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Classic Lessons from a Little Fish in a Pork Barrel - Featuring the Notorious Story of the Endangered Snail Darter and the TVA's Last Dam

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CLASSIC LESSONS FROM A LITTLE FISH IN A PORK BARREL—FEATURING THE NOTORIOUS STORY OF THE ENDANGERED SNAIL DARTER AND THE TVA'S LAST DAM

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I. THE FISH THAT WAS A CANARY: THE SNAIL DARTER AND CONTINUING PUZZLES OF LAW & POLICY

Canaries are small, fragile, sensitive creatures weighing no more than 20 grams, about seven-tenths of an ounce. They have become a familiar and significant metaphor, however, due to the important role they played as vivid warning indicators of substantial threats to human welfare.[1] Because canaries are extremely sensitive to the presence of methane and carbon monoxide—deadly but odorless gases that seep from deep coal deposits—miners in England and the U.S. carried canaries in little cages along with them as they worked in underground coal seams. When the canaries began to sway and slump noticeably on their perches, the miners could react immediately, realizing that something was terribly wrong for humans as well.

The diminutive "snail darter"—the small endangered fish still remembered derisively as an icon of over-reaching wildlife law for its role three decades ago in obstructing completion of the TVA's last water project, the Tellico Dam—likewise served in fact and function as a canary in a coal mine. The darter's role as an indicator of large issues of human welfare and governance, however, never garnered the familiarity and acknowledgment achieved by the canary. The little fish was and is generally cloaked in a cloud of mocking dismissal,[2] remembered as a small technicality misused by extreme environmentalists to block human progress.

 Professor of Law, Boston College. I am honored and proud to have been able to present the second annual Wallace Stegner Lecture, and thank Distinguished Professor Robert Keiter and his marvelous staff for their thoughtfulness and support in organizing and accomplishing the 16th annual Stegner Center Symposium. As an additional resource to the reader, an extensive gallery containing images of the endangered fish, the river, the valley, and the farmers and other citizens who carried the snail darter controversy through its years of legal and political maneuvers is available in the format of a photo-essay booklet, which was prepared for the 30-year commemoration of their effort. The booklet is available at: http://www.bc.edu/snaildarter.

[1] Canaries were used as indicators of human welfare hazards in underground mines as late as the last decades of the 20th century. *See Last coal mine canary*, FLICKR, http://www.flickr.com/photos/philipdunn/3118096659 (last visited June 20, 2012) (showing a photograph of a miner carrying a canary); *see also* William H. van der Schalie et al., *Animals as Sentinels of Human Health Hazards of Environmental Chemicals*, 107 ENVTL. HEALTH PERSP. 309 (1999).

[2] *See infra* text and note at 90.

Nevertheless small artifacts can sometimes produce large societal revelations, particularly when reconsidered in retrospective context through the magnifying lens of history. From this perspective, coming from an avowed advocate participant,[3] this Essay presents a narrative account of the extended citizen battles over the TVA Tellico Dam Project. On its facts the snail darter's surprising and convoluted history, in the federal courts and agencies, in the halls of Congress and the executive offices of the White House, and in the mechanisms of politics and the media, presents a useful parable—a threat to the survival of a small species in a large ecosystem revealing deep human concerns in a wide range of societal dimensions—citizen initiatives, legislatures and courts, law and science, public interest economics, partisan politics and legislative polarization, media and the formation of public opinion, ethics and cultural values, social and community dynamics, and more. The snail darter's story is a prime candidate for retrospective revisionist analysis.[4]

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[3] The author, along with students and friends, served as petitioner and attorney in judicial proceedings from the original darter trial through the Supreme Court, and as the citizen group's coordinator in the darter defenders' extensive efforts in administrative agency and executive offices in Tennessee and Washington, D.C., in congressional politics, in media representation, and through the innovative first cabinet-level economic review in the so-called God Committee or God Squad. *See infra* note 60. This text is thus written from the perspective of an advocate; however, as an academic, the author is also constrained by a responsibility for fairness to opposing arguments. It is impossible, of course, to remove one's personal reactions to a dramatic case which one has lived. On the objective historical record, however, most of the facts of this particular case were ultimately determined to be extremely one-sided. In a wide range of areas, as the 1979 God Committee ultimately concluded, the actual merits of the case for the dam project were slim to none. Seen in retrospect, the citizens' arguments and alternative plans from the start were overwhelmingly more accurate and positive for the affirmative interests of the public and the environment.

