that is not so (all *public* lands are subject to habitat-modification restrictions); but (1) and (2) are quite enough to exclude the Court's interpretation. They identify the land acquisition program as the Act's only response to habitat modification *by private landowners*, and thus do not in the least "contradic[t]," *ibid.*, the fact that §1536 prohibits habitat modification *by federal agencies*.

Third, the Court seeks support from a provision which was added to the Act in 1982, the year after the Secretary promulgated the current regulation.

The provision states:

> "[T]he Secretary may permit, under such terms and conditions as he shall prescribe—
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> . . . . . .
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> "any taking otherwise prohibited by section 1538(a)(1)(B) . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U. S. C. §1539(a)(1)(B).

This provision does not, of course, implicate our doctrine that reenactment of a statutory provision ratifies an extant judicial or administrative interpretation, for neither the taking prohibition in §1538(a)(1)(B) nor the definition in §1532(19) was reenacted. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.,* 511 U. S. ___, ___ (1994) (slip op., at 21). The Court claims, however, that the provision "strongly suggests that Congress understood [§1538(a)(1)(B)] to prohibit indirect as well as deliberate takings." *Ante*, at 12. That would be a valid inference if habitat modification were the only substantial "otherwise lawful activity" that might incidentally and nonpurposefully cause a prohibited "taking." Of course it is not. This provision applies to the many otherwise lawful takings that incidentally take a protected species—as when fishing for unprotected salmon also takes an endangered species of salmon, see *Pacific Northwest Generating Cooperative* v. *Brown*, 38 F. 3d 1058, 1067 (CA9 1994). Congress has referred to such "incidental takings" in other statutes as well—for example, a statute referring to "the incidental taking of . . . sea turtles in the course of . . . harvesting [shrimp]" and to the "rate of incidental taking of sea turtles by United States vessels in the course of such harvesting," 103 Stat. 1038 §609(b)(2), note following 16 U. S. C. §1537 (1988 ed., Supp. V); and a statute referring to "the incidental taking of marine mammals in the course of commercial fishing opera-

tions," 108 Stat. 546, §118(a). The Court shows that it misunderstands the question when it says that "[n]o one could seriously request an `incidental' take permit to avert . . . liability for direct, deliberate action *against a member of an endangered or threatened species.*" *Ante*, at 12–13 (emphasis added). That is not an *incidental* take at all.[4]

This is enough to show, in my view, that the 1982 permit provision does not support the regulation. I must acknowledge that the Senate Committee Report on this provision, and the House Conference Committee Report, clearly contemplate that it will enable the Secretary to permit environmental modification. See S. Rep. No. 97–418, p. 10 (1982); H. R. Conf. Rep. No. 97–835, pp. 30–32 (1982). But the *text* of the amendment cannot possibly bear that asserted meaning, when placed within the context of an Act that must be interpreted (as we have seen) not to prohibit private environmental modification. The neutral language of the amendment cannot possibly alter that interpretation, nor can its legislative history be summoned forth to contradict, rather than clarify, what is in its totality an unambiguous statutory text. See *Chicago* v. *Environmental Defense Fund,* 511 U. S. ___ (1994). There is little fear, of course, that giving no effect to the relevant portions of the Committee Reports will frustrate the real-life expectations of a majority of the Members of Congress. If they read and relied on such tedious detail on such an obscure point (it was not, after all, presented as a revision of the statute's

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[4]The statutory requirement of a "conservation plan" is as consistent with this construction as with the Court's. See *ante*, at 12, and n. 14. The commercial fisherman who is in danger of incidentally sweeping up protected fish in his nets can quite reasonably be required to "minimize and mitigate" the "impact" of his activity. 16 U. S. C. §1539(a)(2)(A).

prohibitory scope, but as a discretionary-waiver provision) the Republic would be in grave peril.

