UNIVERSITY OF NEW HAMPSHIRE SCHOOL OF LAW

FINAL EXAMINATION—STATUTORY INTERPRETATION

INSTRUCTIONS

1. **Time allotted.** This exam consists of five brief “short answer” essay questions, and you have 1.5 hours to take it. You need only answer three of the five questions, and may disregard two of them. Each question has equal value in determining your final grade.

The “questions” are not so much questions as they are statements, or propositions. **Your task is to construct the best argument you can—in three solid, substantive paragraphs or less—for each statement/proposition. The catch, as you will notice, is that you are also required to do the same thing for the converse of each proposition.** So as soon as you have argued for one proposition, you will have to turn around and argue for the opposite proposition.

In other words, the exam requires you to think and behave like a lawyer, advocating for positions with which you don’t necessarily agree.

**SOME HINTS:** These are “short answer” essays. To do reasonably well on this exam, you do not need to cite specific cases, law review articles or authors, famous statutory construction metaphors, influential judges, or legal theorists. That said, doing so may facilitate or demonstrate a better command of the material.

If and when you do refer to cases, you need not discuss them at length or in detail. When discussing a case, it is sufficient to know what the case stands for, or what general approach or specific “move” the case is a good example of, in the context of statutory construction.

When discussing ideologies or philosophies, it is best to avoid political labels (liberal v. conservative, Democrat v. Republican), although use of those labels is not prohibited. It is better to refer to theoretical approaches or legal
values (for example, purposivism, intentionalism, literalism, formalism, rule-of-law, coherence, practicality, fairness, federalism, separation of powers, law-and-order, civil libertarian, legal process, legal realism, critical legal theory, etc., etc., etc.).

2. **Materials you may consult.** You may bring in and consult any materials, including the case book and supplement, homemade or commercial outlines, class notes, and so forth. You may **not** access the internet.

3. **Questions/ambiguities.** If something in the exam strikes you as ambiguous in a way that makes it difficult to answer the question, simply note the ambiguity in your answer, and let me know what assumption you made to resolve the ambiguity or question. You will not be penalized for any reasonable assumption or resolution that you can explain.

4. **Relax and good luck.** I enjoyed hearing your comments in class, and look forward to reading your exam answers. As I’ve told you a few times, as my first law students, you are “guinea pigs.” This is my first exam. If it turns out that I’ve made the exam too long or too short, or too hard or too easy, it will not be reflected in your grade.
QUESTION #1
Stare decisis


QUESTION #2
Legal Process Theory

3a. In Professor Lon Fuller’s The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949), at pgs. 712-718 of your textbook, fictional Justice Foster’s opinion best supports and advances “rule of law” values such as certainty, predictability, and even-handed application of the law.

3b. In Professor Lon Fuller’s The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949), at pgs. 712-718 of your textbook, fictional Justice Handy’s opinion best supports and advances “rule of law” values such as certainty, predictability, and even-handed application of the law.

QUESTION #3
Sources of legislative history

4a. When utilizing legislative history to ascertain legislative intent, committee reports are the best and most trustworthy sources.

4b. When utilizing legislative history to ascertain legislative intent, transcripts of floor speeches and debates are the best and most trustworthy sources.
QUESTION #5
“Textualism, old and new”

7a. The New Textualism, conceived and popularized by Justice Antonin Scalia and Judge Frank Easterbrook, is really nothing more than a modern expression of the classical Legal Process theorists’ conceptions of textualism, in which the interpreter follows the “plain meaning” of the statute’s text (EFG-690), and the Literal Rule (EFG-694), amounting to a theoretical framework for “strict construction” of statutes.

7b. The New Textualism, conceived and popularized by Justice Antonin Scalia and Judge Frank Easterbrook, is a departure, something separate and distinct from the classical Legal Process theorists’ conceptions of textualism, in which the interpreter follows the “plain meaning” of the statute’s text (EFG-690), and the Literal Rule (EFG-694), amounting to a theoretical framework for “strict construction” of statutes.

QUESTION #4
“Dynamic” statutory interpretation

5a. When practiced by state judges, “dynamic statutory interpretation” (characterized by your textbook authors as sensitivity to changed circumstances, modern trends, practicality, notions of fairness, and overall societal coherence) is more legitimate and constitutionally sound than when it is practiced by federal judges.

