THE ENDANGERED SPECIES ACT'S FALL FROM GRACE IN THE SUPREME COURT

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Thirty-five years ago, the Endangered Species Act ("ESA") had as auspicious a debut in the U.S. Supreme Court as any statute could hope for. In Tennessee Valley Authority v. Hill, *a majority of the Court proclaimed that the ESA was intended "to halt and reverse the trend toward species extinction, whatever the cost" and backed up those and other bold words by preventing a nearly completed federal dam from impounding its reservoir because doing so would eliminate the only known (at the time) habitat of a small fish, the now infamous snail darter. To this day,* Hill *remains actively discussed in judicial opinions, on environmental lawyers' short list of important cases, a mainstay of law school casebooks, and a lively focus of legal scholarship. As it turns out, however,* Hill *has become the extreme outlier in the Court's ESA jurisprudence. In a series of four decisions spaced out from 1992 to 2007, two focusing on standing doctrine and two on statutory substance, the Court has silently but unmistakably eviscerated* Hill, *thereby knocking the ESA off its pedestal.*

*This Article is the first to examine the ESA's remarkable fall from grace in the Court. It does so not only as a measure of where the ESA has traveled in the Court, but also more broadly to examine where environmental values and environmental law fit in the Court's jurisprudence and what that suggests for the design of environmental law. Part I provides brief overviews of the ESA, the cases, and the Justices' voting patterns to situate the Court's four post-*Hill *decisions in their jurisprudential contexts. The body of the Article then moves through three lessons that* Hill*'s successors have to offer. Part II uses the ESA's slow demise as a window into the Court's environmental values perspective, using what has happened to the ESA to illuminate and evaluate various legal scholars' theories of how the Court views the natural environment as a jurisprudential context. Part III argues that the driving causal agent behind the ESA's decline has been the evolution of the statute's implementation from a novelty in environmental law to a robust regulatory program. The evidence from the ESA's fall from grace, therefore, is that while the Court has at times seemed apathetic to, confused about, or hostile to the environment, the better explanation for what has happened to the ESA is that the Court is skeptical about environmental law. Part IV thus closes by extracting what can be learned from the history of the ESA in the Court about the design of environmental laws, particularly those aimed at ecosystem protection and biodiversity conservation.*

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INTRODUCTION

Thirty-five years ago, the Endangered Species Act ("ESA")[1] had as auspicious a debut in the U.S. Supreme Court as any statute could hope for. In *Tennessee Valley Authority v. Hill*,[2] a majority of the Court proclaimed that the ESA was "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation"[3] and was intended "to halt and reverse the trend toward species extinction, whatever the cost."[4] The majority backed up those and other bold words[5] with equally bold action by finding that section 7 of the ESA, which directs federal agencies not to "jeopardize the continued existence of any endangered species or threatened species,"[6] prohibited a nearly completed federal dam from impounding its reservoir because doing so would eliminate the only known (at the time)

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[1] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006). This Article is not intended to provide a comprehensive overview of the ESA. For thorough treatment of the ESA, see generally MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 193–276 (3d ed. 1997); ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES (Donald C. Baur & Wm. Robert Irvin eds., 2d ed. 2010) [hereinafter LAW, POLICY, AND PERSPECTIVES]; ERIC T. FREYFOGLE & DALE D. GOBLE, WILDLIFE LAW: A PRIMER 233–77 (2009); LAWRENCE R. LIEBESMAN & RAFE PETERSEN, ENDANGERED SPECIES DESKBOOK (2d ed. 2010); STANFORD ENVTL. LAW SOC'Y, THE ENDANGERED SPECIES ACT (2001); TONY A. SULLINS, ESA: ENDANGERED SPECIES ACT (2001); THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE (Dale D. Goble et al. eds., 2006) [hereinafter THE ENDANGERED SPECIES ACT AT THIRTY].

[2] 437 U.S. 153 (1978).

[3] *Id.* at 180.

[4] *Id.* at 184.

[5] For example, Chief Justice Burger's opinion for the majority also found that "the language, history, and structure of the [ESA] indicate[ ] beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Id.* at 174.

[6] 16 U.S.C. § 1536(a)(2). At the time of the *Hill* litigation, this so-called "jeopardy prohibition" appeared in section 7 of the ESA, which was amended in 1979 to disaggregate section 7 into several subdivisions associated with different federal agency duties, with the jeopardy prohibition appearing in section 7(a)(2). Endangered Species Act Amendments of 1979, Pub. L. No. 96-159, § 4(1)(C), 93 Stat. 1225, 1226 (1979); *see* BEAN & ROWLAND, *supra* note 1, at 240 n.232; *see also* STANFORD ENVTL. LAW SOC'Y, *supra* note 1, at 22–24 (discussing the 1978 amendments to the ESA, 16 U.S.C. § 1536(e), which created the "God Squad" to allow limited exemptions for federal projects).

habitat of a small fish, the now infamous snail darter.[7] Not all observers were as impressed with the statute or the fish at the time — the decision was ridiculed by many[8] and brought sweeping condemnations in Congress[9] — and the ESA has since been no stranger to controversy.[10] But to this day, *Hill* remains "the best known case in environmental law"[11] — it is on environmental lawyers' short list of important cases,[12] a mainstay of environmental law casebooks,[13] actively discussed in judicial opinions,[14] and a lively focus of legal scholarship.[15] *Hill* remains important.[16]

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[7] Having found that the operative language of section 7 "admits of no exception," 437 U.S. at 173, the Court rejected the government's argument that a court's equitable powers justified denial of the plaintiffs' requested injunction, *see id*. at 193–95. After quoting Sir Thomas More, the Court closed with the stern observation that "in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *Id*. at 195. For concise legal histories of the case, including the events leading up to it, the Court's internal deliberations, and the decision's aftermath, see Holly Doremus, *The Story of* TVA v. Hill*: A Narrow Escape for a Broad New Law*, *in* ENVIRONMENTAL LAW STORIES 109 (Richard J. Lazarus & Oliver A. Houck eds., 2005); ZYGMUNT J.B. PLATER, LITTLE FISH IN A PORK BARREL: THE CLASSIC AMERICAN STORY OF THE ENDANGERED SNAIL DARTER AND THE TENNESSEE VALLEY AUTHORITY'S FINAL DAM (forthcoming 2012); Zygmunt J.B. Plater, *In the Wake of the Snail Darter: an Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REFORM 805 (1986). An in-depth journalistic history is provided in CHARLES C. MANN & MARK L. PLUMMER, NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES 164–69 (1996).

[8] Justice Powell predicted "[t]here will be little sentiment to leave this dam standing before an empty reservoir, serving no purpose other than a conversation piece for incredulous tourists." 437 U.S. at 210 (Powell, J., dissenting). The Wall Street Journal quipped that "the Endangered Species Act is pretty silly." *Scopes Prosecution Vindicated*, WALL ST. J., June 16, 1978, at 16.

[9] For Congress's reaction, see Doremus, *supra* note 7, at 132–34.

[10] *See* FREYFOGLE & GOBLE, *supra* note 1, at 237–38 ("For more than three decades, endangered species protection has generated heated controversy."); Robert Infelise & Holly Doremus, *Annual Review of Environmental and Natural Resources Law: Foreword*, 37 ECOLOGY L.Q. 277, 279 (2010) (describing the ESA as "perhaps the most controversial of the federal environmental protection laws").

[11] Daniel A. Farber, *A Tale of Two Cases*, 20 VA. ENVTL. L.J. 33, 34 (2001) (noting that *Hill* may be the best-known case in environmental law).

[12] *See* James Salzman & J.B. Ruhl, *Who's Number One?*, ENVTL. F. (Envtl. Law Inst., D.C.), Nov.–Dec. 2009, at 36, 37–40. *Hill* ranked first in 2001 and fourth in 2009 in surveys of environmental lawyers asking which cases are the most significant in the history of environmental law. *Id. Hill* also was selected for inclusion in an anthology published in 2005 collecting chapters discussing the most important cases in the history of environmental law. *See* Doremus, *supra* note 7, at 109.

[13] *Hill* is covered as a principal case in most environmental law casebooks active on the market. *See*, *e.g*., ROBIN KUNDIS CRAIG, ENVIRONMENTAL LAW IN CONTEXT 326 (2d ed. 2008); ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 344 (5th ed. 2007); ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 430 (4th ed. 2010); J.B. RUHL ET AL., THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW 84 (2d ed. 2010).

[14] Westlaw's "citing references" result for *Hill* shows hundreds of cases "examining" and "discussing" the case, with hundreds more citing it.

[15] *See*, *e.g*., Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 ECOLOGY L.Q. 363, 413–18 (2006) (using *Hill* as a window into the Supreme Court's views of the culture of environmentalism); Farber, *supra* note 11, *passim* (examining *Hill* as an example of Supreme Court views on environmental law); Jan Hasselman, *Holes in the Endangered Species Act Safety Net: The Role of Agency "Discretion" in Section 7 Consul-*

As it turns out, however, *Hill* has become the extreme outlier in the Court's ESA jurisprudence. The Court remained silent on the ESA for over a decade after deciding *Hill*, suggesting the opinion's strong language had staying power. When the Court returned to the ESA in 1992, however, it was clear the love affair was over. *Lujan v. Defenders of Wildlife*[17] was the first in a series of four decisions spaced out over the next fifteen years, two focusing on standing issues and two on ESA substance, the net result of which was silently but unmistakably to eviscerate *Hill*. Indeed, dissenting from the last decision in the series, 2007's *National Association of Home Builders v. Defenders of Wildlife*,[18] Justice Stevens claimed that "today the Court turns its back on our decision in *Hill* and places a great number of endangered species in jeopardy."[19] *Hill* may be important to many lawyers, judges, and legal scholars, but it no longer enjoys special status in the Court. Consequently, neither does the ESA.

This Article is the first to examine the ESA's remarkable fall from grace in the Court, not only as a measure of where the statute has traveled in the Court but also as an examination more broadly into where environmental values and environmental law fit in the Court's jurisprudence and what that suggests for the design of environmental law. It all starts, of course, with *Hill*. The decision itself may still be an active topic in legal scholarship, but *Hill* cannot fully be understood without accounting for what the Court has done to take the wind from its sails. If *Hill* is a shining example of the environment prevailing in the Court, why has the Court turned its back on it, and without ever saying so directly? Why is *Hill* still considered so important by so many working in environmental law, when the Court has all but abandoned it? Are there lessons to be learned about the Court and environmental law from *Hill*'s diminished prestige in the Court's eyes? These questions are as important to ask about *Hill* as the questions asked about the decision itself, yet they have gone untouched in legal scholarship.

To be sure, legal scholars have examined each of the cases in the Court's ESA quintuplet, usually one or two at a time, to assess their meaning for the ESA substantively or for the broader statutory interpretation and

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tation, 25 STAN. ENVTL. L.J. 125 (2006) (discussing early interpretations of the ESA evident in *Hill*); Zygmunt J.B. Plater, *Endangered Species Act Lessons over 30 Years and the Legacy of the Snail Darter, A Small Fish in a Porkbarrel*, 34 ENVTL. L. 289 *passim* (2004) (discussing history and analysis of *Hill*).

[16] The decision is well known not only for its ESA pedigree, but also for the Court's approach to statutory interpretation, an aspect not covered in detail in this Article. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 3 (2010) (using *Hill* to introduce the subject of statutory interpretation). *Hill's* approach to injunctive relief also remains a topic of scholarly focus. *See*, *e.g.*, Brandon M. Middleton, *Restoring Tradition: The Inapplicability of* TVA v. Hill*'s Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors*, 17 MO. ENVTL. L. & POL'Y REV. 318 (2010) (arguing that the injunctive relief standard employed in *Hill* should not be applied to non-federal actors).

[17] 504 U.S. 555 (1992).

[18] 551 U.S. 664 (2007).

[19] *Id.* at 694 (Stevens, J., dissenting).

standing doctrines involved. And legal scholars have examined the larger body of the Court's environmental law cases to assess the Court's attitudes toward the environment and the law of the environment. This Article takes a different approach of using all five of the Court's ESA decisions as a case study for exploring the Court, the environment, and environmental law. I recognize that five cases makes for a small-scale study for such large-scale questions. Indeed, perhaps these five cases are better thought of as three statutory interpretation cases and two standing cases, with the ESA serving merely as the medium for the messages, in which case they do not tell us much at all about these questions. But they are the only five instances in which the Court has spoken directly about the ESA,[20] which is unquestionably one of the nation's most prominent and controversial environmental laws, and in none of the cases could the Court reasonably be described as having portrayed the ESA as mere window dressing.

Part I of this Article provides brief overviews of the ESA, the Court's ESA cases, and the Justices' voting patterns to situate the four post-*Hill* decisions in their statutory and jurisprudential contexts. Perhaps each of the cases was decided on perfectly reasonable grounds for the statutory interpretation or standing doctrines involved. I am no expert in either of those domains, and I take no position here as to whether the Court arrived at the correct descriptions and interpretations of the ESA. My central theme, rather, is that the arc of the decisions and history of the Justices' voting records point unmistakably and relentlessly toward the decline of *Hill* and, with it, the ESA.

The body of the Article then moves through three lessons *Hill*'s hostile successors have to offer. First, Part II uses the history of the cases as a window into the Court's overall approach to the environment and environmental values. Several legal scholars have worked to identify different themes from the Court's environmental jurisprudence — for example, whether it is pro-environment, pro-business, pro-government, or simply inscrutable.[21] All agree, however, that the Court's relationship with the envi-

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[20] I recognize as well that the Court has declined to take up consideration of numerous ESA decisions from the lower courts, which may or may not tell us something about the Court's views on the ESA, the environment, and environmental law. Because of the speculation required to interpret the meaning of certiorari denial, however, I do not include analysis of such cases. *But see infra* note 218.

[21] The most prolific scholar of the Court and environmental law has been Professor Richard Lazarus. *See* Richard J. Lazarus, *The Nature of Environmental Law and the U.S. Supreme Court*, *in* STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE 9 (Michael Allan Wolf ed., 2005) [hereinafter Lazarus, *Nature of Environmental Law*]; Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 U.C.L.A. L. REV. 703 (2000) [hereinafter Lazarus, *Restoring What's Environmental*]; Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 17 PACE ENVTL. L. REV. 1 (1999) [hereinafter Lazarus, *Thirty Years of Environmental Protection Law*]; *see also* Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 (2009); Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 548 (1997); Stephen M. Johnson, *The Roberts Court and the Environment*, 37 B.C. ENVTL. AFF. L. REV. 317 (2010); Richard E. Levy & Robert L. Glicksman, *Judicial Activism and*

ronment has been a disappointment to environmentalists for decades.[22] Solid wins for the environment in the Court since 1970 are rare.[23] *Hill* being one of the first, its downfall confirms other scholars' assessments of the Court's environmental attitude over time as exhibiting apathy, ignorance, and even hostility.