Fourth and lastly, the Court seeks to avoid the evident shortcomings of the regulation on the ground that the respondents are challenging it on its face rather than as applied. See *ante*, at 11; see also *ante*, at 1 (O'CONNOR, J., concurring). The Court seems to say that *even if* the regulation dispenses with the foreseeability of harm that it acknowledges the statute to require, that does not matter because this is a facial challenge: so long as habitat modification that *would* foreseeably cause harm is prohibited by the statute, the regulation must be sustained. Presumably it would apply the same reasoning to all the other defects of the regulation: the regulation's failure to require injury to particular animals survives the present challenge, because at least *some* environmental modifications kill particular animals. This evisceration of the facial challenge is unprecedented. It is one thing to say that a facial challenge to a regulation that omits statutory element *x* must be rejected if there is any set of facts on which the statute *does not require x*. It is something quite different—and unlike any doctrine of "facial challenge" I have ever encountered—to say that the challenge must be rejected if the regulation could be applied to a state of facts in which element *x happens to be present*. On this analysis, the only regulation susceptible to facial attack is one that *not only* is invalid in all its applications, but also does not sweep up *any* person who *could have been* held liable under a proper application of the statute. That is not the law. Suppose a statute that prohibits "premeditated killing of a human being," and an implementing regulation that prohibits "killing a human being." A facial challenge to the regulation would not be rejected on the ground that, after all, it *could* be applied to a killing that happened to be premeditated. It *could not* be applied to such a killing, because it

does not require the factfinder to find premeditation, as the statute requires. In other words, to simplify its task the Court today confuses lawful application of the challenged regulation with lawful application of a *different* regulation, *i.e.*, one requiring the various elements of liability that this regulation omits.

In response to the points made in this dissent, the Court's opinion stresses two points, neither of which is supported by the regulation, and so cannot validly be used to uphold it. First, the Court and the concurrence suggest that the regulation should be read to contain a requirement of proximate causation or foreseeability, principally *because the statute does* —and "[n]othing in the regulation purports to weaken those requirements [of the statute]." See *ante*, at 8, n. 9; 11–12, n. 13; see also *ante*, at 4–6 (O'CONNOR, J., concurring). I quite agree that the statute contains such a limitation, because the verbs of purpose in §1538(a)(1)(B) denote action directed at animals. *But the Court has rejected that reading*. The critical premise on which it has upheld the regulation is that, despite the weight of the other words in §1538(a)(1)(B), "the statutory term `harm' encompasses indirect as well as direct injuries," *ante*, at 9. See also *ante*, at 9–10, n. 11 (describing "the sense of indirect causation that `harm' adds to the statute"); *ante*, at 14 (stating that the Secretary permissibly interprets "`harm'" to include "indirectly injuring endangered animals"). Consequently, unless there is some strange category of causation that is indirect and yet also proximate, the Court has already rejected its own basis for finding a proximate-cause limitation in the regulation. In fact "proximate" causation simply *means* "direct" causation. See, *e.g.,* Black's Law Dictionary 1103 (5th ed. 1979) (defining "[p]roximate" as "Immediate; nearest; *direct*") (emphasis added); Webster's New International Dictionary of the

English Language 1995 (2d ed. 1949) ("proximate cause. A cause which *directly*, or with no mediate agency, produces an effect") (emphasis added).

The only other reason given for finding a proximate-cause limitation in the regulation is that "by use of the word `actually,' the regulation clearly rejects speculative or conjectural effects, and thus itself *invokes* principles of proximate causation." *Ante*, at 5 (O'CONNOR, J., concurring); see also *ante*, at 11–12, n. 13 (majority opinion). *Non sequitur*, of course. That the injury must be "actual" as opposed to "potential" simply says nothing at all about the length or foreseeability of the causal chain between the habitat modification and the "actual" injury. It is thus true and irrelevant that "the Secretary did not need to include `actually' to connote `but for' causation," *ante*, at 11–12, n. 13; "actually" defines the requisite *injury*, not the requisite *causality*.