5b. When practiced by state judges, “dynamic statutory interpretation” (characterized by your textbook authors as sensitivity to changed circumstances, modern trends, practicality, notions of fairness, and overall societal coherence) is no more legitimate and constitutionally sound than when it is practiced by federal judges.
INSTRUCTIONS

1. **Time allotted.** 30 minutes.

2. **Materials you may consult.** None. This is a “closed book” extra credit question. You must put all of your materials aside and consult nothing other than the attached material.


Your task is to identify in the case (with short quotes and citations to the case, utilizing the case book page numbers) as many textual and substantive canons of statutory construction as you discern. The canons you cite may be those **expressly mentioned** in the opinions (whether or not the Latin phrases are utilized), and those that are **relevant to the analysis that could have been expressly mentioned**.

For simplicity’s sake, you should divide your answer into sections on the majority opinion, the dissenting opinion, and the concurring opinion.
The Endangered Species Act of 1973 (ESA or Act), 87 Stat. 884, 16 U.S.C. § 1531 (1988 ed. and Supp. V), contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened. Section 9 of the Act makes it unlawful for any person to "take" any endangered or threatened species. The Secretary has promulgated a regulation that defines the statute’s prohibition on takings to include “significant habitat modification or degradation where it actually kills or injures wildlife.” This case presents the question whether the Secretary exceeded his authority under the Act by promulgating that regulation.

Section 9(a)(1) of the Act provides the following protection for endangered species:

Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—
(B) take any such species within the United States or the territorial sea of the United States. [16 U.S.C. § 1538(a)(1).]

Section 3(19) of the Act defines the statutory term “take”:  

The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. [16 U.S.C. § 1532(19).]

The Act does not further define the terms it uses to define “take.” The Interior Department regulations that implement the statute, however, define the statutory term “harm”:  

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

This regulation has been in place since 1975.

A limitation on the § 9 “take” prohibition appears in § 10(a)(1)(B) of the Act, which Congress added by amendment in 1982. That section authorizes the Secretary to grant a permit for any taking otherwise prohibited by § 9(a)(1)(B) “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B).

In addition to the prohibition on takings, the Act provides several other protections for endangered species. Section 4, 16 U.S.C. § 1533, commands the Secretary to identify species of fish or wildlife that are in danger of extinction and to publish from time to time lists of all species he determines to be endangered or threatened. Section 5, 16 U.S.C. § 1534, authorizes the Secretary, in cooperation with the States, see § 1535, to acquire land to aid in preserving such species. Section 7 requires federal agencies to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of endangered species “or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.” 16 U.S.C. § 1536(a)(2).

[A group of small landowners, logging companies, and families dependent on the forest products industries and organizations that represent their interests brought this action to challenge the Secretary’s definition of _harm_ to include habitat modification and degradation. They specifically objected to the application of the regulation to protect the red-cockaded woodpecker and the spotted owl by prohibiting changes in their natural habitat that would have the effect of injuring or killing those animals. The court of appeals agreed with respondents’ challenge, but the Supreme Court reversed.]

The text of the Act provides three reasons for concluding that the Secretary’s interpretation is reasonable. First, an ordinary understanding of the word “harm” supports it. The dictionary definition of the verb form of “harm” is “to cause hurt or damage to: injure.” Webster’s Third New International Dictionary 1034 (1966). In the context of the ESA, that definition naturally
encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.

Respondents argue that the Secretary should have limited the purview of "harm" to direct applications of force against protected species, but the dictionary definition does not include the word "directly" or suggest in any way that only direct or willful action that leads to injury constitutes "harm." Moreover, unless the statutory term "harm" encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that § 3 uses to define "take." A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation.

Second, the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. In TVA v. Hill, 437 U.S. 153 (1978) [Chapter 7, § 2C], we described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Whereas predecessor statutes enacted in 1966 and 1969 had not contained any sweeping prohibition against the taking of endangered species except on federal lands, the 1973 Act applied to all land in the United States and to the Nation's territorial seas. As stated in § 2 of the Act, among its central purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ."