But my central thesis is that there is more to the ESA's decline than the Court's realization that it had departed in *Hill* from its usual approach to the environment and its subsequent efforts to correct the error. Part III argues that another driving causal agent has been the evolution of the ESA, through administrative reform, from a novelty in environmental law to a broad and robust regulatory program. *Hill* likely happened — that is, the environment won in the Court — precisely because the ESA was seen as the odd bird among environmental laws in the 1970s, capable of stopping a federal dam but seemingly posing no broad regulatory constraints on private landowner and business interests. Over time, however, changes in agency implementation of the ESA gave the statute the qualities of the "big" pollution control statutes, with expansive jurisdiction over land use,[24] complex regulations,[25] expensive and time-consuming permitting,[26] and a gristmill of environmentalist litigation.[27] The more the ESA began to look like the other environmental laws, the less the Court liked it and the more receptive the Court became to appeals by business interests for protection from the ESA's regulatory burdens. While the evidence from the ESA's fall from grace supports the view that the Court has been apathetic about, confused about, and even hostile to *the environment*, the better explanation for what has happened to the ESA is that the Court is skeptical about *environmental law*.

Restraint in the Supreme Court's Environmental Law Decisions, 42 VAND. L. REV. 343 (1989); Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003–04 Term*, 42 HOUS. L. REV. 565 (2005); Kenneth A. Manaster, *Justice Stevens, Judicial Power, and the Varieties of Environmental Litigation*, 74 FORDHAM L. REV. 1963 (2006); Peter Manus, *Five Against the Environment*, 44 NEW ENG. L. REV. 221 (2010); Jay D. Wexler, *The (Non)Uniqueness of Environmental Law*, 74 GEO. WASH. L. REV. 260 (2006).

[22] *See, e.g.,* Lazarus, *Thirty Years of Environmental Protection Law*, *supra* note 21, at 12 (concluding that the Court's "overall trends suggest a troubling result for those looking to the Court to have an affirmative interest in promoting environmental protection"); Manaster, *supra* note 21, at 1964 ("The desire of environmental activists for ringing judicial pronouncements of environmental awareness . . . has not been satisfied, at least not to the degree originally hoped for and not by the Supreme Court.").

[23] *See* Lazarus, *Restoring What's Environmental*, *supra* note 21, at 737 (identifying *Hill* as among the handful of the "significant, albeit rare, victories for environmental concerns in the Supreme Court").

[24] *See generally infra* Part IV.A.

[25] *See, e.g.*, 50 C.F.R. pt. 402 (laying out the procedures for federal agencies to assess the effects of their actions on endangered species).

[26] *See, e.g.*, U.S. FISH & WILDLIFE SERV. & NAT. MARINE FISHERIES SERV., HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK (1996), *available at* http://www.nmfs.noaa.gov/pr/pdfs/laws/hcp_handbook.pdf (containing several hundred pages of guidance on ESA permitting processes); *see generally infra* Part III.

[27] Litigation under the ESA is active and contentious, as documented annually in a summary of litigation developments I have authored each of the past fifteen years for the American Bar Association's Section on Environment, Energy, and Natural Resources. *See, e.g.*, J.B. Ruhl, *Endangered Species: 2010 Annual Report*, *in* THE YEAR IN REVIEW 2010, at 52 (2011).

Part IV closes by extracting what can be learned from the history of the ESA in the Court for the design of environmental law. Ironically, *Hill* exposed the qualities of the ESA that pose the greatest risk for environmental laws in the Court: it regulates land use with little direct connection to public health or welfare; it has weak foundations in cost-benefit and cost-effectiveness analysis; and it is easily accused of disproportionate and often inequitable distribution of benefits and burdens. With these characteristics, the ESA stood little chance of staying on its pedestal for long in the Court. How, then, might we design a law with the ESA's purposes in mind but shield it from the kind of assault the ESA has suffered in the Court? Part IV suggests several strategies, none of which is likely to be palatable to environmental protection interests.

Notwithstanding its obsolescence in the Court's jurisprudence, *Hill* will never completely fade away. Its historical importance is etched on environmental law. It will always be represented on the crest of environmentalism, serve as the bogeyman for critics of the ESA, and be pulled out of the hat when a sentimental reference to the ESA's glory days seems appropriate. But the ESA has lost its luster in the Court, where it now receives no more respect than any other environmental statute, which is to say not much. *Hill*'s story — the full account — thus is the story of the environment and environmental law in the Court's jurisprudence. Surely this is not a cheerful thought for environmentalists, though it may be comforting to property and business interests. My focus, however, is more pragmatic than political — how might we design future environmental laws to avoid what has happened to the ESA?

I. The Fall from Grace

An advantage of using the ESA as a window into the Court's environmental jurisprudence is that the relevant statutory provisions — the parts of the statute that the Court has engaged — have remained relatively stable throughout the history of the statute in the Court.[28] Legislative changes in the statute itself, therefore, cannot explain the Court's change of heart.

By contrast, the composition of the Court has changed quite a bit over the ESA's run in the Court. But the Court's membership has not changed in a way that fully explains what the Court has done to the ESA over the past three decades. As Table 1 at the end of this part of the Article shows, of the eighteen Justices who have voted in at least one of the Court's ESA cases, five left the Court between *Hill* and the next of the ESA cases, *Lujan*. According to an extensive empirical analysis Professor Richard Lazarus performed of the Court's environmental voting records from 1969 to 1999, of those five, Justices Brennan and Marshall had relatively strong pro-environmental voting records, Justices Burger and Powell had anti-environmental

[28] ESA amendments are discussed *infra* note 169.

records, and Justice Stewart was in the middle.[29] Justice Stevens voted in all five of the cases, and Justices Kennedy, Scalia, Souter, and Thomas voted in the four post-*Hill* cases. Justice Stevens and post-*Hill* Court members Souter, Ginsberg, and Breyer are among the most pro-environmental in the Court's history, whereas Justices O'Connor, Scalia, Kennedy, and Thomas are among the most anti-environmental.[30]

Overall, in other words, the Burger Court does not look much different from later eras as far as the balance of environmental voting records is concerned. To be sure, even small changes in the Court's composition can dramatically change the Court's tenor. Indeed, some environmental law scholars have identified the Roberts Court as decidedly antagonistic to environmental interests,[31] but the Lazarus study suggests the Court on balance had been leaning that way for decades before the Roberts Court era. In any event, even if the Roberts Court tilts against the environment more than its predecessors,[32] the change in the Court's composition does not on its face appear sufficient to explain the ESA's radically downward trend in the Court's decisions, which began in earnest well before the Roberts Court with *Lujan* in 1992. It may have some explanatory power, but it is too easy to attribute the demise of the ESA to changes in Court composition and leave it at that. Something more must have been going on over the past thirty years to lead the Court to fully abandon *Hill* and reduce the ESA to the status of a plain vanilla environmental law. To allow deeper analysis of that trend in later parts of the Article, therefore, this part provides the necessary descriptive background on the statute, the cases, and the Justice's voting records.

A. The Statute

Widely regarded as the "pit bull" of environmental laws,[33] the ESA's central purpose is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[34] The agencies delegated to administer the ESA, the U.S. Fish and Wildlife

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[29] *See* Lazarus, *Restoring What's Environmental*, *supra* note 21, at 725 (depicting a chart showing each Justice's environmental protection score).

[30] *See id.* Given the time frame, the study does not assess the two other Justices who voted in ESA cases, Chief Justice Roberts and Justice Alito.

[31] *See, e.g.*, Johnson, *supra* note 21, *passim*; Manus, *supra* note 21, *passim*.

[32] Professor Stephen Johnson has updated the Lazarus study, using the same methodology, to assign environmental voting scores to the Roberts Court Justices, finding that in that period (2005 through 2008 Terms) there is a more pronounced pattern of pro-environmental voting by Justices Ginsburg, Souter, Breyer, and Stevens and continued anti-environmental voting by Justices Alito, Kennedy, Roberts, Scalia, and Thomas. *See* Johnson, *supra* note 21, at 348–49.

[33] Steven P. Quarles, *The Pit Bull Goes to School*, ENVTL. F., Sept.–Oct. 1998, at 55 (discussing the origins of this reputation); *see also* Steven P. Quarles & Thomas R. Lundquist, *The Pronounced Presence and Insistent Issues of the ESA*, 16 NATURAL RES. & ENV'T 59 (2001) (giving additional historical context to highlight the Act's "overbearing statutory certainty").

[34] 16 U.S.C. § 1531(b) (2006).

Service ("FWS") for the Department of the Interior and the National Marine Fisheries Service ("NMFS") for the Department of Commerce,[35] have authority over several core programs aimed toward that objective:

> *The Listing Programs*: Section 4 authorizes the agencies to identify "endangered" and "threatened" species, known as the listing function,[36] and then to designate "critical habitat"[37] and develop "recovery plans"[38] for the species.
> *Interagency Consultations*: Section 7 requires all federal agencies to "consult" with the FWS or NMFS (depending on the species) to ensure that actions they carry out, fund, or authorize do not "jeopardize" the continued existence of listed species or "adverse[ly] modif[y]" their critical habitat.[39]
> *The Take Prohibition*: Section 9 requires that all persons, including all private and public entities subject to federal jurisdiction, avoid committing "take" of listed species of fish and wildlife.[40]
> *Incidental Take Permits*: Sections 7 (for federal agency actions)[41] and 10 (for actions not subject to section 7, e.g., for state and private action)[42] establish a procedure and criteria for the FWS and NMFS to approve "incidental take" of listed species.[43]

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[35] The FWS administers the ESA for all terrestrial, freshwater, and certain other specified species, and NMFS (also known as NOAA-Fisheries) administers the ESA for most marine species and anadromous fish. *See* 50 C.F.R. § 402.01(b) (2008).

[36] 16 U.S.C. § 1522(a)(1); *see generally* LIEBESMAN & PETERSEN, *supra* note 1, at 13–27; STANFORD ENVTL. LAW SOC'Y, *supra* note 1, 38–58; SULLINS, *supra* note 1, at 11–25; J.B. Ruhl, *Section 4 of the ESA: The Keystone of Species Protection Law*, *in* LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 16.

[37] 16 U.S.C. § 1533(a)(3); *see generally* LIEBESMAN & PETERSEN, *supra* note 1, at 29–34; STANFORD ENVTL. LAW SOC'Y, *supra* note 1, 59–69; SULLINS, *supra* note 1, at 26–28; Federico Cheever, *Endangered Species Act: Critical Habitat*, *in* LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 40; Murray D. Feldman & Michael J. Brennan, *The Growing Importance of Critical Habitat for Species Conservation*, 16 NAT. RESOURCES & ENV'T 88 (2001).

[38] 16 U.S.C. § 1533(f); *see generally* LIEBESMAN & PETERSEN, *supra* note 1, at 35–38; STANFORD ENVTL. LAW SOC'Y, *supra* note 1, at 71–77; SULLINS, *supra* note 1, at 34–37; Dale D. Goble, *Recovery*, *in* LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 70.

[39] 16 U.S.C. § 1536(a)(2); *see generally* LIEBESMAN & PETERSEN, *supra* note 1, at 39–62; STANFORD ENVTL. LAW SOC'Y, *supra* note 1, at 83–103; SULLINS, *supra* note 1, at 59–86; Patrick W. Ryan & Erika E. Malmen, *Interagency Consultation Under Section 7*, *in* LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 104, 104–25.

[40] 16 U.S.C. § 1538(a)(1); *see generally* LIEBESMAN & PETERSEN, *supra* note 1, at 63–72; STANFORD ENVTL. LAW SOC'Y, *supra* note 1, at 104–12; SULLINS, *supra* note 1, at 44–54; Alan M. Glen & Craig M. Douglas, *Taking Species: Difficult Questions of Proximity and Degree*, 16 NAT. RESOURCES & ENV'T 65 (2001); Patrick Parenteau, *The Take Prohibition*, *in* LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 146; Quarles & Lundquist, *supra* note 33, at 63.

[41] 16 U.S.C. § 1536(b)(4).

[42] *Id.* § 1539(a)(1).

[43] *Id.* § 1539(a)(1)(B). "Incidental take," although not explicitly defined in a specific statutory provision, is described in section 10 of the statute as take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *Id.* The FWS, for example, has adopted this meaning in regulations implementing incidental take authorization under section 7. 50 C.F.R. § 402.02 (2011). For a description of the incidental take authorization procedures, see LIEBESMAN & PETERSEN, *supra* note 1, at 73–81; STANFORD ENVTL. LAW SOC'Y, *supra* note 1, at 127–73; SULLINS, *supra* note 1, at 87–102.

These four programs are designed to intervene in several categories of environmental change that cause species decline: (1) the present or threatened destruction, modification, or curtailment of habitat; (2) over-utilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors.[44] While few species listed for protection under the ESA have fully recovered, the statute is credited with preventing the extinction of the vast majority of listed species.[45]

As with many environmental laws, the ESA also includes a broad provision for enforcement in administrative and judicial forums, including a "citizen suits" procedure allowing any person to seek civil enforcement against alleged violators of the statute and any agency that does not fulfill nondiscretionary duties.[46] The *Hill* litigation was brought pursuant to this provision. In fact, all five of the Court's ESA cases were brought as citizen suits, and it is quite telling about the statute's history in the Court to see who those citizens were in each case.

B. The Cases

In the decade after *Hill* elevated the ESA to royalty status among environmental laws, the Court did not revisit the legislation's virtues. For the time being, *Hill* must have said all the Court needed to say. These were the ESA's glory days.

Yet this empowered version of the ESA soon began to generate friction with landowners over property rights, with industry over cost, and with environmental groups over implementation and enforcement.[47] One might reasonably have expected the Court to confront ESA cases many times and, if *Hill* was any indication, to reaffirm the statute's strength and vitality each time.

Matters have turned out quite differently, however, as the Court has taken the opportunity to engage the ESA in any meaningful way only four times since *Hill*, in each case taking the statute down a substantial notch in status. This gradual but unmistakable reversal of fortune took place on alternating fronts. In two cases the ESA served as the medium for the Court to address the constitutional or statutory law of standing, and in the course of doing so provide observations about the ESA. In the other two cases the Court dealt squarely with substantive interpretation of the ESA, in one case

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[44] 16 U.S.C. § 1533(a)(1)(A)–(E) (prescribing the factors upon which listing decisions are made).

[45] *See* J. Michael Scott et al., *By the Numbers*, *in* THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 1, at 16, 29–32 (summarizing quantitative measures of ESA success).

[46] 16 U.S.C. § 1540(g); *see generally* Eric R. Glitzenstein, *Citizen Suits*, *in* LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 260; LIEBESMAN & PETERSEN, *supra* note 1, at 84–89; STANFORD ENVTL. LAW SOC'Y, *supra* note 1, at 202–16.

[47] *See*, *e.g.*, STANFORD ENVTL. LAW SOC'Y, *supra* note 1, at 24–30.

to define the scope of the statute's regulatory reach and in the other to explain how the ESA interfaces with other environmental statutes.

The Court's ESA cases thus provide five well-spaced points defining the arc of the ESA's history in the Court. Alas, as the following case discussions show, it has been more of a free fall.

1. *Starting at the Apogee* – TVA v. Hill

Hill is a classic David (armed with a fish) versus Goliath (armed with a dam) story of environmental citizen suit litigation. Hiram Hill was a law student in search of a paper topic who, with the help of his law professor, Zygmunt Plater, wound up in the Supreme Court. The account of how they got there is fit for Hollywood, but suffice it to say for purposes of this Article that the case arrived in the Court notwithstanding relentless efforts of the TVA, the Tennessee congressional delegation, and influential members of the Carter Administration.[48] Having survived those gauntlets, two discrete legal issues framed the case: (1) would TVA violate the interagency consultation and jeopardy prohibition provisions of section 7 of the ESA by completing the dam and impounding the reservoir, an act which was then believed to be the death knell for the snail darter as a species; and (2) if so, did the courts have equitable powers to deny an injunction given how far advanced construction of the dam had progressed and given the (purported) economic importance of the reservoir project?[49] The prevailing answers were "yes" to the first issue and "no" to the second.