[4] *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978), *aff'd* 549 F.2d 1064 (6th Cir. 1977), *rev'd* 419 F. Supp. 753 (E.D. Tenn. 1976).

In addition to the decision of the U.S. Supreme Court there were more than a dozen judicial decisions in the course of the TVA campaign to build the Tellico Dam, including condemnation challenges, NEPA litigation, endangered species litigation, and Indian religious rights cases. *See, e.g.*, United States *ex rel*. TVA v. Two Tracts of Land, 387 F. Supp. 319 (E.D. Tenn. 1974) (involving condemnation challenge), *aff'd*, 532 F.2d 1083 (6th Cir. 1976), *cert. denied*, 429 U.S. 827 (1976); Envtl. Def. Fund v. Tennessee Valley Auth., 339 F. Supp. 806 (E.D. Tenn. 1972) (involving NEPA litigation), *aff'd*, 468 F.2d 1164 (6th Cir. 1972); Envtl. Def. Fund v. Tennessee Valley Auth., 371 F. Supp. 1004 (E.D. Tenn. 1973) (involving NEPA litigation), *aff'd*, 492 F.2d 466 (6th Cir. 1974). Subsequent to the darter litigation was Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608 (E.D. Tenn. 1979) (involving Indian religious rights), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). As noted below, the case was also subject to the first-ever economic review by the cabinet-level Endangered Species Committee under the 1978 Baker-Culver Amendments, which unanimously decided in favor of the darter on economic grounds. U.S. Dep't of the Interior, Endangered Species Committee, Hearing of Jan. 23, 1979 (on file with the author).

Was the snail darter litigation "The Most Extreme Environmental Case Ever"?[5] Its centerpiece, the endangered two-inch long fish, is still regularly invoked as a rhetorical weapon against progressive initiatives by the likes of Rush Limbaugh and Sean Hannity, who characterize the case as an icon of radical irrationality.

As it was widely reported during the 1970s, the story consistently came down to a simple caricature—the snail darter, a two-inch minnow, was misused under the Endangered Species Act by extremist environmentalists, at the last possible moment, to halt completion of a gigantic $150,000,000 hydroelectric dam. In fact, every element of that summary was incorrect.[6] The perceived reality, however, had an immutable force of its own, then and still now, possessing more importance than the facts as they existed on the record.

In remembering and invoking the snail darter as a prime example of regulatory extremism, Rush Limbaugh has called the citizens who brought the case "homosocialists"[7] but Hannity thinks "fringe lunatics" more accurate.[8] Justice

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[5] Even empathic observers can see the story as extreme:

> On a day in early June, Bobby Kennedy Jr. stands over the body of a decomposing fox, killed by one of his homemade traps that had been set after the rabid creature had menaced his children at his home in Mount Kisco, N.Y. Nature is his faith, and he recounts a conversation he'd had with a Catholic priest on a mountain top. "I kind of challenged him with the most difficult episode in the history of environmental advocacy, which was the snail darter case. I said, 'How did we allow this 2-inch fish with no economic significance to hold up a $1 billion dam project that would have provided energy and jobs to people? Why did we put fish before people?'"

John Marks, *The Return of the Kennedys*, U.S. NEWS & WORLD REP. (Aug. 26, 1996), http://www.usnews.com/usnews/culture/articles/960902/archive_034469_print.htm.

[6] *Percina Imostoma tanasi* is a small perch, not a minnow, and it can grow to a full 3 inches. More significantly, as discussed much more fully below, the fish's champions were a coalition of farmers, fishermen, and conservation-minded citizens. The fish's endangerment had been raised as a cautionary issue long before the agency accelerated its efforts in constructing the project. The Tellico Dam was small, itself cost little more than $4 million, and had no electric generators. The project actually had "recreation" as its prime purpose and justification, with the real estate development of thousands of acres of condemned private farmlands as its second major purpose. As to "misuse" of the Endangered Species Act, readers can re-weigh that criticism at the conclusion of this narrative.