In Hill, we construed § 7 as precluding the completion of the Tellico Dam because of its predicted impact on the survival of the snail darter. Both our holding and the language in our opinion stressed the importance of the statutory policy. "The plain intent of Congress in enacting this statute," we recognized, "was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." Although the § 9 "take" prohibition was not at issue in Hill, we took note of that prohibition, placing particular emphasis on the Secretary's inclusion of habitat modification in his definition of "harm." In light of that provision for habitat protection, we could "not understand how TVA intends to operate Tellico Dam without 'harming' the snail darter." Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the Secretary's "harm" regulation. * * *

Third, the fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit, "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," 16 U.S.C. § 1539(a)(1)(B), strongly suggests that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings. The permit process requires the applicant to prepare a "conservation plan" that specifies how he intends to "minimize and mitigate" the "impact" of his activity on endangered and threatened species, 16 U.S.C. § 1539(a)(2)(A), making clear that Congress had in mind foreseeable rather than merely accidental effects on listed species. No one could seriously request an "incidental" take permit to avert § 9 liability for direct, deliberate action against
a member of an endangered or threatened species, but respondents would read “harm” so narrowly that the permit procedure would have little more than that absurd purpose. “When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” Congress’ addition of the § 10 permit provision supports the Secretary’s conclusion that activities not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them.

[The court of appeals had come to a contrary conclusion on the basis of the noscitur a sociis canon: the surrounding words—such as pursue, hunt, shoot—connote application of force directed at a particular animal. But other words, such as harass, do not so connote, and the lower court’s construction would effectively write harm out of the statute entirely.]

We need not decide whether the statutory definition of “take” compels the Secretary’s interpretation of “harm,” because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents’ view and that the Secretary’s interpretation is reasonable suffice to decide this case. See generally Chevron, U.S.A., Inc. v. Natural Resources Defense Council [Chapter 9, § 3]. The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary’s reasonable interpretation. See Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 373 (1986). [Justice Stevens also rejected application of the rule of lenity, see § 2B1 below. Although there is a separate criminal sanction for “knowing” violations of the ESA, the Court has never applied the rule of lenity to review agency rules implementing a civil statute that has parallel criminal sanctions.]

Our conclusion that the Secretary’s definition of “harm” rests on a permissible construction of the ESA gains further support from the legislative history of the statute. The Committee Reports accompanying the bills that became the ESA do not specifically discuss the meaning of “harm,” but they make clear that Congress intended “take” to apply broadly to cover indirect as well as purposeful actions. The Senate Report stressed that “[t]ake’ is defined ... in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” S. Rep. No. 93–307, p. 7 (1973). The House Report stated that “the broadest possible terms” were used to define restrictions on takings. H.R. Rep. No. 93–412, p. 15 (1973). The House Report underscored the breadth of the “take” definition by noting that it included “harassment, whether intentional or not.” Id., at 11 (emphasis added). The Report explained that the definition “would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.” Ibid. **

The definition of “take” that originally appeared in S. 1983 differed from the definition as ultimately enacted in [this] significant respect: It included “the destruction, modification, or curtailment of [the] habitat or range” of fish and wildlife. Respondents make much of the fact that the Commerce Committee removed this phrase from the “take” definition before S. 1983 went
to the floor. See 119 Cong. Rec. 25663 (1973). We do not find that fact especially significant. The legislative materials contain no indication why the habitat protection provision was deleted. That provision differed greatly from the regulation at issue today. Most notably, the habitat protection in S. 1983 would have applied far more broadly than the regulation does because it made adverse habitat modification a categorical violation of the “take” prohibition, unbounded by the regulation’s limitation to habitat modifications that actually kill or injure wildlife. The S. 1983 language also failed to qualify “modification” with the regulation’s limiting adjective “significant.” We do not believe the Senate’s unelaborated disavowal of the provision in S. 1983 undermines the reasonableness of the more moderate habitat protection in the Secretary’s “harm” regulation. [In footnote 19, Justice Stevens rejected the argument that statements by Senate and House sponsors supported the idea that the § 5 land acquisition provision and not § 9 was expected to be the ESA’s remedy for habitat modification.]