Hill was a 6-3 decision in the fish's favor, with the central dispute taking place between Chief Justice Burger, writing for the majority, and Justice Powell, dissenting.[50] All sides accepted "the premise that operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat."[51] That premise, while ultimately requiring revision upon later discoveries of snail darter populations elsewhere,[52] drove the Court toward a battle of statutory interpretation. Section 7 then plainly stated that federal agencies must "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of listed species.[53] Chief Justice Burger observed that "one would be hard pressed to find a statutory provision whose terms were any plainer,"[54] concluding that completing the dam would violate the statute, whereas Justice Powell found the term "actions" limited to "prospective actions, i.e., actions with respect

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[48] *See* Doremus, *supra* note 7, at 120–26.

[49] TVA v. Hill, 437 U.S. 153, 172 (1978).

[50] Chief Justice Burger wrote the opinion for the majority and was joined by Justices Brennan, Marshall, Stevens, Stewart, and White. *See id.* at 156. Justice Powell wrote a dissent joined by Justices Blackmun and Rehnquist. *Id.* at 195. Justice Rehnquist also filed a separate dissent on the question of injunctive relief. *Id.* at 211.

[51] *Id.* at 171.

[52] *See* Doremus, *supra* note 7, at 134–35.

[53] 437 U.S. at 173.

[54] *Id.*

to which the agency is deciding whether to authorize, fund, or to carry out."[55] The dam being almost completed, Justice Powell reasoned that the time for decision was long past.

Observing that the language of section 7 "admits of no exception," the majority opinion refused to "ignore the ordinary meaning of plain language" even while accepting that "this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars of public funds."[56] Pulling no punches, Justice Powell invoked the absurdity doctrine of statutory interpretation,[57] arguing that a statute "may be construed in a way that avoids an 'absurd result' without doing violence to its language."[58] He found support for his interpretation in congressional appropriations committee reports calling for completion of the dam,[59] but the majority found that this fell short of persuasive legislative history, and could not be said to have had the legislative effect of a repeal of the ESA for the dam.[60]

Much of the strong language the majority used to describe the ESA thus was designed to squeeze all ambiguity out of the term "actions" and to discount the economic arguments in favor of finishing the dam, so as to leave no crack in the door for Justice Powell's appeal to the absurdity doctrine. Yet, bluntly hinting that it did not necessarily find the outcome palatable, the majority observed that "it is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated,"[61] and that judges' "individual appraisal of the wisdom or unwisdom of a particular course consciously selected by Congress is to be put aside in the process of interpreting a statute."[62] It is not for judges, in other words, "to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.' "[63] Indeed, the backstory on *Hill* suggests Chief Justice Burger considered the opinion nothing less than "serv[ing] notice on Congress that it should take care of its own 'chestnuts.' "[64] Nevertheless, while it may have felt painted into a corner by Congress and Justice Powell's aggressive stance, the majority's review of the statutory language and legislative history led, in its view, to the inexorable conclusion that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost,"[65] and that section 7 "reveals a conscious decision by Congress to give

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[55] *Id.* at 205 (Powell, J., dissenting).
[56] *Id.* at 173–74.
[57] *See* MANNING & STEPHENSON, *supra* note 16, at 85–101 (explaining the absurdity doctrine).
[58] 437 U.S. at 204–05 (Powell, J., dissenting).
[59] *Id.* at 207–11 (Powell, J., dissenting).
[60] *Id.* at 189–93.
[61] *Id.* at 185.
[62] *Id.* at 194.
[63] *Id.* at 195.
[64] Doremus, *supra* note 7, at 131 (quoting internal papers of the Court).
[65] 437 U.S. at 184.

endangered species priority over the 'primary missions' of federal agencies."[66] In short, the fish wins.

2. *Standing (Round I)* – Lujan v. Defenders of Wildlife

The ESA's section 7 interagency consultation provisions at issue in *Hill* figured prominently once again in the next opportunity the Court had to take up the statute, its 1992 decision in *Lujan v. Defenders of Wildlife*.[67] A number of environmental groups challenged a rule the FWS and NMFS promulgated in 1986 limiting the geographic scope of the jeopardy prohibition to actions federal agencies carry out, fund, or authorize in the United States and on the high seas. This 1986 rule revised the position the agencies had adopted in a 1978 rule extending the scope to federal agency actions in foreign nations.[68] The lower courts sided with the environmental groups and ordered the agencies to resurrect the 1978 rule.[69] However, the district court and Eighth Circuit Court of Appeals had disagreed over whether the environmental groups had standing to challenge the rule.[70] Although the appellate court resolved the issue in favor of allowing the suit and then reached the merits to decide against the government's new position, standing, not the merits, became the decisive question in the Supreme Court.[71]

Justice Scalia wrote for a 6-3 balance of the Court on the standing question,[72] ruling that the environmental groups did not satisfy the three essential requirements the Constitution demands for courts to entertain a plaintiff's claim: concrete injury in fact to the plaintiff, causation of the injury by the defendant, and redressibility of the injury by the courts.[73] The Court found that the environmental groups had demonstrated no separate concrete interests that would be injured, such as firm plans to visit or research protected species in foreign countries where the agencies were failing to conduct consultations; rather, they had alleged injuries such as harm to ecosystems in general and to their personal concerns about the well-being of species abroad, neither of which the majority found sufficiently concrete.[74] Without

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[66] *Id.* at 185.
[67] 504 U.S. 555 (1992).
[68] *Id.* at 558.
[69] *Id.* at 559.
[70] *Id.* at 559.
[71] *Id.* at 559.
[72] The Court's breakdown was complex. On the standing issue, Justice Scalia wrote an opinion in which Chief Justice Rehnquist and Justices White, Kennedy, Souter, and Thomas joined in whole or in part, which was sufficient to rule for the government on standing. Justices Blackmun, O'Connor, and Stevens would have found the plaintiffs had standing. The decision was actually 7-2 in favor of the government, but one vote was from Justice Stevens, who dissented on the standing issue but concurred in the judgment for the government because he found that the rule limiting the reach of the ESA to domestic actions was consistent with the statute. *See id.* at 581 (Stevens, J., concurring). Justice Stevens was the only member of the Court to address the merits of the extraterritoriality question.
[73] *Id.* at 560–61.
[74] *Id.* at 565–71.

more at stake, their alleged "procedural injury" alone did not confer standing.[75]

To decide the standing issue that way, Justice Scalia's opinion had to make two substantive observations about the ESA that suggested the luster *Hill* put on the statute was beginning to dull. First, it is up to the agency taking an action, not the FWS or NMFS, to decide whether an action requires consultation under section 7(a)(2) to determine compliance with the jeopardy prohibition.[76] Second, the consultation between the action-taking agency and the FWS or NMFS is not the kind of procedure in which third parties have any direct participation rights that could be injured should the agencies disregard or improperly conduct the procedure.[77] Hence the Court portrayed the consultation procedure — the procedure sainted in *Hill* — as an agency black box shielded from public scrutiny.

But Justice Scalia's opinion does not mention *Hill* in either of these respects. Ironically, his sole reference to *Hill* comes at the opening of the decision, where he cites the opinion for the proposition that the ESA "seeks to protect species of animals against threats to their continuing existence caused by man."[78] Reducing *Hill*'s "whatever the cost" rhetoric into authority for describing the ESA as a statute that merely *seeks* to protect species is a rather tepid reading. *Hill* receives absolutely no play in the remainder of Justice Scalia's opinion.

One might have expected the Justices dissenting on the standing issue to use *Hill* as a means of calling attention to the importance of the ESA and its consultation procedure. After all, if a law student could stop the powerful and parochial TVA from completing a nearly finished dam in Tennessee, why not give standing to citizens with just as strong an interest in species conservation to require agencies financing projects in other countries to comply with section 7? But Justice Blackmun's and Justice Stevens's opinions finding that the plaintiffs had standing draw no energy from *Hill*.

The only Justice to reach the merits of the extraterritorial jurisdiction question, Justice Stevens, substantially refuted *Hill*'s message by finding that the statute does not have extraterritorial reach. Justice Stevens cites *Hill* only once, for the proposition that "Congress recognized that one of the 'major causes' of extinction of endangered species is the 'destruction of natural habitat.'"[79] From there, however, he convolutedly reasoned that this congressional purpose bolsters the case for not applying the statute extraterritorially. Pointing to the language of section 7, he found that "nothing in this text indicates that the section applies in foreign countries."[80] In other

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[75] *Id.* at 571–78.

[76] *Id.* at 568–69 ("[W]ith respect to consultation the initiative, and hence arguably the initial responsibility for determining statutory necessity, lies with the [action-taking] agencies.").

[77] *Id.* at 571–78.

[78] *Id.* at 558.

[79] *Id.* at 587–88 (Stevens, J., concurring).

[80] *Id.* at 586 (Stevens, J., concurring).

words, the statutory provision that *Hill* instructs us was part of the most comprehensive species conservation legislation ever enacted, that admits of no exception, makes endangered species protection a priority over the primary missions of federal agencies, and is intended to reverse species decline whatever the cost, is in his view, "not sufficient to overcome the presumption against the extraterritorial application of statutes."[81] While it is true that the ESA contains no affirmative expression of extraterritorial reach,[82] Justice Stevens's conclusion did not bode well for *Hill* or the ESA.

3. *Substance (Round I)* – Sweet Home

It was almost two decades after *Hill* before the Court directly revisited the substance of the ESA in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.[83] Property rights interests had launched a frontal assault on an FWS regulation defining the scope of the section 9 prohibition against "take" of protected fish and wildlife species.[84] The ESA defines take to include both the obvious, such as to kill or wound, and the amorphous, such as to harm or harass.[85] By regulation, the FWS had defined harm to include modification of a species' habitat if it leads to actual death or injury,[86] but property rights interests argued that Congress intended "take" to encompass only acts involving direct application of force toward a protected species, not habitat modification that indirectly leads to injury.[87] The D.C. Circuit initially sided with the government, but then reversed itself on rehearing in a divided opinion, which created a split in the courts of appeals.[88]

In another 6-3 ruling,[89] the Court agreed with the government on the basis that "Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the . . . 'harm' regulation."[90] This "comprehensive protection" thesis leaned heavily on *Hill*, from which the majority quoted liberally and described as having "stressed the importance of the statutory policy."[91] Extending the take prohibition to include habitat modification that indirectly injures or kills a pro-

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[81] *Id.* at 586 n.4 (Stevens, J., concurring).

[82] *Cf.* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (noting that the "affirmative intention of Congress" to apply a statute extraterritorially must be "clearly expressed").

[83] 515 U.S. 687 (1995).

[84] 16 U.S.C. § 1538(a)(1) (2006).

[85] *Id.* § 1532(19).

[86] *See* 515 U.S. at 691.

[87] *See id.* at 693–95.

[88] *See id.* at 694–95. For background on the lower court decisions and the split in the courts of appeals, see STANFORD ENVTL. LAW SOC'Y, *supra* note 1, at 106–09; Quarles & Lundquist, *supra* note 33, at 161–68.

[89] Justice Stevens wrote the majority opinion in which Justices Breyer, Ginsberg, Kennedy, O'Connor, and Souter joined, and Justice O'Connor wrote a separate concurring opinion. Justice Scalia wrote a dissent in which Chief Justice Rehnquist and Justice Thomas joined. 515 U.S. at 688.

[90] *Id.* at 699.

[91] *Id.*

tected species thus "extend[s] protection against activities that cause the precise harms Congress enacted the statute to avoid."[92]

Although on its surface the majority's decision appears to endorse *Hill* and the ESA's regulatory power and to open the door to broad enforcement of the take prohibition in the courts, in practical terms the opinion substantially undercuts the take prohibition. Some lower courts previously had found take violations in contexts of extenuated causation and on the basis of population trends rather than actual proof of harm to identifiable members of a protected species.[93] The *Sweet Home* decision tightened the take analysis by making it clear that proof of a harm violation is measured under tort-like tests of "ordinary requirements of proximate causation and foreseeability" and of "but for" causation,[94] and that the plaintiff also must establish "injury to particular animals."[95] The combined effect of these principles being injected into the ESA's principal regulatory arm was a stunning blow to the statute's vitality. Because it can be quite difficult to prove that habitat modification is the proximate, foreseeable, and "but for" cause of actual death or injury to particular members of a protected species,[96] *Sweet Home* can be seen as a Pyrrhic victory for the government and environmental groups.

To be sure, this outcome was not as devastating to the ESA as would have been the case had Justice Scalia's version of the statute prevailed. In-

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[92] *Id.* at 698.

[93] *See*, *e.g.*, Palila v. Haw. Dep't of Land & Natural Res., 639 F.2d 495 (9th Cir. 1981).

[94] 515 U.S. at 696 n.9 (stating that the harm regulation "incorporate[s] ordinary requirements of proximate cause and foreseeability"); *id*. at 700 n.13 (noting that "the regulation . . . is subject to . . . ordinary requirements of proximate causation and foreseeability" and "'but for' causation" is "obviously require[d]"); *id*. at 700 ("Congress had in mind foreseeable rather than merely accidental effects on listed species.").

[95] *Id.* at 700 n.13; *see also id*. at 697 (stating that the term harm "naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species").

[96] *See generally* BEAN & ROWLAND, *supra* note 1, at 216 ("The difficulty of transferring this concept from tort law to endangered species conservation is that what is easily foreseeable to those with a modicum of training in natural history may not be foreseeable to those who hold widely prevalent, but erroneous, views of ecology and animal behavior."); Glen & Douglas, *supra* note 40, at 68–69 (summarizing the difficulties in proving a harm claim after *Sweet Home*); *id.* at 132 (explaining that "[t]he Court's strict construction of the rule has led most lower courts to bear a heavy burden of proof"); Quarles & Lundquist, *supra* note 33, at 63 (summarizing the difficulties in proving a harm claim after *Sweet Home*); 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, 618 (2003) ("[P]ost-*Sweet Home* case law appears to be taking a narrow view of when habitat modification will be considered the proximate cause of harm to a protected species."). The uncertainty as to when habitat modification will meet the proximate cause test imposes its own indirect constraints on habitat modification from land development, as risk-averse lenders and partners of a development project may demand the project resolve the risk of noncompliance either by limiting the project's habitat impacts or by obtaining incidental take authorization from the FWS or NMFS. Moreover, if incidental take authorization is sought, the uncertainty works in the agency's favor in terms of assessing the extent to which the project will cause a take, an administrative determination a court would review deferentially. *See* J.B. Ruhl, *How to Kill Endangered Species, Legally: The Nuts and Bolts of Endangered Species Act "HCP" Permits for Real Estate Development,* 5 ENVTL. L. 345, 361–62, 376, 391–93 (1999).

voking the familiar noscitur a sociis canon of statutory construction,[97] he sided with the view that the word "harm" must be construed to draw its meaning from the words around it in the "take" definition, such as kill and shoot, all of 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."[98] Limiting the take prohibition to such acts would have rendered the provision little more than an anti-hunting measure, so in this sense his failure to garner a majority can be seen as a victory for the environment.[99] But the *Sweet Home* majority's hard-nosed tort law approach to species protection can hardly be interpreted as a ringing endorsement of *Hill* or a shot of adrenaline for the ESA.