The regulation says (it is worth repeating) that "harm" means (1) an act which (2) actually kills or injures wildlife. If that does not dispense with a proximate-cause requirement, I do not know what language would. And changing the regulation by judicial invention, even to achieve compliance with the statute, is not permissible. Perhaps the agency itself would prefer to achieve compliance in some other fashion. We defer to reasonable agency interpretations of ambiguous statutes precisely in order that agencies, rather than courts, may exercise policymaking discretion in the interstices of statutes. See *Chevron*, 467 U. S., at 843–845. Just as courts may not exercise an agency's power to adjudicate, and so may not affirm an agency order on discretionary grounds the agency has not advanced, see *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943), so also this Court may not exercise the Secretary's power to regulate, and so may not uphold a regulation by adding to it even the most reasonable of elements it does not contain.

The second point the Court stresses in its response seems to me a belated mending of its hold. It apparently *concedes* that the statute requires injury *to particular animals* rather than merely to populations of animals. See *ante*, at 11–12, n. 13; *id.*, at 7, 9 (referring to killing or injuring "*members* of [listed] species" (emphasis added)). The Court then rejects my contention that the regulation ignores this requirement, since, it says, "every term in the regulation's definition of `harm' is subservient to the phrase `an act which actually kills or injures wildlife.'" *Id.*, at 11–12, n. 13. As I have pointed out, see *supra*, at 3, this reading is incompatible with the regulation's specification of impairment of "breeding" as one of the *modes* of "kill[ing] or injur[ing] wildlife."[5]

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[5]JUSTICE O'CONNOR supposes that an "impairment of breeding" intrinsically injures an animal because "[t]o make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete." *Ante*, at 2 (concurring opinion). This imaginative construction does achieve the result of extending "impairment of breeding" to individual animals; but only at the expense of also expanding "injury" to include elements beyond *physical harm* to individual animals. For surely the only harm to the individual animal from impairment of that "essential function" is not the failure of issue (which harms only the issue), but the *psychic harm* of perceiving that it will leave this world with no issue (assuming, of course, that the animal in question, perhaps an endangered species of slug, is capable of such painful sentiments). If it includes *that* psychic harm, then why not the psychic harm of not being able to frolic about—so that the draining of a pond used for an endangered animal's recreation, but in no way essential to its survival, would be prohibited by the Act? That the concurrence is driven to such a dubious redoubt is an argument for, not against, the proposition that "injury" in the regulation

But since the Court is reading the regulation and the statute incorrectly in other respects, it may as well introduce this novelty as well—law à la carte. As I understand the regulation that the Court has created and held consistent with the statute that it has also created, habitat modification can constitute a "taking," but only if it results in the killing or harming of *individual animals*, and only if that consequence is the direct result of the modification. This means that the destruction of privately owned habitat that is essential, not for the feeding or nesting, but for the *breeding*, of butterflies, would not

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includes injury to populations of animals. Even more so with the concurrence's alternative explanation: that "impairment of breeding" refers to nothing more than concrete injuries inflicted by the habitat modification on the animal who does the breeding, such as "physical complications [suffered] during gestation," *ante*, at 3. Quite obviously, if "impairment of breeding" meant such physical harm to an individual animal, it would not have had to be mentioned.

The concurrence entangles itself in a dilemma while attempting to explain the Secretary's commentary to the harm regulation, which stated that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," 46 Fed. Reg. 54748 (1981). The concurrence denies that this means that the regulation does not require injury to particular animals, because "one could just as easily emphasize the word `direct' in this sentence as the word `individual.'" *Ante*, at 3. One could; but if the concurrence does, it thereby refutes its separate attempt to exclude indirect causation from the regulation's coverage, see *ante*, at 4–6. The regulation, after emerging from the concurrence's analysis, has acquired *both* a proximate-cause limitation *and* a particular-animals limitation—precisely the one meaning that the Secretary's quoted declaration will not allow, whichever part of it is emphasized.

violate the Act, since it would not harm or kill any living butterfly. I, too, think it would not violate the Act—not for the utterly unsupported reason that habitat modifications fall outside the regulation if they happen not to kill or injure a living animal, but for the textual reason that only action directed at living animals constitutes a "take."

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The Endangered Species Act is a carefully considered piece of legislation that forbids all persons to hunt or harm endangered animals, but places upon the public at large, rather than upon fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species. There is neither textual support for, nor even evidence of congressional consideration of, the radically different disposition contained in the regulation that the Court sustains. For these reasons, I respectfully dissent.