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The Supreme Court and the Endangered Species Act

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THE SUPREME COURT AND THE ENDANGERED SPECIES ACT

Leon Lazer:

Thank you. The end is near. I am going to talk to you about *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon.*[1] This case deals with the Endangered Species Act.[2] We do not deal too often here on Long Island with that Act. We have some familiarity with it and, of course, many of us remember the famous snail darter case where that small fish became the basis for preventing the building of the Tellico Dam.[3] Now, the *Babbitt* case is a very interesting legislative construction case. I recommend it to you because as municipal lawyers, many of you are constantly dealing with problems of how to interpret particular legislative or regulatory language. This case has it all, including analysis of legislative history and analysis of the various canons of construction, including the matter of deference to a regulatory official or regulation, which I think under the decisions of the New York Court of Appeals and the New York courts, is a very great deference. Therefore, if you have such a case and you take a look at *Babbitt* and the opinions in *Babbitt*, you may be able to get some help.

In any event, what is involved in *Babbitt* is a regulation of the Department of the Interior, which declares that it is unlawful under the Endangered Species Act to significantly degrade or modify the habitat of an endangered species.[4] The issue in the case is whether the Secretary of the Interior, in promulgating this regulation, had the power to do so based on the underlying congressional act.[5] The

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1. 115 S. Ct. 2407 (1995).

2. Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C.A. §§ 1531-1543 (1988 ed. and Supp. V). The Endangered Species Act "contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened." *Babbitt*, 115 S. Ct. 2409.

3. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (prohibiting the completion of a dam where its operation would destroy the endangered snail darter or its habitat).

4. 50 C.F.R. § 17.3 (1994). *See infra* note 9 and accompanying text.

5. *Babbitt*, 115 S. Ct. at 2409.

lawsuit was brought by various forest interests, logging companies and farmers, people who make a living from forestry products and their organizations. The relief sought was a declaratory judgment that the regulation was beyond the power of the Secretary and, therefore, invalid.[6]

The decision, yours, mine and that of the Court, as to what is right in this case turns obviously on language. Section 9 of the Endangered Species Act, which is the section in issue in this case, states that "it is unlawful . . . to take any such species within the United States or the territorial sea of the United States."[7] The key word is "take." What does that mean? In further sections of the Act, Congress defines "take." "The term 'take' means to harass, harm," -- hold on to that word for a moment -- "pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct."[8] Does this language imply the use of direct force against the animal or fish? That, of course, is part of the issue in this case, and I suppose for a time that is the way that language was viewed.

However, the Interior Department by regulation further defined the word "harm," one of those words that I just read to you: "*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."[9] What the case turned on, of course, is whether the statute implies direct use of force, and the Secretary expanded that into indirect force,[10] without the power or authority of the statute. The declaratory judgment action challenged application of the regulation to the red-cockaded woodpecker and the northern spotted owl.

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6. *Id.* at 2410. The respondents claimed that "application of the 'harm' regulation to the red-cockaded woodpecker, an endangered species, and the northern spotted own, a threatened species, had injured them economically." *Id.*

7. 16 U.S.C.A. § 1538(a)(1)(B).

8. 16 U.S.C.A. § 1532(19).

9. *Babbitt*, 115 S. Ct. at 2410 (quoting 50 C.F.R. § 17.3 (1994)).

10. *Id.* at 2411.

At the district court level, the plaintiffs argued that the statute did not intend the word "harm" to include habitat modification. They made three arguments in that direction. The first argument was that habitat modification was included in the original bill draft but the Senate deleted it.[11] The second argument was that section 5 of the Act itself gives the Secretary the power and the funds to buy habitats.[12] Thus, if habitat degradation is to be prevented, then it will be done under the funding provisions of the Act, not by declaring it unlawful for someone to degrade or modify habitat when actually the statute is directed against direct application of force against the animal, such as killing or injuring it.[13] Furthermore, plaintiffs claimed that the word "harm" -- that one word I asked you to focus on for a moment -- was included as a floor amendment during the debate in 1973 when the Act was passed, and it was included without any comment. Therefore, the word "harm" should be read very narrowly.[14] Additionally, the plaintiffs claim -- and this is threaded throughout the case and discussed, of course, by both the majority and dissent -- the issue lends itself to be the interpretive canon *noscitur a sociis*, which we largely refer to, I think, in New York as "a word is known by the company it keeps."[15] The company that "harm" keeps in the statute is to harass, pursue, hunt shoot, wound, kill, trap, capture, collect, et cetera, et cetera.