4. *Standing (Round II)* – Bennett v. Spear

Because *Lujan* addressed only the requirements for standing under Article III of the Constitution, the question remained open as to what further standing requirements the statute imposed. In *Bennett v. Spear*,[100] a unanimous Court provided the answer: none. The Court has long enforced the jurisprudential principle that regulatory statutes inherently limit standing to the "zone of interests" the statute is intended to protect.[101] The plaintiffs in *Bennett* were ranchers complaining that by limiting flows of irrigation water from federal projects to protect an endangered sucker fish, the FWS was over-regulating their access to water through the section 7 jeopardy prohibition.[102] Clearly, it would seem at first blush, this is not a claim within the "zone" of protecting imperiled species. But the ESA contains a citizen suit provision allowing "any person" to sue any other person, including the FWS and other federal agencies, for violating the statute.[103] The ranchers alleged the FWS had violated the statute by not following the ESA's directive that the agency must reach its jeopardy consultation decisions using the "best scientific data available."[104] The lower courts shut the doors to that claim based on the zone of interests test, and the Supreme Court unanimously reversed.[105]

With Justice Scalia delivering the opinion,[106] the Court held that the "any person" feature of the citizen suit provision flatly negated the general

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[97] *See* MANNING & STEPHENSON, *supra* note 16, at 245–47.

[98] 515 U.S. at 720 (Scalia, J., dissenting).

[99] *See* Lazarus, *Restoring What's Environmental*, *supra* note 21, at 737 (counting *Sweet Home* as among the rare environmental victories).

[100] 520 U.S. 154 (1997).

[101] *Id.* at 162–63.

[102] *Id.* at 157–59.

[103] *Id.* at 164; *see also* 16 U.S.C. § 1532(13) (2006) (defining person broadly); *id.* § 1540(g) (providing for citizen suits).

[104] 520 U.S. at 176–77.

[105] *Id*. at 156–57, *rev'g* Bennett v. Plenert, 63 F.3d 916, 919 (9th Cir. 1995), *aff'g* No. 93-6067-HO, 1993 WL 669429, at *5 (D. Or. Nov. 18, 1993).

[106] Other members of the Court at the time were Chief Justice Rehnquist and Justices Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens, and Thomas.

zone of interest test, thus opening the door to suits against the agencies by commercial, agricultural, recreational, and other economic interests.[107] This alone seems oddly out of sync with *Hill*'s description of the ESA's purposes,[108] but Justice Scalia did not stop there.

Although the Court found that the citizen suit provision preempts the prudential zone of interests test, thus making the ranchers' interests in suing irrelevant, the Court ultimately found that their claims alleged mere "maladministration" of the consultation procedure, not actual *violations* of the statute as required in the citizen suit provision.[109] That kind of claim, the Court reasoned, had to be brought under the Administrative Procedure Act,[110] to which the zone of interest test does apply.[111] But the Court found that the ranchers did in fact have a protected interest under the ESA through the requirement in section 7 that the agency base its decisions on the "best scientific . . . data available."[112] That requirement, the unanimous Court explained, is intended "to ensure that the ESA not be implemented haphazardly, on the basis of speculation" and "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives."[113] Hence the ranchers' "claim that they are victims of such a mistake is plainly within the zone of interests that the provision protects."[114]

The fact that *Bennett* was a unanimous opinion pokes a rather large hole in any thesis that changes in the Court's composition fully explain the ESA's fall from grace, as several of the Court's strongest pro-environmental voters — Justices Breyer, Ginsberg, Stevens, and Souter[115] — joined in Justice Scalia's opinion. That a unanimous Court would endorse concern over the potential for zealously unintelligent, economically disruptive implementation of the ESA seems a far cry from *Hill*'s protect "at any cost" theme. Indeed, if it is any invitation to judicial intervention in ESA administration, *Bennett* suggests courts should be wary of agency "*over*enforcement" of the ESA's species protection regulatory provisions.[116] Not surprisingly, *Hill* shows up nowhere in the opinion.

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[107] 520 U.S. at 165–66.

[108] TVA v. Hill, 437 U.S. 153, 178 (1978) (quoting H.R. Rep. No. 93-412, at 4–5 (1973)); *see also supra* Part I.B.1.

[109] 520 U.S. at 173–74.

[110] 5 U.S.C. §§ 551–559 (2006).

[111] 520 U.S. at 174–76. For a detailed explanation of the division between ESA citizen suits and APA actions that *Bennett* created, see Glitzenstein, *supra* note 46, at 260, 265–70. Of course, *Bennett*'s doctrine is not limited to ESA cases, and thus the opinion is considered a major force in standing law generally. *See* William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis after* Bennett v. Spear, 49 ADMIN. L. REV. 763 (1997); Sam Kalen, *Standing on Its Last Legs:* Bennett v. Spear *and the Past and Future of Standing in Environmental Cases*, 13 J. LAND USE & ENVTL. L. 1 (1997).

[112] 16 U.S.C. § 1536(a)(2); 520 U.S. at 176–77.

[113] 520 U.S. at 176–77.

[114] *Id.* at 177.

[115] *See* discussion *supra* note 32.

[116] 520 U.S. at 166 (explaining that the citizen suit is available "to actions against the Secretary asserting overenforcement under § 1533").

5. *Substance (Round II)* – Home Builders

Ten years passed after *Bennett* before the Court took up the ESA again. In *National Association of Home Builders v. Defenders of Wildlife*,[117] a 5-4 majority of the Court finished the about-face from *Hill* by deciding that the FWS and NMFS had reasonably interpreted the section 7 consultation procedure to apply only to "discretionary action" federal agencies take under their respective authorizing statutes.[118] The action-taking statute in question, the Clean Water Act ("CWA"),[119] requires the Environmental Protection Agency ("EPA") to delegate authority to issue water pollution permits (known as National Pollution Discharge Elimination System Permits or "NPDES permits") to a state once the state satisfies nine prescribed criteria, such as adequacy of enforcement authority.[120] Environmental groups argued, and the Ninth Circuit agreed, that EPA improperly delegated this authority to Arizona because, consistent with the FWS and NMFS rule, EPA did not also consult with the FWS and NMFS under section 7(a)(2) of the ESA to ensure that the delegation to Arizona would not jeopardize a protected species.[121] The issues for the Court thus were whether the agencies' rule limiting section 7 consultation to discretionary agency actions was a valid interpretation of the statute and, if so, whether the CWA delegation procedure allowed EPA any discretion.

Justice Alito based his decision for the majority reversing the decision below on the finding that the CWA makes delegation of permitting authority non-discretionary once the nine criteria are met,[122] whereas section 7(a)(2) of the ESA, as reasonably interpreted by FWS and NMFS in his view, requires consultation only with respect to discretionary agency actions.[123] Given this reading of the statutes, and that the later-enacted ESA does not expressly intervene in the CWA delegation process, the majority found no basis for finding an express or implied repeal of the CWA and refused to apply the urged "tenth criterion" in the form of a requirement that the delegation undergo a satisfactory section 7 consultation.[124]

Notably, Justice Stevens, in his opinion for the four dissenting Justices, attacked the majority opinion as an outright repudiation of "our unequivocal holding in *Hill* that the ESA has 'first priority' over all other federal action."[125] He leaned on *Hill*'s "admits of no exception" principle to reason

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[117] 551 U.S. 644 (2007).

[118] *See id.* at 664–69. Justice Alito wrote the majority opinion in which Chief Justice Roberts and Justices Kennedy, Scalia, and Thomas joined. Justices Stevens, Breyer, Ginsberg, and Souter dissented. *Id.* at 648.

[119] 33 U.S.C. §§ 1251–1387 (2006).

[120] *See* 551 U.S. at 650–51.

[121] *See id.* at 655.

[122] Justice Stevens in dissent disagreed with the majority's characterization of the CWA delegation action as nondiscretionary, *see id.* at 690–93, but that question is outside the scope of this Article.

[123] *See id.* at 661–73.

[124] *Id.* at 663.

[125] *Id.* at 678 (Stevens, J., dissenting).

that "it follows from *Hill* that § 7(a)(2) applies to such NPDES transfers — whether they are mandatory or discretionary."[126] In his view, the majority's approach thus "permits a wholesale limitation on the reach of the ESA. Its interpretation of [the agency rule] conflicts with . . . our interpretation of § 7 in the 'snail darter' case."[127]

Indeed, the majority's rationale in *Home Builders* more closely resembles Justice Powell's dissent in *Hill* than anything in Chief Justice Burger's majority opinion. Similarly, as Justice Powell explained his reasoning in *Hill*

> The critical word in § 7 is "actions" and its meaning is far from "plain." It is part of the phrase: "actions authorized, funded or carried out." In terms of planning and executing various activities, it seems evident that the "actions" referred to are not all actions that an agency can ever take, but rather actions that the agency is *deciding whether* to authorize, to fund, or to carry out.[128]

Similarly, the *Home Builders* majority deferred to the agencies' rule providing that "§ 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the NPDES permitting transfer authorization) that an agency is *required* by statute to undertake once certain specified triggering events have occurred."[129] The majority then distinguished *Hill* on the basis that "[c]entral to the Court's decision was the conclusion that Congress did not *mandate* that the TVA put the dam into operation; there was no statutory command to that effect . . . ."[130] *Hill* thus "did not speak to the question whether § 7(a)(2) applies to *non*-discretionary actions . . . ."[131]

To be sure, *Home Builders* leaves *Hill* breathing. By limiting the analysis of how much discretion the agency enjoys to the de jure question of what the statute provides, the majority did not buy into the full effect of Justice Powell's dissent in *Hill*, which characterized the dam as de facto nondiscretionary on the basis of its nearly completed construction. But *Home Builders* surely narrows *Hill*'s scope by putting nondiscretionary actions off-limits for the ESA and, more fundamentally, by reversing the presumption of statutory priority.[132] In *Hill* the Court searched for but could not find congressional displacement of section 7 of the ESA in any of the TVA legislation — i.e., the ESA trumps unless there is clear congressional intent to preempt it.

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[126] *Id.* (Stevens, J., dissenting).
[127] *Id.* at 679 (Stevens, J., dissenting).
[128] TVA v. Hill, 437 U.S. 153, 205 (1978) (Powell, J., dissenting).
[129] 551 U.S. at 669.
[130] *Id.* at 670.
[131] *Id.* at 671.
[132] *See* Doug Karpa, *Loose Canons: The Supreme Court Guns for the Endangered Species Act in* National Association of Home Builders v. Defenders of Wildlife, 35 ECOLOGY L.Q. 291, 293 (2008) (arguing that *Home Builders* "worked a substantial revision of United States environmental policy that limits the reach of the [ESA] and renders biodiversity policy incoherent and self-defeating").

In *Home Builders* the Court switches perspectives, ruling that the ESA does not implicitly repeal another affirmative congressional directive — i.e., the other statute trumps unless there is clear congressional intent for the ESA to preempt it.

Justice Stevens no doubt sensed that *Home Builders* was about far more than the narrow questions certified — it was about whether *Hill*'s "definitive interpretation" of the ESA[133] had any lasting potency to tilt the balance of legal interpretation in favor of the ESA's central goal of species protection. Apparently, it does not in the Supreme Court any longer. *Hill* may still be breathing after *Home Builders*, but it is on life support.

To be sure, the distance one believes *Hill* has fallen after *Home Builders* depends to some extent on how one believes the five cases fit together. As noted previously, one could characterize all five of the cases as more about statutory interpretation and standing doctrines than about the ESA, in which case asking how far *Hill* has fallen is a non sequitur. But that does not respond to the point that these five cases are indeed the sum total of the Court's pronouncements on one of the nation's premier environmental statutes. If these cases cannot give us some glimpse into the Court's ESA mind, none can.

More to that point, however, *Hill* could plausibly be interpreted as a one-off instance of the Court coming to the environment's rescue. After all, it is the only one of the five ESA cases that involved active application of the ESA for the protection of a species thought to be on the brink of extinction; the other four cases involved general principles of statutory interpretation and standing doctrine with no direct consequences to species on the line. Perhaps the *Hill* majority simply decided to save the fish, and its statutory interpretation thus should be taken as purely results-oriented, leaving the Court since then to mop up after Chief Justice Burger's unnecessarily generous opinion. From this perspective *Hill* has not really fallen because the Court never really intended for it to have any meaning outside of its particular circumstances. But Justice Stevens, the one Justice to have voted in all five of the ESA cases, surely saw it differently in *Home Builders*. His view is that *Hill* has fallen off a steep cliff, and he is not subtle about his charge that the Court's ESA jurisprudence has been fundamentally altered.[134] To test his position, the next section explores in more detail how the Court and the individual Justices have treated the ESA over time in the context of the various interests involved in the cases.

C. The Justices

Legal scholars agree that environmental interests generally have not fared well in the Court's jurisprudence, and have examined six possible ex-

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[133] 551 U.S. at 694 (Stevens, J., dissenting).
[134] *Id.* at 678–79 (Stevens, J., dissenting).

planatory factors for the Court's behavior:[135] (1) indifference to environmental values as a legal context (the Apathy Thesis); (2) ignorance about the importance of the environment (the Ignorance Thesis); (3) bias against environmentalism (the Hostility Thesis); (4) bias in favor of the government (the Pro-Government Thesis); (5) bias in favor of business interests (the Pro-Business Thesis); and (6) skepticism about environmental law (the Environmental Law Skepticism Thesis).[136] These studies vary in terms of time frame, variables examined, and use of empirical analysis.[137] The first three factors all have to do with the Court's perceptions of the environment and environmental values (taken up in Part II of the Article), whereas the last three factors all relate to the Court's perceptions of environmental law and its institutional and economic impacts (taken up in Part III of the Article).

My study of the ESA in the Court, relying as it does on only five cases and involving only one statute, clearly is too small and narrow a sample to support conclusive findings about which of these variables help explain the Court's overall environmental jurisprudence. This study differs from the others, however, by tracing the arc of one of the core environmental laws over its history in the Court spanning more than three decades. The ESA thus can serve as a case study for illuminating and evaluating scholarly analyses of the Court, the environment, and environmental law.

To facilitate that purpose in later parts of this Article, the discussion in this section focuses on the three competing interests at play in the cases — environment, government, and business — to provide a brief descriptive account of how the decisions break down and the Justices stack up. Taking the decisions first, Table 1 shows how the interests fared as well as the breakdown of the Justices in majority and concurring positions versus those dissenting. The first two rows show the interest of the party prevailing in the court below and the disposition of the case in the Court. The next two rows show the interest of the party prevailing in the Court and also the interest, if any, incidentally benefitting from the decision. Because the government's interest as a party could be aligned with either environmental or business interests, it is important to show these aligned interests in each case. Indeed, because environmental and business interests never coincided in the cases, aligned interests only appear when linked to the government as a party. The next two rows show the same for the losing interests — which interest was the losing party and, if it was the government, which interest was aligned to it. The final two rows show how the Justices voted, merging the majority

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[135] Of the legal scholars examining these possible explanations, Professor Stephen Johnson's work goes the farthest in developing a typology encompassing most of the factors listed here and using it to compare different scholars' explanations for the Court's behavior. *See generally* Johnson, *supra* note 21.