The history of the 1982 amendment that gave the Secretary authority to grant permits for “incidental” takings provides further support for his reading of the Act. The House Report expressly states that “[b]y use of the word ‘incidental’ the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity.” H.R. Rep. No. 97–567, p. 31 (1982). This reference to the foreseeability of incidental takings undermines respondents’ argument that the 1982 amendment covered only accidental killings of endangered and threatened animals that might occur in the course of hunting or trapping other animals. Indeed, Congress had habitat modification directly in mind: Both the Senate Report and the House Conference Report identified as the model for the permit process a cooperative state-federal response to a case in California where a development project threatened incidental harm to a species of endangered butterfly by modification of its habitat. See S. Rep. No. 97–418, p. 10 (1982); H.R. Conf. Rep. No. 97–835, pp. 30–32 (1982). Thus, Congress in 1982 focused squarely on the aspect of the “harm” regulation at issue in this litigation. Congress’ implementation of a permit program is consistent with the Secretary’s interpretation of the term “harm.”

**JUSTICE SCALIA, with whom THE CHIEF JUSTICE [REHNQUIST] and JUSTICE THOMAS join, dissenting.**

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

[Justice Scalia objected to three features of the regulation, which, as he saw it, (1) failed to consider whether death or injury to wildlife is an intentional or even foreseeable effect of a habitat modification; (2) covered omissions as well
as acts; and (3) considered injuries to future as well as present animal populations, and not just specific animals.] None of these three features of the regulation can be found in the statutory provisions supposed to authorize it. The term "harm" in § 1532(19) has no legal force of its own. An indictment or civil complaint that charged the defendant with "harming" an animal protected under the Act would be dismissed as defective, for the only operative term in the statute is to "take." If "take" were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself. To "take," when applied to wild animals, means to reduce those animals, by killing or capturing, to human control. [Citing dictionaries, cases, and Blackstone.] This is just the sense in which "take" is used elsewhere in federal legislation and treaty. See, e.g., Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988 ed., Supp. V) (no person may "pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill" any migratory bird); Agreement on the Conservation of Polar Bears, Nov. 15, 1973, Art. I, 27 U.S.T. 3918, 3921, T.I.A.S. No. 8409 (defining "taking" as "hunting, killing and capturing"). And that meaning fits neatly with the rest of § 1538(a)(1), which makes it unlawful not only to take protected species, but also to import or export them (§ 1538(a)(1)(A)); to possess, sell, deliver, carry, transport, or ship any taken species (§ 1538(a)(1)(D)); and to transport, sell, or offer to sell them in interstate or foreign commerce (§§ 1538(a)(1)(E), (F)). The taking prohibition, in other words, is only part of the regulatory plan of § 1538(a)(1), which covers all the stages of the process by which protected wildlife is reduced to man's dominion and made the object of profit. It is obvious that "take" in this sense — a term of art deeply embedded in the statutory and common law concerning wildlife — describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).

[Although "harm" has a range of meaning, the most likely in this statutory context is one that focuses on specific and intentional harming.] "Harm" is merely one of 10 prohibitory words in § 1532(19), and the other 9 fit the ordinary meaning of "take" perfectly. To "harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect" are all affirmative acts (the provision itself describes them as "conduct," see § 1532(19)) which are directed immediately and intentionally against a particular animal — not acts or omissions that indirectly and accidentally cause injury to a population of animals. *** What the nine other words in § 1532(19) have in common — and share with the narrower meaning of "harm" described above, but not with the Secretary's ruthless dilation of the word — is the sense of affirmative conduct intentionally directed against a particular animal or animals.

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

The Act's definition of "take" contains a list of actions that illustrate the intended scope of the term... With the possible exception of "harm," these terms all represent forms of conduct that are directed against and likely to injure or kill individual wildlife. Under the principle of statutory construction, ejusdem generis,... the term "harm" should be interpreted to include only those actions that are directed against,
and likely to injure or kill, individual wildlife. [Memorandum of April 17, 1981 (emphasis in original).

I would call it *noscitur a sociis*, but the principle is much the same: The fact that "several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." **[Moreover,]**] the Court’s contention that "harm" in the narrow sense adds nothing to the other words underestimates the ingenuity of our own species in a way that Congress did not. To feed an animal poison, to spray it with mace, to chop down the tree in which it is nesting, or even to destroy its entire habitat in order to take it (as by draining a pond to get at a turtle), might neither wound nor kill, but would directly and intentionally harm.