[7] "The militant environmentalist movement in America today is a new homosocialism, communism . . . They are trying to attack capitalism and corporate America . . . and they're trying to say that we must preserve . . . virgin trees because the spotted owl and the rat kangaroo and whatever live in them, and it's the only place they can live, the snail darter and whatever it is." Rush Limbaugh, *The Rush Limbaugh Show*, (Infinity radio broadcast, Dec. 7, 1993).

[8] *See Hannity's America* (ABC radio broadcast December 7, 2008) (interviewing Ainsley Earnhardt):

Scalia and many others on the anti-regulatory Right use the little snail darter as a dismissive shorthand for misguided government rules,[9] a sardonic put-down quip

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> SEAN HANNITY: I'm all for nuclear energy . . . . But now . . . why haven't we gone further?
> AINSLEY EARHARDT: Really, the environmentalists are worried about the habitats. You have the snail-darter example that you saw . . . .
> HANNITY: These are fringe lunatics. We've got to live.
> EARHARDT: They are worried about the fish. They are worried about the habitat.
> HANNITY: They're worried about porcupine, caribous—always some animal they are worried about.
> EARHARDT: Right. But what about us and our energy?
> HANNITY: Exactly.

[9] Justice Scalia, during oral argument in a recent Supreme Court case weighing costs of power-plant water rules, where the issue was endangered fish fry being sucked into power plant intakes, argued that "It seems ridiculous to . . . require [cost-benefit analysis] where human health is at stake, and yet to forbid it . . . when you were just talking about snail darters." Oral Argument at 54:41, Entergy Corp. v. Riverkeeper, Inc., 555 U.S. 941 (2008) (No. 07–588), *available at* http://www.oyez.org/cases/2000-2009/2008/2008_07_588.

Amongst many others who have used the little fish in recent months and years as a dismissive put-down of government action are Ann Coulter, Trent Lott, George Will, and even Stephen Colbert and Vice President Joe Biden. See for example:

Ann Coulter talking about her 2006 book "Godless": "[L]iberalism sees humans as just part of the Earth; we're not given dominion over the Earth, as Genesis says. We're, if anything, a blight on the Earth and we must give way . . . . We must make sure the snail darter is fine, but we should be living like the aborigines." *Kudlow & Company* (CNBC television broadcast June 15, 2006).

Sen. Trent Lott: "I sat in the audience and listened to the snail darter case before the Supreme Court. Listening to the arguments in that one case was enough for me. I left and never returned." 149 CONG. REC. S3676-77 (daily ed. March 13, 2003).

George F. Will, *How Congress Trumps Darwin*, WASH. POST, Feb. 8, 2009, at B07, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/02/06/AR2009020602743.html.

> [E]volution is a fact, and its mechanism is natural selection: Creatures with variations especially suited to their environmental situation have more descendants than do less well-adapted creatures . . . . [I]n 1973, Congress passed the Endangered Species Act . . . . Four years later, the act held up construction of a Tennessee dam deemed menacing to the snail-darter minnow . . . [*quoting Ed Yoder*] "The Congress of the United States, one is intrigued to learn, intends to stop [evolution] in its tracks." With that accomplished, it should be child's play for Congress to make the climate behave. Pick your own meaning of "child's play."

used to characterize a broad range of progressive initiatives as unreasoning extremism and rank stupidity. The little fish entered the public canon more generally, as well. The brouhaha over the silly darter filled the newspapers, talk shows, and television coverage for six years—it was one of the three most covered environmental stories of that decade,[10] virtually always with a text or subtext of ludicrous disproportionality. The deprecatory public image of the case ultimately facilitated a congressional override that permitted final construction of the dam (subsequently augmented by successful transplanting efforts that have allowed the darter to be down-listed from "endangered" to "threatened").[11] Today, even political liberals regard the darter case as a vignette of far-fetched governmental protectionism,[12] and ardent environmentalists assume the campaign to save the fish, no matter how ethically or ecologically appealing, stretched the limits of common sense rationality.[13] And Ronald Dworkin, perhaps the most eminent living philosopher, uses the Supreme Court's snail darter decision, which he contrasts to the judgmental wisdom of Hercules, as a primary example of law run amok.[14]

Vice President Joseph Biden: "It used to be when the construction trades and the building trades would support us, when we'd say, 'green' that meant, oh, God, the *snail darter!* We're not going to have a building, we're not going to build a dam." Jennifer Harper, *Inside the Beltway*, WASH. TIMES, Apr. 22, 2010, at A2 (emphasis added), *available at* http://www.washingtontimes.com/news/2010/apr/22/inside-the-beltway-91303173/?page=all.