The district court rejected the plaintiffs' arguments and sustained the regulation.[16] The Court of Appeals reversed and decided that the word "harm" should not be read as expansively as the Secretary of the Interior read it.[17] The D.C. Circuit, in deciding the case and

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11. *Id.* at 2410-11.

12. *Id.* at 2411. 16 U.S.C.A. § 1534(a)(2) provides that the Secretary "is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him." *Id.*

13. *Babbitt*, 115 S. Ct. at 2411.

14. *Id.*

15. *Id.* (citing Neal v. Clark, 95 U.S. 704, 708-09 (1878)).

16. *Id.* The court found the word "take" to have an expansive interpretation that includes habitat modification.

17. *Id.*

reversing the district court, failed, and perhaps refused, to mention a Ninth Circuit case that went the other way.[18]

Of course, it is this conflict between the two circuits that resulted in certiorari by the Supreme Court, which then took the case and decided by a vote of six to three that the regulation was valid.[19] Sympathetic as I am to the result here, I must say that I found some of the reasoning of Justice Stevens, writing for the majority, to be somewhat on the weak side. For instance, he writes that if you look at the Webster's Third New International Dictionary, which is the dictionary we are told is the one you should use in brief writing or decision writing, the words "hurt" or "damage" never include the

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18. *See* Palila v. Hawaii Dep't of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988). In *Palila*, the Sierra Club and other plaintiffs sought to end the government's practice of maintaining feral sheep, mouflon sheep and goats within the habitat of the palila, an endangered six inch long finch. *Id.* at 1107. The palila depends on mamane trees for its food, shelter and nesting; however, habitat degradation resulted when the sheep and goats fed on the mamane seedlings, thus preventing its growth and eventually would prevent the regeneration of these essential woodlands. *Id.* The Ninth Circuit affirmed the district court's holding that "harm" includes habitat destruction that would eventually cause an endangered species into extinction. *Id.* at 1108. It noted that the interpretation is consistent with the Secretary's definition of "harm," including "not only direct physical injury, but also injury caused by impairment of essential behavior patterns via habitat modification that can have significant and permanent effects on a listed species." *Id.*

19. *Babbitt*, 115 S. Ct. at 2412. Justice Stevens delivered the opinion of the Court, in which Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer joined. Justice O'Connor filed a concurring opinion, and Justice Scalia dissented, in which Justices Rehnquist and Thomas joined. The majority set forth three reasons for finding the Secretary's interpretation of "harm" to be reasonable: "First, an ordinary understanding of the word 'harm' supports [the Secretary's interpretation." *Id.* at 2412. "Second, the broad purpose of the [Endangered Species Act] supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid." *Id.* at 2413. Lastly,

> the fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit, "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), strongly suggests that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings.

Id. at 2414.

word "directly," so damage or hurt can be indirect and, obviously, habitat modification is indirect hurt.[20] There is a reluctance by Justice Stevens to treat any of the words as redundant.[21] If "harm" simply means shoot, kill, capture, collect, what was the point of putting it in? It must have had some specific force behind it to have been inserted on the floor of the Senate, and Senator Tunney, the offeror of the amendment, must have had something else in mind besides the other nine words.[22]

Finally, of course, the decision refers to another element in legislative construction. In 1982 Congress amended the Endangered Species Act to provide that the Secretary of Interior could issue permits that would involve the taking -- remember the word "taking" -- of Endangered Species if it was incidental to another lawful use.[23] The majority's view is that these permits really were for the loggers or for the farmers or for the foresters or whatever to be able to go on with their enterprises even though degradation and habitat modification was involved. Thus, if Congress never intended habitat modification to be involved in section 9, requiring permits, they never would have amended the statute to provide for the issuance of permits.[24]

Justice Stevens tried to meet the *noscitur a sociis* argument, "a word is known by the company it keeps," head on by declaring that a word in that context can have an independent meaning.[25] Secondly, he said -- and I have some problems with it -- words such as "harass," "pursue," "wound" and "kill" do not necessarily refer to direct force.[26] Well, perhaps on first blush they do, but maybe if you think about it a while, I suppose you could kill

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20. *Id.* at 2412-13.