[136] I discuss each of these theses in more detail *infra* Parts II–III, treating the Pro-Government Thesis and Pro-Business Thesis together given their relatedness.

[137] *Compare* Lazarus, *Restoring What's Environmental*, *supra* note 21 (describing an empirical study examining over two hundred environmental decisions from 1969 to 1999), *with* Lin, *supra* note 21 (studying only the 2003–04 term).

and concurring Justices together as any nuanced differences are not vital for these purposes and are addressed later in the Article where relevant.

TABLE 1. INTERESTS AND OUTCOMES IN THE COURT'S ESA CASES

	Hill	***Lujan***	***Sweet Home***	***Bennett***	***Home Builders***
Prevailing Below	environment	environment	business	government	environment
Outcome in Court	affirmed	reversed	reversed	reversed	reversed
Prevailing Interest	environment	government	government	business	government
Aligned Interest	none	business	environment	none	business
Losing Interest	government	environment	business	government	environment
Aligned Interest	business	none	none	environment	none
Majority and Concurring	Brennan Burger Marshall Stevens Stewart White	Kennedy Rehnquist Scalia Souter Stevens[138] Thomas White	Breyer O'Connor Ginsburg Kennedy Souter Stevens	Breyer Ginsburg Kennedy O'Connor Rehnquist Scalia Souter Stevens Thomas	Alito Kennedy Roberts Scalia Thomas
Dissenting	Blackmun Powell Rehnquist	Blackmun O'Connor	Rehnquist Scalia Thomas	none	Breyer Ginsburg Souter Stevens

Table 1 thus reveals how much of an outlier *Hill* is in the ESA's overall history in the Court. It is the only instance in which the environmental interest prevailed as a party, the only case in which the government and business interests were aligned on the losing side, and the only instance in which the Court affirmed the lower court decision. It was, in short, a home run for the environment.

Table 1 also shows the ascendancy of business interests over the run of cases. After *Hill*, where business interests were aligned with the government's loss, the only setback business interests have suffered was in *Sweet*

[138] As explained *supra* note 72, Justice Stevens ruled for the government on substantive grounds but would have held for the plaintiffs on the standing question.

Home. That case, as described above, offered business interests a silver lining in the form of the tort law approach the Court took to causation in the proof of harm analysis. Adjusting for that feature of *Sweet Home* — calling it more of a tie than a loss for business in practical effect — business interests are undefeated since *Hill*.

Turning to the Justices, ordered by when they left the Court or joined it if still sitting, Table 2 shows how each Justice who voted in one or more of the ESA cases lined up with respect to environmental, government, and business interests. Whichever interest the Justice voted for, whether in the majority, concurrence, or dissent, the vote is counted in the "Primary" column under the appropriate "Pro" interest category. In addition to accounting for votes for the prevailing or losing party's interest, Table 2 also accounts for aligned interests that benefitted, or would have benefitted in the case of a dissenting vote, from a vote for the government interest. For example, if a Justice voted for the government and the government prevailed, that vote is counted in the "Primary" column under "Pro-Government," and if business interests were aligned with the government in the case, the Justice also would be counted under the "Aligned" column under "Pro-Business."

This tabulation reveals several trends. First, the government is the dominant primary vote recipient. Since *Hill* it has garnered as many primary votes as environmental and business interests combined and more than them combined when counting only Justices still sitting. Even more telling, however, is how the balance tilts when all primary and aligned interests are considered. Since *Hill*, business interests have received more than double the primary and aligned votes that environmental interests have received. Of the thirteen Justices who have cast a vote in an ESA case since *Hill*, five never cast a primary or aligned vote for the environment, and three did so only once. Of the seven of those Justices still sitting, primary votes for government and business interests combined outnumber primary votes for the environment eighteen to two, and aligned votes for business interests outnumber aligned votes for environmental interests eight to three. Once again, these scores count *Sweet Home* as an aligned victory for environmental interests, when in fact business interests may think of it as a partial victory as well. If *Sweet Home* is considered a tie, therefore, business interests truly swamp environmental interests.

Based on the foregoing descriptions of the statute, the cases, and the Justices' voting records, the discussion turns in the remaining parts of this Article to the lessons that can be drawn. No further proof or analysis is needed to conclude that *Hill* has been neutered and, consequently, the ESA diminished as a force in environmental law. The "at all costs" and "top priority" themes of *Hill* are over and done with in the Court after *Home Builders*. But what does that fall from grace tell us about the status of environmental values and environmental law in the Court's jurisprudence, and what does it tell us about design principles for environmental law if avoiding similar demises is of any concern?

TABLE 2. VOTING PATTERNS OF THE JUSTICES IN ESA CASES

Justice	Number of Cases	Pro-Environment	Pro-Government	Pro-Business		
		Primary	Aligned	Primary	Primary	Aligned
Stewart	1	1				
Burger	1	1				
Powell	1			1		1
Brennan	1	1				
Marshall	1	1				
White	2	1		1		1
Blackmun	2	1		1		1
Rehnquist	4			2	2	2
O'Connor	3	1	1	1	1	
Souter	4	1	1	2	1	1
Stevens	5	2	1	2	1	1
Scalia	4			2	2	2
Kennedy	4		1	3	1	2
Thomas	4			2	2	2
Ginsburg	3	1	1	1	1	
Breyer	3	1	1	1	1	
Roberts	1			1		1
Alito	1			1		1
Total – all		12	6	21	12	15
Total – post-*Hill*		6	6	18	12	12
Total – still sitting		2	3	11	7	8

II. THE COURT AND ENVIRONMENTAL VALUES

What does the Supreme Court think of the environment and environmentalism? Not much, suggests the foregoing case study of the ESA in the Court. But by "not much" one could intend several different meanings. One is that the Court simply does not think much *about* the environment in selecting and deciding cases. In this view, other factors, such as the integrity of administrative law or proper statutory interpretation techniques, and not species protection, are what have driven the Court's ESA decisions. The Court is, in other words, apathetic about the environment and it is simply a coincidence that any case involves the environment as context for a more

central issue of concern, such as standing. Another meaning could be that the Court, while thinking purposively about the environment, has not formed an accurate *conception* of it. In this view, the Court might have an environmental purpose when it selects and decides cases involving the environment — perhaps even a benevolent one — but is misguided by its environmental ignorance in how best to fulfill those purposes. Lastly, the Court might simply not think much *of* the environment. In this view, hostility to environmentalism guides the Court's case selections and decisions. Legal scholars have posited all three of these "not much" explanations for what the Court thinks of environmentalism, and the history of the ESA in the Court lends support to all three interpretations.

A. The Apathy Thesis

Professor Dan Farber has suggested that the Court has rendered itself irrelevant to environmental law through a long practice of "hyperactive passivity" about the environment and environmental law.[139] Whether the Justices are emotionally apathetic about the environment is hard to prove one way or the other, but if any Justice has been particularly interested in the environment as a jurisprudential context it is hard to detect from the five ESA opinions. Three of the cases were hotly contested decisions involving substantive interpretation of the statute, yet at most one can detect only occasional nods to the environment as a factor in the tussle. *Hill*, not surprisingly, has the most to say about the environment. For example, Chief Justice Burger's selections from the legislative history often focus on the virtues of species conservation. One extended quote waxes about the importance of mollusks,[140] and elsewhere the opinion emphasizes that "the legislative proceedings in 1973 are, in fact, replete with expressions of concern over the risk that might lie in the loss of any endangered species."[141] Chief Justice Burger then adds numerous italicized emphases in a long quote on genetic heritage, the final suggesting his endorsement of the ESA as an "institutionalization of . . . caution."[142]

Similarly, *Sweet Home*, the only other decision in which environmental interests ostensibly came out on top (though as an aligned interest and arguably not decisively), also contains a few examples of the Justices having thought about the environmental consequences of the contrasting interpretations. In disputing Justice Scalia's conception of harm, for example, it was important to the majority that under his interpretation "a developer could drain a pond, knowing that the act would extinguish an endangered species of turtles."[143] Similarly, Justice O'Connor's concurrence emphasized that

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[139] *See* Farber, *supra* note 21, at 549; Manaster, *supra* note 21, at 1963–66.
[140] TVA v. Hill, 437 U.S. 153, 177 n.23 (1978).
[141] *Id.* at 177.
[142] *Id.* at 178–79.
[143] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 701 n.15 (1995).

"breeding, feeding, and sheltering are what animals do," so if a land use interferes with any of those essential behaviors it could run the risk of causing actual death or injury prohibited under section 9.[144]

By and large, however, one has to look hard and stretch a bit to find these and the few other isolated examples of any Justice inserting the environment directly into the jurisprudence of the ESA. After *Hill* they are almost nonexistent. Even the dissenting opinions in *Lujan* and *Home Builders* fail to capitalize on any sense that the environment is at stake in the case. The *Lujan* dissents are remarkably sterile in this sense, not mentioning *Hill* or anything about the environment. Similarly, while Justice Stevens invokes *Hill* in his *Home Builders* dissent, only at the end of his opinion does he go beyond complaining about the majority's statutory interpretation and infidelity to *Hill*, claiming without the slightest bit of elaboration that the majority's approach "places a great number of endangered species in jeopardy."[145] In short, the Court's ESA cases and the Justices' opinions have much to say about the ESA, but not much to say about the importance of species conservation.

B. The Ignorance Thesis

While not going so far as to call the Court environmentally ignorant, Richard Lazarus has suggested that part of the explanation for how the Court has approached the environment stems from its lack of sufficient experiential grounding in ecology.[146] Lack of a deep understanding of ecological processes could help explain the Court's growing distance from the ESA, as the ESA is inherently about how ecosystems support species and how injuries to ecosystem integrity undermine that support.

The ignorance thesis finds support in several of the Court's ESA cases. Ironically, one of the most glaring examples is from the majority opinion in *Hill*, where Chief Justice Burger wrote that "[u]ntil recently the finding of a new species of animal life would hardly generate a cause celebre."[147] Biologists might beg to differ. Perhaps *lawyers* only began to care about the finding of new species once the ESA made that a legally relevant event, but biologists did not require the ESA to put the discovery of new species high on their list. Consider also the *Sweet Home* majority's arguably unbiological tort law approach for determining whether a land use harms a species. As Professor Patrick Parenteau has observed, "[c]onventional notions of proximate cause do not mesh well with the way that the science of conservation biology evaluates the risk of extinction from multiple factors including

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[144] *Id.* at 710 (O'Connor, J., concurring).

[145] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 694 (2007) (Stevens, J., dissenting).

[146] *See* Lazarus, *Restoring What's Environmental*, *supra* note 21, at 744–71.

[147] 437 U.S. at 159.

habitat loss and fragmentation."[148] In other words, conservation biologists do not think like tort lawyers.

Of course, any disconnect between the science of species conservation and the law of species conservation is not the Court's doing — it is the product of an underlying tension in the ESA between science and law. The statute compels a messy amalgam of scientific and legal determinations, such as whether a land use is the proximate cause of harm to a species, from which a "law-science" decision-making process emerges, befuddling to lawyers and scientists alike.[149] The *Sweet Home* Court thus was in a bind, for had it crafted a scientific standard for harm, the lawyers would have accused the Court of legal ignorance. Perhaps, therefore, the ESA cases demonstrate that the Court's exhibited ignorance of the environment in its ESA cases is a function not of the Justices' own lack of diligence, but of the challenges of environmental law in general.

C. The Hostility Thesis

Some scholars have characterized the Court, particularly members of the Roberts Court, as practicing "anti-environmental activism."[150] While one can identify isolated examples in the Court's ESA cases supporting the apathy thesis and the ignorance thesis, the hostility thesis finds support running throughout. Justice Powell's dissent in *Hill* started the theme, to say the least. The opinion chokes out an obligatory bow to the environment buried in a footnote, where he claims that "[t]he purpose of this Act is admirable" and that "[p]rotection of endangered species long has been neglected," but immediately thereafter suggests that the majority's decision was "invited by careless draftsmanship of otherwise meritorious legislation."[151] The body of the opinion is reserved for the real salvos at the environment, including his remark that the majority's opinion lacks "accord[ ] with some modicum of common sense and the public weal."[152] He went so far as to accuse the majority's interpretation of the ESA of being "without regard to its manifest

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[148] Parenteau, *supra* note 40, at 154; *see also* BEAN & ROWLAND, *supra* note 1, at 215–16 (describing how "this issue of the directness of the linkage between the habitat destruction and the resulting injury or death of an endangered animal . . . confused the Court" and observing that "a biologist may view the death of a turtle from draining its pond as a highly likely and predictable result, yet the turtle's death may be entirely unforeseen by the ordinary person with no biology training"). As Professor Robert Adler has argued, Justice Scalia's dissent in *Sweet Home* evidences an even greater disconnect between scientific and the Court's understanding of ecosystems. *See* Robert W. Adler, *The Supreme Court and Ecosystems: Environmental Science in Environmental Law*, 27 VT. L. REV. 249, 362 (2003) ("Justice Scalia appeared to believe, contrary to the basic tenets of modern conservation biology, that species can only be protected within confined zoological reserves . . . .").

[149] *See* J.B. Ruhl, *Reconstructing the Wall of Virtue: Maxims for the Co-evolution of Environmental Law and Environmental Science*, 37 ENVTL. L. 1063, 1068–76 (2007) (describing the numerous law-science decisions demanded under the ESA).

[150] Manus, *supra* note 21, at 221; *see* Lazarus, *Restoring What's Environmental*, *supra* note 21, at 705; Lin, *supra* note 21, at 632–35.

[151] 437 U.S. at 202 n.11 (Powell, J., dissenting).

[152] *Id.* at 196 (Powell, J., dissenting).

purpose,"[153] as if stopping the dam worked counter to the interest of the snail darter, and to reveal that he could "not believe that Congress would have gone this far to imperil every federal project, however important, on behalf of any living species *however unimportant*."[154]

Far subtler in its antagonism for the environment is Chief Justice Burger's majority opinion. As noted above, in some passages he appears blithely ignorant about the importance of such events as discovery of new species. His perspective elsewhere in the opinion, however, has been described as anything from "studied ambivalence" to adopting an openly "skeptical tone."[155] For example, the opinion describes it as "curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant" would require shutting down the dam project.[156] Hemmed in by the text of the statute, but by no means committed to the purpose of the statute, by the end of the opinion Justice Burger appears to be begging Congress to correct the "unwisdom" of the ESA.[157] If the overall tenor of the opinion cannot be deemed hostile to species conservation, neither can it be deemed the least bit enthusiastic.