The penalty provisions of the Act counsel this interpretation as well. Any person who "knowingly" violates § 1538(a)(1)(B) is subject to criminal penalties under § 1540(b)(1) and civil penalties under § 1540(a)(1); moreover, under the latter section, any person "who otherwise violates" the taking prohibition (i.e., violates it unknowingly) may be assessed a civil penalty of §500 for each violation, with the stricture that "[e]ach such violation shall be a separate offense." This last provision should be clear warning that the regulation is in error, for when combined with the regulation it produces a result that no legislature could reasonably be thought to have intended: A large number of routine private activities — for example, farming, ranching, roadbuilding, construction and logging — are subjected to strict-liability penalties when they fortuitously injure protected wildlife, no matter how remote the chain of causation and no matter how difficult to foresee (or to disprove) the "injury" may be (e.g., an "impairment" of breeding). ***

So far I have discussed only the immediate statutory text bearing on the regulation. But the definition of "take" in § 1532(19) applies "[f]or the purposes of this chapter," that is, it governs the meaning of the word as *used everywhere in the Act*. Thus, the Secretary's interpretation of "harm" is wrong if it does not fit with the use of "take" throughout the Act. And it does not. In § 1540(e)(4)(B), for example, Congress provided for the forfeiture of "[a]ll guns, traps, nets, and other equipment ... used to aid the taking, possessing, selling, [etc.] of protected animals. This listing plainly relates to "taking" in the ordinary sense. If environmental modification were part (and necessarily a major part) of taking, as the Secretary maintains, one would have expected the list to include "plows, bulldozers, and backhoes." ***

The Act is full of like examples. See, e.g., § 1538(a)(1)(D) (prohibiting possession, sale, and transport of "species taken in violation" of the Act). "[I]f the Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), the regulation must fall.

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

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

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

These provisions have a double significance. Even if §§ 1536(a)(2) and 1538(a)(1)(B) were totally independent prohibitions — the former applying only to federal agencies and their licensees, the latter only to private parties — Congress’s explicit prohibition of habitat modification in the one section would bar the inference of an implicit prohibition of habitat modification in the other section. “[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Keene Corp. v. United States, 508 U.S. 200, 208 (1993). And that presumption against implicit prohibition would be even stronger where the one section which uses the language carefully defines and limits its application. That is to say, it would be passing strange for Congress carefully to define “critical habitat” as used in § 1536(a)(2), but leave it to the Secretary to evaluate, willy-nilly, impermissible “habitat modification” (under the guise of “harm”) in § 1538(a)(1)(B).

In fact, however, §§ 1536(a)(2) and 1538(a)(1)(B) do not operate in separate realms; federal agencies are subject to both, because the “person[s]” forbidden to take protected species under § 1538 include agencies and departments of the Federal Government. See § 1532(13). This means that the “harm” regulation also contradicts another principle of interpretation: that statutes should be read so far as possible to give independent effect to all their provisions. See Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994). By defining “harm” in the definition of “take” in § 1538(a)(1)(B) to include significant habitat modification that injures populations of wildlife, the regulation makes the habitat-modification restriction in § 1536(a)(2) almost wholly superfluous. As “critical habitat” is habitat “essential to the conservation of the species,” adverse modification of “critical” habitat by a federal agency would also constitute habitat modification that injures a population of wildlife.

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

Second, the Court maintains that the legislative history of the 1973 Act supports the Secretary’s definition. Even if legislative history were a legitimate and reliable tool of interpretation (which I shall assume in order to rebut the Court’s claim); and even if it could appropriately be resorted to when the enacted text is as clear as this, but see Chicago v. Environmental Defense Fund, 511 U.S. 328, 337 (1994); here it shows quite the opposite of what the Court says. I shall not pause to discuss the Court’s reliance on such statements in the Committee Reports as “‘take’ is defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” [S. Rep. No. 93–307, p. 7 (1973)]. This sort of empty flourish— to the effect that “this statute means what it means all the way” — counts for little even when enacted into the law itself. See Reves v. Ernst & Young, 507 U.S. 170, 183–84 (1993).