[10] According to Professor Ronald Rollet, an environmental journalism specialist at the University of Michigan School of Natural Resources, as recounted to the author; the other two issues were the Love Canal toxics and the Alaska Lands Act controversies. Report from Professor Ronald Rollet, University of Michigan School of Natural Resources, to Zygmunt Plater, Boston College of Law (1980) (on file with the author).

[11] *See* Fish and Wildlife Service, 49 Fed. Reg. 27510-01 (July 5, 1984) (to be codified at 50 C.F.R. pt. 17).

[12] *See* Press Release, The White House, Office of the Vice President, Remarks by Vice President Biden Announcing Recovery Act "Retrofit Ramp-Up" Awards on Eve of Earth Day (Apr. 21, 2010) (commenting on federal subsidy grants for communities implementing efficient programs for energy conservation), *available at* http://www.filmannex.com/movie/vp-biden-announces-retrofit-ramp-up-awards/25928 (last visited Sept. 29, 2011).

[13] *See* Marks, *supra* note 5. Robert F. Kennedy, Jr., is the Hudson Riverkeeper, an environmental law professor, and ardent advocate and litigator, currently on the faculty at Pace University Law School.

[14] *See* RONALD DWORKIN, LAW'S EMPIRE 20–30, 328–347 (1986). Dworkin, the author's erstwhile conflicts professor, forcefully declares his conception of the facts and foolishness of the darter case. The reader may wish to re-evaluate the good professor's thesis in light of the record noted herein. Dworkin is "asking how an ideal Dworkinian judge (Hercules) could operate in a pervasively unjust legal system . . . ." Dworkin's argument alleges that legal positivists, who are committed to the view that "legal facts are grounded in . . . social, not moral, facts" (p.33), cannot account for "theoretical disagreements" in the law, i.e., disagreements "about what the grounds of law are" (p.36). As an example of such a debate, Dworkin cites *Tennessee Valley Auth. v. Hill*, in which a

For many Americans today the snail darter is a story that happened before they were born. For most, in all likelihood it is a story that has been encountered—by environmentalists as well as antagonists—in simplistic terms, usually as the object of notoriety and ridicule. It continues in today's political rhetoric still ensnarled in a confused history of factual controversy and spin.

Depending how you looked at it, the darter-dam conflict was an inappropriate, unbalanced, campaign of self-appointed crusaders misusing a tiny fish to serve their own obstructionist ends—or it's an instructive saga of citizen amateurs carrying a diminutive endangered fish like a warning symbol, a canary in the coal mine, through multiple ascending layers of political officialdom, against large odds, to tell the world about an Emperor not wearing clothes.

Clearly favoring the canary metaphor, this Essay is a revisionist analysis of the darter-dam story, re-scrutinizing the tumultuous six years of the darter battles. Like water everywhere, the snail darter's river reflected all that touched it—landscape, history, people, science, the structures and politics of modern governance. Behind the narrative of the darter-dam litigation and its political context lie several special puzzles for modern environmental protection initiatives.

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divided Supreme Court enjoined the construction of a dam that would have threatened with extinction the noble snail darter, in violation of the Endangered Species Act of 1973 . . . The majority and the dissent disagreed about "the legal relevance" of the "plain facts" about which they agreed—namely, that the Endangered Species Act was valid law, that the Congress had not squarely addressed the policy question raised in the case, and that they found the idea of stopping a nearly-completed $100 million dam construction project to save a relatively unimportant species of fish to be recklessly improvident, as a matter of policy (p.38). Nevertheless, they disagreed about whether the plain text of the statute should, in a case not contemplated by the legislature, be followed literally, despite the absurd consequences, or whether, in such a case, the text should be construed so as to avoid the absurdity. Such a disagreement fits neatly into Dworkin's conception of interpretive legal argument—the relevant question would be which interpretation best fits with the existing body of case law and is morally best, i.e., most consistent with the deep moral principles running through our legal system. Shapiro notes, however, that legal positivists have not yet provided a similarly convincing account, though he begins to sketch his own positivistic solution to the puzzle, which suggests that disagreements about the grounds of law are really disagreements about the "political objectives that the current designers of the legal system sought to achieve" (p.45)—i.e., disagreements about social, not moral, facts. Joseph R. Reisert, *RONALD DWORKIN, by Arthur Ripstein (ed.)*, L. & POL. BOOK REV., http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/ripstein0108.htm (last visited June 24, 2012).