Moving into the modern era of the Court's ESA cases, Justice Scalia's majority opinion in *Lujan* continues the tradition by smoothly denigrating the interests in the environment the plaintiffs advanced as, in Justice Scalia's words, a "series of novel standing theories."[158] Although not openly hostile to the idea that the environment deserves protection, the opinion drips with disdain as Justice Scalia, writing in the textualist tradition, dissects what he calls the "inelegantly styled 'ecosystem nexus'" and its siblings "called, alas, the 'animal nexus' approach . . . and the 'vocational nexus' approach."[159] These are so far off the mark, according to Justice Scalia, as to comprise "pure speculation and fantasy."[160]

Justice Scalia was far less restrained in dissent in *Sweet Home*, where his concerns centered on the impact that the majority's decision to uphold the harm regulation could have on private land uses and industry. Although once again framing his decision as textalist purism, Justice Scalia's true colors do shine through here and there, as when he complains that under the majority's decision "[a] large number of routine private actions — for example, farming, roadbuilding, construction and logging — are subjected to strict-liability penalties when they fortuitously injure protected wildlife."[161] The opinion also reveals Justice Scalia's concern over the distribution of the benefits and burdens of fulfilling environmental values, as in his interpreta-

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[153] *Id.* at 202 (Powell, J., dissenting).
[154] *Id.* at 207 n.16 (Powell, J., dissenting) (emphasis added).
[155] *See* Cannon, *supra* note 15, at 416.
[156] 437 U.S. at 172.
[157] *Id.* at 194.
[158] Lujan v. Defenders of Wildlife, 504 U.S. 555, 565 (1992).
[159] *Id.* at 565–66.
[160] *Id.* at 567.
[161] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 721 (1995) (Scalia, J., dissenting).

tion that the ESA requires "habitat destruction on private lands . . . to be remedied by public acquisition, and *not* by making particular unlucky landowners incur 'excessive costs to themselves.'"[162]

This concern over the impacts of the ESA on private interests comes through in *Bennett* as well, where, writing for the unanimous Court, Justice Scalia emphasized that the ranchers' need for water is a "competing interest in the water the Biological Opinion declares necessary for the preservation of the suckers."[163] This "competing interest" is put on equal footing with species conservation for purposes of standing under the ESA's citizen suit provision because, as Justice Scalia observes, "there is no textual basis for saying its expansion of standing requirements applies to environmentalists alone."[164] Similarly, under the APA standing analysis, Justice Scalia places the "ESA's overall goal of species preservation" on no higher ground than the interest in "avoid[ing] needless economic dislocation."[165] The message is clear: environmental interests might needlessly conflict with economic interests, so both get a say under the ESA.

Ironically, the one opinion devoid of textual evidence of hostility to the environment is the one Justice Stevens accuses of "plac[ing] a great number of endangered species in jeopardy."[166] One will search Justice Alito's sterile, descriptive *Home Builders* opinion in vain for even the slightest hit on the environment. Perhaps that says it all — it is no longer necessary to take swipes at species conservation to justify taking the ESA down yet a few more pegs.

III. The Court and Environmental Law

Although one can extract excerpts from the Court's ESA cases to support any of the three theses about the Court's environmental values attitude, none of the theses seem entirely satisfying as a medium for understanding and explaining the decline of *Hill* and the ESA in the Court's jurisprudence. After all, if a majority of the Court truly has held and still holds substantial hostility toward the environment, how did *Hill* happen, and why did it take three decades to undo? Yet the apathy and ignorance theses also offer incomplete explanations, as the trend in the cases has been unmistakably toward taking more punch out of the ESA each step of the way. Apathy and ignorance are unlikely sources of such consistency.

Hence, although apathy, ignorance, and hostility toward the environment may all be in the mix to some extent for various Justices over time, it is

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[162] *Id.* at 728 (Scalia, J., dissenting); *see also id.* at 735–36 (Scalia, J., dissenting) (stating that the ESA "places on the public at large, rather than on fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species").

[163] Bennett v. Spear, 520 U.S. 154, 160 (1997).

[164] *Id.* at 166.

[165] *Id.* at 176.

[166] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 694 (2007) (Stevens, J., dissenting).

necessary to step out of the texts of the cases and the names of the Justices to get a fuller sense of what is behind the ESA's fall from grace. This leads us to an important historical period not yet examined — the gap from *Hill* to *Lujan*. *Hill* caught the ESA in its relative infancy, just five years after enactment, whereas *Lujan*, fifteen years after *Hill*, worked with a statute in full swing. What happened in between?

To be sure, the composition of the Court changed in the interim, but as previously noted, not obviously in a way as devastating to *Hill* as matters have turned out.[167] In any event, the Court took no occasion to affirm or reject *Hill*'s message during the following decade and a half — the ESA was offline for the Court during that period.

By comparison, Congress remained more engaged, reacting quickly to *Hill* by adding the symbolic "God Squad" exemption to the statute in 1978[168] and making a number of minor and more substantial adjustments to the statute in several other rounds of amendments.[169] Congress shut down further meaningful work on the ESA in 1982, however, and at that time the statute was still very close to its original form[170] — close enough at least to rule out changes in the statute as a factor for the Court's reversal of sentiment.

By contrast, whereas the Court and, soon after, Congress went on ESA hiatus, beginning in the 1990s the FWS and NMFS initiated a breathtakingly expansive agenda of administrative reform of the ESA's regulatory programs. As this Part explains, the transformational effects of the agencies' reform efforts correlate most closely with the Court's turnabout on the ESA. My argument, in other words, is that since it got back in the ESA game, the Court has not been troubled by species conservation generally so much as it has been troubled by how the agencies implement species conservation, as well as by who has been most adversely affected — business interests.

A. The Environmental Law Skepticism Thesis

The argument that ESA's implementation, rather than its purposes, lies behind its downfall in the Court is consistent with the central thesis Professor Lazarus has developed in his work on the Court in the environmental realm: it is environmental *law*, not necessarily environmental *values*, that has been the principal target of the Court's skepticism over the past four

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[167] *See supra* notes 29–32 and accompanying text.

[168] *See* 16 U.S.C. § 1536(h)–(n). Known officially as the Endangered Species Committee exemption, Congress designed this cumbersome and infrequently used exemption procedure to allow a federal project to go forward notwithstanding that it might jeopardize a species.

[169] These amendments are explained in STANFORD ENVTL. LAW SOC'Y, *supra* note 1, at 22–26. Amendments in 1979 and 1988 were technical and of no substantive consequence. *See also* U.S. FISH & WILDLIFE SERV., A HISTORY OF THE ENDANGERED SPECIES ACT (2001), *available at* http://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf (summarizing each round of amendments).

[170] *See* STANFORD ENVTL. LAW SOC'Y, *supra* note 1, at 22–26.

decades.[171] Indeed, the ESA's fate in the Court offers compelling evidence of this thesis, as the ESA evolved from a values statute to a legalistic regulatory regime in the time between *Hill* and its hostile successors.

The ESA started out as an outlier among environmental laws. Compared to the major pollution control laws enacted in the early 1970s, the Clean Air Act ("CAA")[172] and CWA, the ESA seemed an oddity. As Professor Zygmunt Plater has explained in discussing the features contributing to the statute's "differentness," 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.[173] This led to implementation largely through litigation that was, like *Hill*, "typically citizen-promoted and opportunistic, most often focusing attention on . . . just one highly localized habitat place — one creek, one spring, one cave, one valley."[174] Of course, *Hill* made it clear that even "one creek" could be significant both politically and economically, but it did not provide much of a glimpse into the future of ESA implementation.

A convergence of several trends completely transformed the "one creek" ESA of the *Hill* days into a statute of immense regulatory power and geographic reach. First, largely as a result of citizen petitions, the number of listed species in the United States rose from about 200 in 1975 to just under 1000 in 1995, and geographic coverage of their aggregate critical habitat designations necessarily went nationwide as well.[175] The effect was to expand the ESA's reach far throughout the nation as the "one creek" feature multiplied to such an extent that there was a potential "one creek" problem around every corner.[176] And some of these "one creeks" became as large as states, or even larger, as species with vast geographic ranges, such as the northern spotted owl and Pacific salmon, were listed.[177] Moreover, the proliferation of federal environmental laws during the 1970s meant that pri-

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[171] *See generally* Lazarus, *Restoring What's Environmental*, *supra* note 21.

[172] 42 U.S.C. §§ 7401–7671q (2006).

[173] Plater, *supra* note 15, at 290–91.

[174] *Id.* at 291.

[175] *See* D. Noah Greenwald et al., *The Listing Record*, *in* THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 1, at 51, 55 (charting annual listings from citizen petitions); Scott et al., *supra* note 45, at 17 (charting annual and cumulative listings); *id.* at 24 (depicting a map of critical habitat distribution).

[176] *See* Scott et al., *supra* note 45, at 21 (showing a 2004 map of U.S. distribution of listed species). For an interactive map showing the listed species found in every state and county, see *Species Search*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/endangered/species/index.html (last updated Apr. 23, 2012).

[177] *See State Maps Showing Sub-Units*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/pacific/ecoservices/nso/map.html (last visited May 18, 2012) (on file with the Harvard Law School Library) (mapping the vast geographic scope of northern spotted owl critical habitat); *Salmon Critical Habitat Designation Maps*, NW. REG'L OFFICE, NAT'L MARINE FISHERIES SERV., http://www.nwr.noaa.gov/Salmon-Habitat/Critical-Habitat/CH-maps.cfm (last visited May 18, 2012) (on file with the Harvard Law School Library) (containing maps showing the vast geographic scope of salmon population critical habitat).

vate land development and resource use projects increasingly required federal environmental permits, which trigger the "authorized by" action agency nexus under section 7,[178] meaning section 7 increasingly reached deeper and deeper into the private sector.[179] Simultaneously, citizen suit litigation exploded through aggressive litigation against federal agencies under section 7 and prosecutions under the section 9 take prohibition, often using the harm definition to attack land uses involving loss of species habitat.[180] The net result was that by the early 1990s, the ESA was about far more than stopping a federal project here and there — the "one creek" had gone viral, the ESA had gone nationwide, and the regulatory burden had gone private. The ESA, in other words, was now acting like a mainstream environmental law.

And thus Congress awakened. The congressional politics of the mid-1990s placed the now-expansive ESA problem front and center in the congressional reform agenda. Seeing the writing on the wall, Secretary of the Interior Bruce Babbitt set in motion an administrative reform agenda that successfully staved off the congressional assault, but which would forever transform the ESA.[181] Chief among these reforms was the reinvention of a previously little-used permitting program found in section 10(a) of the statute, known colloquially as the habitat conservation plan ("HCP") program.[182] Put simply, an HCP permit provides an avenue for non-federal projects not subject to section 7 to obtain authorization to take a protected species, usually in the form of habitat modification, in return for mitigation

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[178] 16 U.S.C. § 1536(a)(2) (2006) (requiring consultation for actions federal agencies authorize).

[179] As one court recently observed in connection with the regulatory scope of section 7, "a vast number of land use projects require a permit from a federal agency," so if a parcel of land is part of a critical habitat designation, "it may become quite difficult for a public or private entity to exploit that land." Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 2011 WL 73494, at *1 (C.D. Cal. Jan. 8, 2011); *see generally* Patrick W. Ryan & Erika E. Malmen, *Interagency Consultation Under Section 7*, *in* LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 104, 106 ("Whenever a nonfederal entity seeks a license or permit to proceed with a project or activity, compliance with section 7(a)(2) is almost always implicated.").

[180] *See* Glen & Douglas, *supra* note 40 (discussing the history of citizen suits enforcing section 9); Eric R. Glitzenstein, *supra* note 46, at 260, 276 ("Citizen suits have been crucial to the enforcement of the ESA and they will continue to play a vital role in the Act's implementation regardless of who controls the political branches of government.").

[181] For a detailed contemporaneous review of the reform agenda items and implementation, see J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367, 374–87 (1998).

[182] *See* 16 U.S.C. § 1539(a)(1)(B). For policy discussions of the HCP program written when it was emerging from dormancy under Secretary Babbitt's visionary reform agenda, see Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning under the Endangered Species Act of 1973,* 21 ENVTL. L. 605 (1991); J. B. Ruhl, *Regional Habitat Conservation Planning under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection,* 44 SW. L.J. 1393 (1991). For policy discussions having the benefit of several years of experience of program implementation, see DEFENDERS OF WILDLIFE, FRAYED SAFETY NETS (1998); Albert C. Lin, *Participants' Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 ECOLOGY L.Q. 369 (1996); Eric Fisher, *Habitat Conservation Planning Under the Endangered Species Act: No Surprises & the Quest for Certainty*, 67 U. COLO. L. REV. 371 (1996).

and other measures assembled in a conservation plan.[183] Although the HCP program was added to the statute in the 1982 amendments, it had been essentially dormant throughout the 1980s.[184] Secretary Babbitt saw it as a win-win reform opportunity, however, as he could offer landowners a palatable and secure way out of their ESA problems — give the species some conserved habitat as mitigation for the modified habitat and you get to use your property.[185]

The rejuvenated HCP program was a huge success, with hundreds of permits issued by FWS throughout the nation in just a few years.[186] Indeed, through the use of "regional" HCPs large metropolitan areas and even states could solve their ESA problems through megapermits, some covering up to hundreds of thousands of acres, thus giving the program the "cooperative federalism" feel of the pollution control laws.[187] Overall, these developments went a long way toward allaying the property rights pushback against the ESA,[188] but that gain came at a cost to the ESA's image. HCPs gave the ESA the look of any other environmental law — a command-and-control program that enlisted state and local cooperation through large-scale permits, leveraged the harm definition to extend jurisdiction over private property widely throughout the nation, and administered a heavy regulatory permitting process to control how land uses comply.[189] Suddenly the ESA started to look more like the other environmental protection statutes. Not coincidently, that is when its troubles began in the Court.

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[183] For a more detailed description of the HCP permitting process, see J.B. Ruhl, *supra* note 96, at 376–96.

[184] By 1992, for example, FWS had issued only twelve HCP permits. DEFENDERS OF WILDLIFE, *supra* note 182, at vi-xiii.

[185] For comprehensive and thoughtful "insider" accounts of Secretary Babbitt's vision and implementation of this phase of ESA reform, see John D. Leshy, *The Babbitt Legacy at the Department of Interior: A Preliminary View*, 31 ENVTL. L. 199 (2001); Joseph L. Sax, *Environmental Law at the Turn of the Century; A Reportorial Fragment of Contemporary History*, 88 CAL. L. REV. 2375 (2000). For a brief history of the ramping up of the HCP program specifically, see Robert D. Thornton, *Habitat Conservation Plans: Frayed Safety Nets or Creative Partnerships?*, 16 NAT. RESOURCES & ENV'T 94, 95 (2001).

[186] By late 1997 FWS had issued more than 225 HCP permits. *See* DEFENDERS OF WILDLIFE, *supra* note 182 at vi-xiii.

[187] *See* Ruhl, *supra* note 182 (describing the regulatory leverage and permit administration features of the HCP program). The ESA clearly does not replicate the formal cooperative federalism structure of the CAA and CWA. *See* J.B. Ruhl, *Cooperative Federalism and the Endangered Species Act: A Comparative Assessment and Call for Change*, *in* THE ENDANGERED SPECIES ACT AND FEDERALISM 35 (Kaush Arha & Barton H. Thompson, Jr. eds., 2011). The large-scale HCP permitting thrust, however, brought state and local governments deeply into the fold. *See* Robert P. Davison, *The Evolution of Federalism under Section 6 of the Endangered Species Act*, *in* THE ENDANGERED SPECIES ACT AND FEDERALISM, *supra* note 187, at 89, 106–10.

[188] *See* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 315–24 (1997).