21. *Id.* at 2413.

22. *Id.* at 2416-17. The Court found that "[a]n obviously broad word that the Senate went out of its way to add to an important statutory definition is precisely the sort of provision that deserves a respectful reading." *Id.* at 2417.

23. *Id.* at 2417-18.

24. *Id.*

25. *Id.* at 2415. The Court stated that "'[t]he Secretary's interpretation of 'harm' to include indirectly injuring endangered animals through habitat modification permissibly interprets 'harm' to have 'a character of its own not to be submerged by its association.'" *Id.* (citation omitted).

26. *Id.*

indirectly and, indeed, by habitat modification and degradation, you do kill indirectly.

In his dissent, Justice Scalia declared that section 5, which empowers the Secretary to buy habitat property and to pay for it, provides the protection that the habitats are supposed to get.[27] That argument was rejected by Justice Stevens and the majority. The response that they make is that funding habitat protection is done before destruction, but section 9, which is the one we are dealing with, is a criminal statute enforceable after the destruction.[28] Finally, and I mentioned this before, the majority said deference and latitude must be given to the Secretary,[29] and the statute, of course, does give various powers to the Secretary. "When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his."[30] On that basis, the majority reversed the D.C. Circuit.

Justice O'Connor wrote an interesting opinion[31] and one that drew a rather cutting response from Justice Scalia that I will detail for you in a few moments. Justice O'Connor concurred with the majority provided that habitat protection or regulation was limited to significant habitat modification, such that causes actual death and "the regulation's application is limited by ordinary principles of proximate causation which introduce notions of foreseeability."[32] Now that is interesting because she and Justice Scalia then drifted into a discussion of proximate cause and notions of foreseeability.[33] As a tort teacher, and I know my colleague here is a tort teacher as well, I did not think it was a very learned discussion. Justice Scalia ended up taking a simple quote out of

27. *Id.* at 2427-28. Justice Scalia explained that Congress clearly intended 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.'" *Id.* at 2428.

28. *Id.* at 2415.

29. *Id.* at 2418.

30. *Id.*

31. *Id.* at 2418-21 (O'Connor, J., concurring).

32. *Id.* at 2418.

33. *Id.* at 2420 (O'Connor, J., concurring) and 2429-30 (Scalia, J., dissenting).

context as to proximate cause and spoke in terms of proximate cause as "direct." By this time we know that proximate cause gets pretty indirect under certain circumstances.

In her concurring opinion, Justice O'Connor wrote a number of things that sort of riled her colleague, Justice Scalia, by stating that "to make it impossible for an animal to reproduce, [you must] impair its most essential physical functions [rendering the] animal . . . obsolete."[34] "Breeding, feeding and sheltering are what animals do. If significant habitat modification, by interfering with these essential behaviors, actually kills or injures an animal protected by the Act, it causes 'harm' [remember "harm"?] within the meaning of the regulation."[35]

In discussing proximate cause, Justice O'Connor stated that it cannot be too precise.[36] Bear this in mind, she was responding to Justice Scalia's example of the farmer who by plowing causes some erosion and some silt drifts into the river and that silt then kills the fish.[37] Has the farmer committed a crime under the Act, which, incidentally, has severe penalties for knowing violation of the Act and civil fines for unknowing violation of the Act? It is a strict liability act. On the question of proximate cause, Justice O'Connor made an interesting comment that "proximate causation 'normally eliminates the bizarre.'"[38]

Three judges dissented.[39] Justice Scalia wrote what is a very sharp opinion, starting out by giving us his property rights philosophy.[40] He stated, "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

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34. *Id.* at 2419.