See also John T. Noonan Jr., *Hercules and the Snail Darter*, N.Y. TIMES, May 25, 1986, at 7-12, *available* at http://www.nytimes.com/1986/05/25/books/hercules-and-the-snail-darter.html?pagewanted=all.

If considered, the actual facts of the darter litigation would perhaps require an expansion of Professor Dworkin's philosophical focus to note that *context* can be critical to a conscientious judge's search for justice, thereby implying that a case's factual context, beyond the essential legal facts of the prima facie case, should be part of the presentation of every action at law. This is a proposition that Dworkin doesn't address and probably would eloquently resist.

Is it unethical or hypocritical for citizen opponents to use federal law to obstruct a public works project in a way the bill's majority in Congress clearly never intended, hanging the lawsuit on a statutory technicality? Were my students and I blatant hypocrites to use an endangered fish beyond its intended statutory context in order to save a river and 300 family farms from the Tennessee Valley Authority's last dam? Upon first hearing about the darter-dam lawsuit a natural and almost-universal first reaction was, and is, a skeptical sense that the law protecting wildlife was being misused. An inherent hint of illegitimacy, coupled with the force of a lobbying campaign by anti-regulatory interests, hung like a troublesome cloud over the citizens' efforts throughout the narrative. As a scowling Chief Justice Burger sneered from the bench, "I'm sure that they *just don't want this project!* . . . . When the snail darter was discovered [it] became a *handy handle* to hold onto!"[15]

To what extent can endangered species usefully serve a functional role as indicators of broader civic concerns—as canaries—in our modern framework of laws and governance? National and domestic policies for the protection of endangered wildlife are based in part upon philosophical and aesthetic human concerns, but also (and perhaps more forcefully in terms of legislative politics) upon utilitarian notions of perceived human benefits.

The chemistry or neurology of embattled rare species may someday "provide a cure for cancer." The active warning function provided by the threatened existence of endangered species in their natural habitat settings serves a more systemically instrumental utilitarianism. Canaries can reveal information critical to human welfare that otherwise would not be recognized—neither smelled, seen, heard, nor thought. And once a canary's warning has been sounded, what systemic obstacles may prevent the functional message from being heard and reacted to? If inherent institutional and psychological blocks trigger resistance and avoidance of societally important information, the short- and long-term consequences to sustainability and public welfare can indeed be potentially troubling in the complex, hectic, challenged structures and currents of modern democratic governance.

Beyond Chief Justice Burger's acerbic side-comment, none of these puzzles is evidenced within the Supreme Court's snail darter decision. As a legal artifact, law professors have consistently ranked the case as one of the Court's two most significant environmental protection decisions.[16] In narrowest terms, however, the

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[15] Official Transcript of Oral Argument at 51–52, Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (on file with the author) [hereinafter TVA Oral Argument].

[16] In an online poll of environmental law professors from across the country in 2001 seeking a consensus on the ten most important court cases in the history of environmental law, Tennessee Valley Auth. v. Hill received the highest number of votes, almost twice as many as the two cases that placed second (Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) and Ethyl Corp. v. Envtl. Prot. Agency, 541 F.2d 1 (D.C. Cir. 1976)). *See* Posting of James Salzman, salzman@wcl.american.edu, to envlawprofs@darkwing.uoregon.edu (Oct. 26, 2001) (on file with author). In 2009 the same poll still had Tennessee Valley Auth. v. Hill in the law professors' top two (the other

majority opinion in *TVA v. Hill* is essentially just a clarification of a point of standard equity law: do judges have the ability to override statutory provisions based on their own view of the public's interest, or is that ultimately the job of the other branches? *TVA v. Hill's* more significant precedent may be in terms of policy and politics: A motley little group of very unpowerful, unwealthy citizens carrying their factual arguments up through all three branches of government, through a gauntlet of media and political ridicule, thereby raising some intriguing questions.