[189] *See* Liebesman & Petersen, *supra* note 1, at 73 (describing the HCP permitting process as a "regulatory hurdle[ ]" that "has proven to be demanding and resource-intensive"); Thornton, *supra* note 185, at 95 (describing the HCP program as becoming "increasingly complex and sophisticated" and plagued by "sheer complexity," the "absence of adequate public funding," and "regulatory uncertainty").

The first post-*Hill* blow, *Lujan*, preceded the rise of the HCPs, but it caught the ESA well on its way to ever-expanding geographic reach through section 7. By approaching the case as a standing problem, the Court avoided having to reach the extraterritorial jurisdiction question, but by denying standing the decision substantially restricted access to the courts even for domestic "one creek" disputes. Still, *Lujan* did not engage the fully transformed ESA.

By contrast, *Sweet Home* concerned the lynchpin of the ESA's new mainstream model — the harm definition and the regulatory leverage it provides for the ESA generally and the HCP program in particular. If the Court had rejected the possibility of habitat modification constituting an illegal take of protected species, accepting Justice Scalia's theory that direct force or contact must cause the death or injury, the ESA would have largely evaporated as a non-federal lands regulatory statute.[190] Only the section 7 jeopardy prohibition would have applied to non-federal lands, and even then only through federal agency funding and approval actions. The HCP permitting program thus perfectly illustrated what the harm definition supported — a sprawling environmental command-and-control statute. Justice Scalia wanted nothing to do with that, working instead to turn the statute into a hunting regulation regime. The majority did not accept Justice Scalia's cramped interpretation of "harm," but rather treated the harm definition like any other leg in a command-and-control regime — the enforcement agency has to prove the violation, and that requires meeting some standard of causation, in this case one integrating tort principles of proximate cause.

Matters turned much uglier for the ESA in *Bennett*, where the unanimous Court treated the ESA as if it were just any other command-and-control environmental statute. No passage in any opinion involving any environmental statute could better reveal the Court's skepticism about environmental law generally than its concern that the ESA must employ a "best scientific data available" standard "to ensure that the ESA not be imple-

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[190] Eighty-five percent of imperiled species included in one study were affected by habitat loss, with private land conversion for commercial and residential uses being the leading contributor. *See* David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 607, 609–12 (1998). Moreover, the prevalence of at-risk species on nonfederal lands increases the importance of policies toward private land development. One study estimates that over ninety percent of the species listed as threatened or endangered under the ESA have some or all of their habitat on nonfederal lands. U.S. GEN. ACCOUNTING OFF., GAO/RCED-95-16, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 4 (1994), *available at* http://www.gao.gov/archive/1995/rc95016.pdf. Of those species, about seventy-three percent have over sixty percent of their habitat on nonfederal lands, and about thirty-seven percent are completely dependent on nonfederal lands. *Id.* at 5. Several studies demonstrate that a mere seven percent of the land area of the United States is home to fully fifty percent of plant and animal species listed under the ESA, and that the "hot spots," within which many at-risk species appear in clusters, are often located near areas experiencing suburban expansion. *See Mapping Out Endangered Species' Hot Spots*, 150 SCI. NEWS 101 (1996); *see also* A.P. Dobson et al., *Geographic Distribution of Endangered Species in the United States*, 275 SCIENCE 550 (1997); Jon Paul Rodriguez et al., *Where are Endangered Species Found in the United States?*, ENDANGERED SPECIES UPDATE, Mar.–Apr. 1997, at 1.

mented haphazardly, on the basis of speculation . . . [and] to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives."[191] That additional reminder that the ranchers' water uses were "competing interests" on equal standing grounds with species conservation interests[192] leaves little doubt that the ESA enjoys no special status among environmental laws and that environmental laws enjoy no special status at all.

Indeed, the *Home Builders* decision appears to take pains to assign no sense of importance to the ESA, treating its collision with the CWA as a plain vanilla statutory interpretation problem to reconcile two equals in the lowly class of environmental laws. Despite all the protestations by Justice Stevens that the majority effectively abandoned *Hill* and subverted the ESA's purposes, the majority's sterile, dispassionate opinion drives home the lesson that the ESA is now a mere mortal among environmental laws. The relevant statutory framework, however, had not changed materially since *Hill*; it was through the expansion of listings, citizen suit litigation, the harm definition, and the rise of the HCP programs that the ESA gradually morphed from being different to being just like all the others. That, if anything, best explains the ESA's fall from grace into the Court's abyss of skepticism toward environmental law.

B. The Pro-Business and Pro-Government Theses

A corollary to the thesis that the Court has reserved special skepticism for environmental law, leading it to hammer away at the ESA as the FWS and NMFS slowly took the statute into command-and-control mode, is the thesis that the Court also generally seeks to protect business interests.[193] The collateral damage of any such bias is likely to include skepticism about the regulatory burdens of environmental law generally and the ESA specifically. Under this view, the government more often wins when it is on the side of business interests, and more often loses when it is against them. Professor Jonathan Adler has challenged the pro-business thesis with a study of the first two terms of the Roberts Court, contending that a pro-government bias provides more explanatory value than the pro-business thesis because business interests reap incidental benefits when they have piggybacked on the government's positions.[194]

Longer-term studies of the Court point more strongly towards the pro-business thesis as the more robust of the two theories. For example, based on their study of activism and restraint evident in the Court's environmental opinions, Professors Levy and Glicksman conclude that "a consistent pro-development pattern has prevailed in the Supreme Court's environmental

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[191] Bennett v. Spear, 520 U.S. 154, 176–77 (1997).
[192] *Id.* at 160, 179.
[193] *See*, *e.g.*, Levy & Glicksman, *supra* note 21, *passim*.
[194] *See* Adler, *supra* note 21, at 972–75.

law decisions since 1976."[195] This pattern, they contend, has more explanatory value than the pro-government thesis, as a closer analysis of the Court's treatment of the government in environmental cases shows that the government wins most consistently when it is aligned with business interests.[196] Similarly, Professor Lazarus has observed that the Court "has been too willing to grant petitions filed by parties who claim that environmental protection laws are overreaching, which has led to an unfortunate skewing of the Court's docket."[197]

The Court's ESA cases also seem to tilt more in favor of the pro-business thesis. As Tables 1 and 2 from Part I show, the government has lost in two of the five ESA cases, *Hill* and *Bennett*. In two of the three cases in which the government prevailed, *Lujan* and *Home Builders*, it was aligned with business interests, and in *Sweet Home*, while it was aligned with environmental interests, the outcome as a practical matter has been favorable to business interests. Indeed, *Sweet Home* is the only case in which business interests have ostensibly been the losing party. If *Sweet Home* is the worst the Court hands business interests under the ESA, that does not bode well for environmental interests.

The voting records behind those outcomes are even more lopsided. Of the thirteen Justices who have cast a vote in at least one ESA case since *Hill*, five never cast a primary or aligned vote for the environment, and three did so only once. Of the seven of those Justices still sitting, primary votes for business outnumber primary votes for the environment seven to two, and aligned votes for business outnumber aligned votes for the environment eight to three. Although the government wins the most cases and garners the most primary votes, most of its sway with the Justices has come when it is aligned with business.

By the time of *Bennett*, the Court was no longer hiding its pro-business slant on the ESA. Central to the Court's standing analysis was its observation that "the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest)."[198] The ranchers and species conservation simply presented "competing interest[s]" as to how to manage the environment,[199] and in this respect it was as important to the Court to protect the ranchers from "overenforcement" as it was to protect species from "underenforcement."[200] Particularly given that, in the Court's estimation, such over-enforcement was likely to stem from "officials zealously but unintelligently pursuing their environmental objectives" and could lead to "needless economic dislocation,"[201] business interests deserve

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[195] Levy & Glicksman, *supra* note 21, at 421.
[196] *See id.* at 421–22.
[197] Lazarus, *The Nature of Environmental Law*, *supra* note 21, at 9.
[198] Bennett v. Spear, 520 U.S. 154, 165 (1997).
[199] *Id.* at 160.
[200] *Id.* at 166.
[201] *Id.* at 177.

as much voice in the courts as do environmental interests. This hardly sounds like pro-government rhetoric.

Bennett also proves an apt example of Professor Lazarus's observation about the Court's petition review bias in favor of business interests challenging overreaching environmental laws. Indeed, that was apparently the purpose of the decision — to open the door to such challenges — and it has clearly had that effect in ESA litigation.[202] *Home Builders*, of course, is the second shoe to drop in that regard, making it the third of the Court's five ESA cases — three out of four since *Hill* — in which business interests succeeded in getting their challenge to ESA administration before the Court. *Bennett* thus drives home the pro-business bias thesis and establishes its roots going back well before the Roberts Court era.

IV. Environmental Law Design Lessons

The final lesson to draw from the ESA's slow demise in the Court has to do with how to avoid similar fates for other environmental laws, particularly in ecosystem protection and biodiversity conservation contexts where new legislative initiatives may be needed to implement effective policy.[203] Although I am not suggesting that avoiding harsh treatment in the Court should be the driving factor in the design of such statutes, the ESA's history shows why it is not a trivial concern. In this Part, therefore, I identify the principal structural features that appear to be behind the statute's fall from grace in the Court and suggest what lessons this fall offers environmental law design. Whether legislators and agencies choose to follow them — and I am not arguing one way or the other in that regard — is a different matter, but they should at least be aware of the risks of not doing so.

A. Avoid Directly Regulating Private Land and Resources

Although Bruce Babbitt's administrative reforms gave the ESA the look and feel of an environmental regulatory program, no amount of makeup could cover up the feature that most distinguishes the ESA from its pollution control cousins — it *directly* regulates use of private land and resources. The extreme version of political rhetoric about this quality of the ESA is the claim that "today the ESA is a tool for controlling land and water, not for

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[202] *See* Patrick Parenteau, *An Empirical Assessment of the Impact of Critical Habitat Litigation on the Administration of the Endangered Species Act* 5 (Vt. Law Sch. Faculty Papers, Paper No. 1, 2005), *available at* http://lsr.nellco.org/vermontlaw_fp/1 (presenting an empirical study of critical habitat litigation showing eighty-three percent of all active cases at the time of the study were brought by business interest plaintiffs).

[203] *See generally* J.B. Ruhl, *Ecosystem Services and the Clean Water Act: Strategies for Fitting New Science into Old Law*, 40 Envtl. L. 1381 (2010) (discussing the limits of administrative discretion to integrate the economics of ecosystem services into existing environmental laws).

preserving species."[204] More accurately, I would say, and have many times, the agencies use the habitat modification prohibition embedded in harm definition as leverage to control land and water use as a tool for preserving species.[205] Nor am I alone among legal scholars in recognizing the ESA as one of the federal government's principal mechanisms for controlling use of private land and natural resources.[206]

Taking the ESA for what it is in this respect, the Court has not looked favorably upon the ESA's impact on private land use. Consider that *Hill* and *Lujan* involved only the scope of section 7 jeopardy prohibition restrictions over *federal* projects, and yet that alone was concern enough for Justice Powell, in his *Hill* dissent, to bemoan that the majority's decision would mean "the Act covers every existing federal installation."[207]

By the time of *Sweet Home*, however, it was obvious that, through the leverage the agencies' harm definition supplied over habitat modification, the ESA was also about regulating private land and resource uses under sections 9 (take prohibition) and 10 (HCP permits) of the statute. This did not go unnoticed by the Justices, as all of the examples in the majority and concurring opinions referred to private landowners, such as Justice Stevens's reference to a "developer" who might "drain a pond"[208] and Justice O'Connor's example of a "landowner who drains a pond on his property."[209] Even more directly, Justice Scalia in dissent focused intensely on his perception that the majority's reasoning employs the harm definition to "preserve[ ] habitat on private lands."[210]

Bennett then returned to section 7 to connect it to private resource users, in that case ranchers receiving irrigation water from federal reclamation projects. The ranchers' central claim was that under the FWS's biologi-

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[204] U.S. Congressman Mike Simpson, *Bringing the Endangered Species Act into the 21st Century*, http://simpson.house.gov/IssueStatements/ESAreform.htm (last visited May 18, 2012) (on file with the Harvard Law School Library).

[205] *See*, *e.g.*, J.B. Ruhl, *The Endangered Species Act and Private Property: A Matter of Timing and Location*, 8 CORNELL J.L. & PUB. POL'Y 37 *passim* (1998); J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 COLO. L. REV. 555, 579–601 (1995); J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 SMU L. REV. 1393 *passim* (1991).

[206] *See* Jacalyn R. Fleming, *The Scope of Federal Authority Under the Endangered Species Act: Implications for Local Land Use Planning*, 65 ALA. L. REV. 497 (2001) (discussing the ESA as an example of "the federalization of land use controls"); Ashira P. Ostrow, *Land Law Federalism*, 61 EMORY L.J. (forthcoming 2012) (describing the ESA as among the "federal permitting requirements significantly restrict[ing] the development of privately owned wetlands or species habitats"); William F. Pedersen, *Using Federal Environmental Regulations To Bargain for Private Land Use Control*, 21 YALE J. ON REG. 1, 15–24 (2004) (discussing ways in which the ESA imposes burdens on land use); Steven P. Quarles & Thomas R. Lundquist, *Land Use Activities and the Section 9 Take Prohibition*, *in* LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 161 (describing the ESA's land use regulation provisions).

[207] TVA v. Hill, 437 U.S. 153, 203 (1978) (Powell, J., dissenting).

[208] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 701 n.15 (1995).

[209] *Id.* at 713 (O'Connor, J., concurring).

[210] *Id.* at 714 (Scalia, J., dissenting).

cal opinion "the amount of available water will be reduced and that they will be adversely affected thereby,"[211] and that this harm was sufficient to allow them standing under the ESA and the APA. Clearly, therefore, the scope of control of private land and resource regulation has been pressing on the Court's mind when evaluating the ESA.

The ESA's closest sibling among environmental laws, the wetlands protection program under section 404 of the CWA, has suffered a similar fate in the Court largely as a consequence of its reach over private lands. Section 404(a) of the CWA authorizes the Secretary of the Army, through the U.S. Army Corps of Engineers ("Corps"), to "issue permits . . . for the discharge of dredged or fill material in the navigable waters of the United States at specified disposal sites."[212] Thus, under section 404, and subject to specified exceptions, wetlands subject to federal jurisdiction may be filled only if the Corps grants a permit. These permits, known as "404 permits," "wetland permits," or "Corps permits," have become the cornerstone for federal protection of wetland resources.[213]

Section 404 thus quite directly regulates private lands and resources, putting pressure on the question of precisely where "navigable waters of the United States" begin and end in the context of marshes, swamps, and other not-so-obviously "navigable" waters. The Court has chipped away at that question in a series of cases bearing an uncanny resemblance to the history of the ESA cases. First, in a *Hill*-like opener the Court held that section 404 reaches wetlands that are adjacent to navigable waters, as the Corps' regulations provided, because "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."[214] Fifteen years later, however, the Court held that the Corps overreached in regulating "isolated ponds, some only seasonal, wholly located within two Illinois counties,"[215] and most recently it ruled, in a fractured set of opinions still befuddling courts and practitioners, that intermittent creeks and channels would also in many, if not most, cases fall outside section 404 jurisdiction.[216]

Much like the ESA cases, therefore, the Court's three section 404 cases begin with a decisive victory for environmental interests only to be followed

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[211] Bennett v. Spear, 520 U.S. 154, 168 (1997).

[212] 33 U.S.C. § 1344(a), (d) (2006).