Much of the Court’s discussion of legislative history is devoted to two items: first, the Senate floor manager’s introduction of an amendment that added the word “harm” to the definition of “take,” with the observation that (along with other amendments) it would “help to achieve the purposes of the bill”; second, the relevant Committee’s removal from the definition of a provision stating that “take” includes “the destruction, modification or curtailing of [the] habitat or range” of fish and wildlife. The Court inflates the first and belittles the second, even though the second is on its face far more pertinent. But this elaborate inference from various pre-enactment actions and inactions is quite unnecessary, since we have direct evidence of what those who brought the legislation to the floor thought it meant — evidence as solid as any ever to be found in legislative history, but which the Court banishes to a footnote.

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

Through [the] land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.

Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption, or other purposes. The provisions of [the bill] would prohibit the commerce in or the importation, exportation, or taking of endangered species . . . . [119 Cong. Rec. 25669 (1973) (emphasis added).]

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

[T]he principal threat to animals stems from destruction of their habitat . . . [The bill] will meet this problem by providing funds for acquisition of critical habitat . . . It will also enable the Department of Agriculture to cooperate with willing landowners
who desire to assist in the protection of endangered species, but who are understand­ably unwilling to do so at excessive cost to themselves. Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that the Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so. [Id., at 30162 (emphasis added).]

Habitat modification and takings, in other words, were viewed as different problems, addressed by different provisions of the Act. [Justice Scalia argued that these statements destroy the Court’s legislative history case and that the Court has no response.]

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

[T]he Secretary may permit, under such terms and conditions as he shall prescribe—

- any taking otherwise prohibited by section 1538(a)(1)(B) . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. [16 U.S.C. § 1539(a)(1)(B).]

This provision does not, of course, implicate our doctrine that reenactment of a statutory provision ratifies an extant judicial or administrative interpretation, for neither the taking prohibition in § 1538(a)(1)(B) nor the definition in § 1532(19) was reenacted. The Court claims, however, that the provision “strongly suggests that Congress understood [§ 1538(a)(1)(B)] to prohibit indirect as well as deliberate takings.” That would be a valid inference if habitat modification were the only substantial “otherwise lawful activity” that might incidentally and nonpurposefully cause a prohibited “taking.” Of course it is not. This provision applies to the many otherwise lawful takings that incidentally take a protected species — as when fishing for unprotected salmon also takes an endangered species of salmon. * * *

This is enough to show, in my view, that the 1982 permit provision does not support the regulation. I must acknowledge that the Senate Committee Report on this provision, and the House Conference Committee Report, clearly contemplate that it will enable the Secretary to permit environmental modification. But the text of the amendment cannot possibly bear that asserted meaning, when placed within the context of an Act that must be interpreted (as we have seen) not to prohibit private environmental modification. The neutral language of the amendment cannot possibly alter that interpretation, nor can its legislative history be summoned forth to contradict, rather than clarify, what is in its totality an unambiguous statutory text. There is little fear, of course, that giving no effect to the relevant portions of the Committee Reports will frustrate the real-life expectations of a majority of the Members of Congress. If they read and relied on such tedious detail on such an obscure point (it was not, after all, presented as a revision of the statute’s prohibitory scope, but as a discretionary-waiver provision) the Republic would be in grave peril. * * *
JUSTICE O'CONNOR wrote a separate concurring opinion, responding to some of Justice Scalia's concerns. “[T]he regulation’s application is limited by ordinary principles of proximate causation, which introduce notions of foreseeability.” For example, she disapproved of an application of the statute where the grazing of sheep was found to be a “taking” of palila birds, as the sheep destroyed seedlings which would have grown into trees needed by the bird for nesting. The chain of causation is simply too attenuated, Justice O'Connor concluded. Justice Scalia responded that this was Justice O'Connor’s gloss on the statute, not the agency’s. He chided his colleague for trying to have it both ways — deferring to the agency under Chevron (see Chapter 9, § 3) but then rewriting the regulation to suit her fancy. Justice Scalia concluded: “We defer to reasonable agency interpretations of ambiguous statutes precisely in order that agencies, rather than courts, may exercise policymaking discretion in the interstices of statutes. See Chevron, 467 U.S. at 843–45. Just as courts may not exercise an agency’s power to adjudicate, and so may not affirm an agency order on discretionary grounds the agency has not advanced, so also this Court may not exercise the Secretary’s power to regulate, and so may not uphold a regulation by adding to it even the most reasonable of elements it does not contain.”]