35. *Id.* Justice O'Connor determined that "by use of the word 'actually,' the regulation clearly rejects speculative or conjectural effects, and thus itself invokes principles of proximate causation." *Id.* at 2420.

36. *Id.*

37. *Id.*

38. *Id.* (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043, 1049 (1995)).

39. Justices Scalia, Rehnquist and Thomas dissented. *Id.* at 2421-31.

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

endangered animals."[41] That, of course, is the argument that the penal sections of the Act were not intended to protect against degradation. If you want to protect against degradation of the habitat, buy the property.

He continued by stating that "[t]he 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."[42] That is the view of the property protection majority of the Court in most cases and it has been expressed by Justice Rehnquist and Justice Scalia rather repeatedly. If something is important to the public, whether it be the preservation of wetlands, the preservation of landmarks, or, as here, the preservation of the endangered species, the public should pay for it and not impose the cost of maintaining it for the public on a private property owner. That has been repeatedly said and now, in a series of cases, has become the basis for overthrowing land use regulation.[43]

Justice Scalia then pointed at the Ninth Circuit case that I mentioned to you that upheld the regulation of the Commissioner, and that is the case involving the protection of palilas.[44] In that case, sheep grazing mamane seeds -- did you know that there was such a thing as mamane seeds -- prevented the seeds from growing into mamane trees which are the type that palilas feed and nest in. Therefore, by permitting these sheep to eat the seedlings, there was a violation of this regulation.[45] I tend to agree with Justice Scalia that this is sort of a remote proximate causation, if I have ever seen it. Justice Scalia went on to attack at every angle the majority

41. *Id.* (emphasis in original).

42. *Id.*

43. *Id.* at 2431. *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (stating that "[o]ne of the principal purposes of the Takings Clause [of the Fifth Amendment] is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'") (citation omitted).

44. *See* Palila v. Hawaii Dep't of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988), *supra* note 18.

45. *Id.* at 1110.

opinion and dealt with each of their arguments. On the question of the meaning of the word "take," he cited five different dictionaries as to its meaning, showing that traditionally when "take" is used to catch an animal, that is a direct force.[46] He then dealt with legislative history.[47] Both sides indulged a rather selective method of using legislative history.

Ultimately, Justice Scalia stated that what is involved in the controversy is not the killing of animals but the impairment of breeding which would prevent the increase of the population of animals, and Congress never really had an intent to deal with breeding. Therefore, the regulation clearly exceeded what Congress ever intended in that legislation.[48] He then hit rather hard at the majority statement that the broad purpose of the Act invited support -- in the snail darter case, the majority had upheld the Act, saying we must uphold the purposes "at any cost."[49] In Justice Scalia's view, if purpose is the standard by which you make these details, well, then all the other standards are insignificant and must be lost.[50] In the end, Justice Scalia weakened what I think was a fairly strong opinion by getting into proximate cause which he should not have done because that reasoning does not hold water.

Finally, Justice Scalia declared in a footnote that Justice O'Connor was imputing to animals the ability or the capacity to

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46. *Babbitt*, 115 S. Ct. at 2422 (Scalia, J., dissenting). The dissent provides the following citations of sources defining "take":

> *See, e.g.*, 11 Oxford English Dictionary (1933) ("Take . . . Too 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").

Id.

47. *Id.* at 2422-23.

48. *Id.* at 2430.

49. *Id.* at 2425-26.

50. *Id.* at 2426.

suffer psychic injury -- a psychic injury that inflicts harm on the animal as it perceives "it will leave this world with no issue."[51] He then added that under this theory an endangered species of slug would suffer psychic injury when it perceived its inability to leave issue.[52]

On that basis now eight minutes after four, I thank you for your patience and I wonder if you were becoming an endangered species based on the heat in this room. Do not forget that we will be having Justice Scalia -- do not tell him what I said -- Justice Scalia here on the 18th to make a public speech and you are all invited. He will be spending the day with us and taking classes and the like. Next year we will do a similar program and you are all invited. Thanks for being with us.

51. *Id.* at 2430 n.5.
52. *Id.*