[213] For background on the scope of federal wetlands regulation, see Douglas R. Williams & Kim Diana Connolly, *Federal Wetlands Regulation: An Overview*, *in* WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404, at 1, 1–26 (Douglas R. Williams et al. eds., 2005).

[214] United States v. Riverside Bayview Homes, 474 U.S. 121, 134 (1985).

[215] Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 171 (2001).

[216] *See* Rapanos v. United States, 547 U.S. 715 (2006). The details and implications of *Rapanos* are far too complex to cover here. Suffice it to say entire symposia have been devoted to deciphering the Court's opinions. *See*, *e.g.*, Symposium, Rapanos v. United States, 22 NAT. RESOURCES & ENV'T, Summer 2007.

by two equally decisive steps in the other direction.[217] Perhaps most telling as to what was behind this turnabout in the section 404 cases is the Court's unsubtle warning, in its second foray into wetlands law, that extension of federal jurisdiction to wetlands beyond the adjacent wetlands boundary risks constitutional scrutiny because of its potential to "result in a significant impingement of the States' traditional and primary power over land and water use."[218]

The lesson for environmental legislation from the Court's ESA and section 404 cases is clear: it is one thing for legislatures to regulate land uses indirectly by constraining pollution and other land use externalities — that will buy you the Court's default level of skepticism for environmental law — but try *directly* regulating private land, water, and other resources and you can expect the Court to employ a heightened level of scrutiny that resembles outright hostility. To be sure, it may be difficult to manage large-scale ecological problems effectively without extending some form of regulatory impact over private lands and resources. Where that is the case, the next two lessons offer some salient design considerations.

B. Account for Regulatory Costs

Unlike many other environmental laws, the ESA is almost devoid of attention to cost-benefit and cost-effectiveness standards for regulatory implementation. The jeopardy prohibition in section 7 and the take prohibition in section 9 incorporate such checks on regulatory impact only indirectly through exemption processes that extend little in the way of balance. The "God Squad" exemption process in section 7, added in response to *Hill*, is limited to instances where the benefits of the exemption "clearly outweigh"

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[217] Consistent with this trend, the Court recently unanimously held that an administrative compliance order issued to residential property owners alleged to have illegally filled wetlands on their lot without a section 404 permit was subject to pre-enforcement judicial review. *See* Sackett v. EPA, 132 S.Ct. 1367 (2012). The Court rejected the government's position that the order, which required the lot owners to restore the property or face fines up to $75,000 per day, was not final agency action subject to review, leaving the owners the option of complying with the order or violating it and contesting the claims in the agency's enforcement action. *Id.* at 1370, 1374. In a separate concurring opinion, Justice Alito described the government's position as "put[ting] the property rights of ordinary Americans entirely at the mercy of [agency] employees" and asserted that "in a nation that values due process, not to mention private property, such treatment is unthinkable." *Id.* at 1375 (Alito, J., concurring).

[218] *SWANCC*, 531 U.S. at 174. Despite this warning, the Court has steadfastly declined to review lower court decisions finding that ESA protection of purely intrastate species is not an unconstitutional exercise of federal power over interstate commerce. *See*, *e.g.*, Stewart & Jasper Orchards v. Salazar, 638 F.3d 1163 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 498 (2011); Alabama-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003), *cert. denied*, 545 U.S. 1114 (2005); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom*., Gibbs v. Norton, 531 U.S. 1145 (2001); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). This persistent refusal to engage the federal power issue is not unique to the ESA, but it does evidence a limit to the Court's pro-business bias in environmental law contexts.

the benefits of enforcing the jeopardy prohibition and are of "regional or national significance,"[219] and in any event this cumbersome and elaborate procedure has rarely been employed.[220] The section 10 HCP program, while offering a way for land owners to proceed with land uses by mitigating for habitat modification, does not require that the permitting agency ensure its demands meet any cost-benefit or cost-effectiveness condition other than that the permit applicant be required to provide habitat loss mitigation "to the maximum extent practicable."[221]

Whereas the private land use component of the ESA grew over time as a factor in the Court's jurisprudence, from the very start the Court has had a problem with this lack of integrated, robust cost-benefit and cost-effectiveness mechanisms in the ESA's regulatory programs. Indeed, this concern virtually defined *Hill*, as Justice Powell in dissent was relentless in claiming that the majority's whatever-the-cost approach "requires the waste of at least $53 million . . . and denies the people of the Tennessee Valley area the benefits of the reservoir . . . ."[222] Even Chief Justice Burger, writing for the majority, seemed puzzled that "the survival of a relatively small number of three-inch fish . . . would require the halting of a virtually completed dam for which Congress has expended more than $100 million."[223] As it has for so many other aspects of this analysis, *Bennett* crystallizes the ESA's limited attention to costs as a serious problem for the Court. It was problem enough for Justice Scalia that the ESA's regulatory arms could potentially wreak "economic dislocation" across the landscape, a trait the ESA shares with many environmental laws even if properly administered.[224] The deeper sin, however, was that if not checked by the best available science mandate the ESA could result in "needless" economic dislocation meted out arbitrarily by unintelligent, zealous agency officials.[225] In essence, Justice Scalia converted the "best available science" mandate into a second-best proxy for cost-benefit and cost-effectiveness controls.

While the Court could not subvert a congressional mandate to protect a particular environmental interest "whatever the cost," the ESA cases suggest that the Court can and will find ways to temper such unrealistic cost-insensitive legislative exuberance through procedural maneuvers and crabbed interpretations of statutory provisions. Particularly when environmental legislation substantially touches private lands and resources, therefore, incorporating more specific, rigorous attention to costs, such as through feasibility standards, than is found in the ESA could be a prudent strategy for fending off this type of sideways judicial intervention.

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[219] 16 U.S.C. § 1536(h)(1)(A)(ii)–(iii) (2006).
[220] *See* LIEBESMAN & PETERSEN, *supra* note 1, at 60.
[221] 16 U.S.C. § 1539(a)(2)(B)(ii).
[222] TVA v. Hill, 437 U.S. 153, 210 (1978) (Powell, J., dissenting).
[223] *Id.* at 172.
[224] Bennett v. Spear, 520 U.S. 154, 176 (1997).
[225] *Id.* at 176–77.

The concern about the lack of such structure in the ESA no doubt played an important role in motivating one of Secretary Babbitt's mid-1990s administrative reforms — the "No Surprises" policy protecting HCP permittees from bearing the costs of responding to unforeseen circumstances threatening a species covered in the permit.[226] This protection from runaway costs was seen as a critical component of the reinvented HCP program to allay landowner concerns,[227] though the agency could only carry the thought so far and even then was the target of intense pushback by environmental interests.[228] Indeed, many ESA practitioners believe that more landowner protections and incentives, rather than regulations, can produce an overall more effective species conservation strategy and compliance culture.[229] The history of the ESA in the Court thus suggests it would be prudent when designing new or reformed environmental laws regulating private lands and resources to pay close attention to such concerns and to build a coherent regulatory framework for cost accounting and cost control into the legislation directly rather than relying on the initiative of post-enactment administrative reforms.

C. Reduce Skewed Regulatory Burdens

As noble as the ESA's species conservation goals are, it has been difficult for the statute to shake the reputation of being unfair in its distribution of benefits (primarily to environmental protection interests) and burdens (primarily to private landowner interests). The reputation is not without truth. As I have observed previously,

> [t]he ESA's unfairness surfaces in many ways, usually concerning the inherent unfairness possible whenever a landowner's fate depends on timing and location. For example, when land development is a major contributing cause of a species' endangerment, those landowners lucky enough to have developed before the spe-

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[226] *See* 69 Fed. Reg. 71,723, 71,724 (Dec. 10, 2004) (codified at 50 C.R.F. §§ 17.22, 17.32(b)(5), 222.307(g)). The FWS has described the policy as within a package of reforms "designed to: improve the species recovery rate while minimizing impacts of the ESA on landowners, grant more authority to State and local governments, require greater scientific scrutiny of endangered species decisions, and make implementation of the ESA more efficient." *Making the ESA Work Better*, ENDANGERED SPECIES BULL. (U.S. Fish & Wildlife Serv.), May–June 1995, *available at* http://www.fws.gov/filedownloads/ftp_DJCase/endangered/bulletin/95/10points.html.

[227] *See* Fred P. Bosselman, *The Statutory and Constitutional Mandate for a No Surprises Policy*, 24 ECOLOGY L. Q. 707, 711 (1997) (noting that reduced regulatory uncertainty increases land values).

[228] *See* Spirit of the Sage Council v. Kempthorne, 511 F. Supp. 2d 31 (D.D.C. 2007) (upholding the No Surprises regulation over a litany of substantive challenges over a decade after the agencies first announced the policy). For a brief history of this litigation see Douglas P. Wheeler & Ryan M. Rowberry, *Habitat Conservation Plans and the Endangered Species Act*, *in* LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 221, 225–27.

[229] *See*, *e.g.*, Michael J. Bean, *Landowner Incentives and the Endangered Species Act*, *in* LAW, POLICY, AND PERSPECTIVES, *supra* note 1, at 207 *passim*.

> cies is listed, and whose land uses thus led to the listing, escape all regulation. However, the poor souls that either intentionally or inadvertently left the species' habitat on their lands shoulder the post-listing regulatory burden. Moreover, to the extent we justify the ESA on the ground of the collective benefits species offer to humans (medicines, aesthetic pleasure, ecosystem functions, etc.), the costs of species protection tends to fall on a much narrower subgroup of society than all those who derive the benefits.[230]

Once again it is Justice Scalia who places this issue in focus most aggressively, in his *Sweet Home* dissent, by expressing his concern that in extending the harm definition to reach private land regulation, the majority's reasoning "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."[231] The unfairness in this, in his view, is that private landowners bear the financial brunt of the nation's species preservation ideals. For Justice Scalia, the "cost of preserving the habitat of endangered species" should be "place[d] upon the public at large, rather than upon fortuitously accountable individual landowners."[232] Hence, the proper financing of species conservation in his view requires that "habitat destruction on private lands . . . be remedied by public acquisition, and *not* by making particular unlucky landowners incur 'excessive cost to themselves.'"[233] Justice Scalia reprises this concern as a central theme in *Bennett*, this time writing for a unanimous Court rather than in dissent, when he observes that the ESA could be over-enforced against private interests.[234]

Indeed, the concern over the distributional effects of environmental laws extends beyond the ESA and seems to be brewing in the Court with respect to climate change regulation as well. In its first climate change decision, *Massachusetts v. EPA*,[235] a majority of the Court found that the EPA had erred in denying a citizen rulemaking petition to regulate greenhouse gas emissions from motor vehicles under the CAA. The opinion opens with the pronouncement that "[a] well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related."[236] Just a few years later, however, the Court ruled that the EPA's then-fledgling implementation of the CAA to regulate greenhouse gases preempted federal common law claims alleging that major sources of green-

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[230] J.B. Ruhl, *The Endangered Species Act and Private Property: A Matter of Timing and Location*, 8 CORNELL J.L. & PUB. POL'Y 37, 42 (1998).

[231] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 714 (1995) (Scalia, J., dissenting).

[232] *Id.* at 735–36 (Scalia, J., dissenting).

[233] *Id.* at 728 (Scalia, J., dissenting).

[234] Bennett v. Spear, 520 U.S. 154, 166 (1997).

[235] 549 U.S. 497 (2007).

[236] *Id.* at 504–05.

house gases are public nuisances.[237] Noting that EPA had decided that greenhouse gases do contribute to climate change, the Court on this occasion opened its decision with a reference to a well-known climate change skeptic and the caveat that "the Court, we caution, endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change."[238]

It took the Court fifteen years before it started backpedaling on *Hill* and the ESA, whereas for climate change it took a mere four. One explanation for how swiftly the Court has retreated in the climate change context could be a concern that nuisance liability would land arbitrarily on whomever plaintiffs select as the guilty sources of greenhouse gas emissions. The Court observed, for example, that EPA "is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."[239] And this has been a theme of environmental law in general for many decades. Recall, for example, the famous case of *Boomer v. Atlantic Cement Co.*,[240] in which New York's highest court declined to enjoin a cement plant's air emissions found to constitute a nuisance. The court in *Boomer* ruled instead that a damages remedy, previously not available under New York law, was the more equitable approach.[241] Among the reasons the court gave for its dramatic move was that it would be unfair to impose on the defendant the burden of curing what was an industry-wide pollution problem.[242] As the court explained,

> techniques to eliminate dust and other annoying by-products of cement making are unlikely to be developed by any research the defendant can undertake within any short period, but will depend on the total resources of the cement industry nationwide and throughout the world. The problem is universal wherever cement is made.
>
> For obvious reasons the rate of the research is beyond control of the defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles.[243]

Of course, the faith courts demonstrate in expert environmental agencies to mete out costs and benefits in a more balanced, rational way than the common law courts are capable of through nuisance law is unfounded in contexts such as the ESA. This is because the ESA lacks rigorous attention

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[237] *See* Am. Elec. Power v. Connecticut, 131 S. Ct. 2527 (2011).
[238] *Id.* at 2533 n.2.
[239] *Id.* at 2539–40.
[240] 257 N.E.2d 870 (N.Y. 1970).
[241] *Id.* at 875.
[242] *Id.* at 873.
[243] *Id.*

to costs to begin with and, other than what *Bennett* ekes out of the best available science standard, has little in the way of checks on inequitable agency cost distribution policy. It is as if the ESA was designed to concentrate the benefits of endangered species protection on those who bear little of the costs, while concentrating the costs on those who enjoy few of the benefits. While it may be impractical, as well as constitutionally unnecessary, to fulfill Justice Scalia's ideal of protecting private landowners from all regulatory constraints of ecological protection laws, the Court's ESA cases strongly suggest that greatly skewed regulatory burdens are a red flag for the Court and one of the indicia of environmental law that has led to the Court's skepticism.

Conclusion

It is ironic that one of the best known and most revered of the Court's environmental cases is essentially a dead letter in the Court's environmental jurisprudence. Environmental law professors still teach *Hill*, and environmental lawyers still think of *Hill* when they think of the ESA, but the real lessons lie in the Court's methodical evisceration of *Hill* in *Lujan*, *Sweet Home*, *Bennett*, and *Home Builders*. The surgery, largely at the hands of Justice Scalia, was so subtle and yet so complete that it seems to have taken Justice Stevens by total surprise when Justice Alito stitched it up in *Home Builders*.

The ESA's fall from grace thus provides a microcosm within which to examine various theses environmental law scholars have offered about the Court's environmental values and environmental law jurisprudence. More than anything in this respect, the ESA cases suggest the Court holds a deep skepticism of environmental law generally, particularly when business interests are on the line. The perfect storm for unleashing the Court's wrath, moreover, brews when an environmental law directly regulates private lands and resources, without mechanisms to ensure cost-benefit or cost-effective regulation, and without attention to the potential for inequitable distribution of costs and benefits. Those conditions define the ESA and have played a prominent role in the Justices' opinions over the decades it took for *Hill*'s free fall to land with a thud in *Home Builders*. There may be no practical way for environmental law always to avoid crossing these lines in ecosystem protection and biodiversity conservation contexts, but the design lesson is that when such a statute must venture into these dangerous realms, any friendly reception in the Court is likely to be hard-earned and short-lived.