II. THE DARTER, THE LITTLE TENNESSEE RIVER, AND THE TVA TELLICO DAM PROJECT

The context of the snail darter-Tellico Dam conflict is complex and extends out over two decades of the twentieth century. Condensed to its most essential elements it was:

(1) a project ultimately shown to be a major destructive mistake, set in motion by a government agency and its political allies, and

(2) only because of the not-exactly-coincidental existence of an endangered species, and 20 years of effort by citizens motivated to leverage the law, was the ongoing mistake eventually acknowledged within the official wheels of our modern industrial democracy, with mixed results.

A bit of background history: As late as 1936, the small species of perch that would come to be known as the snail darter probably existed throughout the Tennessee River system in scattered populations living and spawning on broad shallow river shoals.[17] The Big Tennessee River, the Little Tennessee, and their tributaries rose in the Great Smoky Mountain region where the eastern edge of Tennessee meets North Carolina and Georgia, and flowed in multiple threads westward across Tennessee and parts of Kentucky, to the Mississippi. The wild game and rich soils in the fertile bottomlands around the Little Tennessee supported continuous layers of human settlement for longer than any other place in the continental United States.[18] When the Cherokee confederation came together West of the Great Smoky Mountains in the early 1500s, it chose the Little Tennessee River as its spiritual and governing center, with the capital village of Chota as its Jerusalem and city of refuge. When in the 1830s Andrew Jackson and Martin van Buren drove the Cherokees away to Oklahoma or into hidden valleys in the mountains, white settler families took their lands. Some of the settlers' descendants still farmed those rich dark soils a century-and-a-half later, living in

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was Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497 (2007)). *See* James Salzman & J.B. Ruhl, *Who's Number One?*, 26 ENVTL. FORUM 36, 39 (November/December 2009). The "hypocrisy" issue raised in the Chief Justice's comment at oral argument was nowhere reflected in the text of his majority opinion.

[17] *See* WAYNE C. STARNES, THE ECOLOGY AND LIFE HISTORY OF THE ENDANGERED SNAIL DARTER, *PERCINA TANASI* (1977).

[18] The work done in the Little Tennessee River Valley by Professors Chapman and Schroedl is detailed in JEFFERSON CHAPMAN, TELLICO ARCHAEOLOGY: TWELVE THOUSAND YEARS OF NATIVE AMERICAN HISTORY (1994).

rugged little communities, often turning up arrowheads in their fields when they plowed each spring.[19]

In 1933, the Franklin D. Roosevelt Administration's New Deal created the Tennessee Valley Authority (TVA), a federal wholly-owned corporation comprising parts of seven Southeastern states,[20] with a mandate to bring progressive health, planning, and economic initiatives to this "backward" region. Two major areas for the commitment of federal dollars were agriculture (fertilizer operations), and building new resources for the generation of electricity. Emphasizing the latter, in 1936 the agency compiled a list of 69 potential dam sites and commenced building them. By 1960 it had built more than four dozen dams, eliminating linear 2500 miles of flowing riverways and giving Tennessee more slack water shoreline than all the Great Lakes combined.[21]

By the early 1960s, however, virtually all of the remaining listed river sites were too marginal to be justified as hydro-electric projects. TVA was evolving from its traditional progressive image into nothing more than the region's largest utility company. Its political power exceeded that of the state government's.[22]

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[19] Personal communication from David Scates, 1975. Arrowheads are particularly exposed after a rain on plowed or harrowed fields.

[20] TVA's jurisdiction touches all or part of Tennessee, Kentucky, Virginia, North Carolina, South Carolina, Georgia, and Alabama.

[21] The total shoreline of TVA reservoirs within Tennessee is now approximately 10,000 miles in summer months, compared to the Great Lakes' 10,500 miles. Telephone interview with a member of the reference staff, TVA Public Information Office (Sept. 3, 1982); GRADY WAYNE, THE GREAT LAKES (2007).

[22] For 1971 correspondence where TVA's Chairman Wagner, rejected Gov. Winfield Dunn's request that the dam project be terminated, *see* WILLIAM BRUCE WHEELER AND MICHAEL J. MCDONALD, TVA AND THE TELLICO DAM, 1936–1979: A BUREAUCRATIC CRISIS IN POST-INDUSTRIAL AMERICA 142–43 (1986), and KENNETH M. MURCHISON, THE SNAIL DARTER CASE: TVA VERSUS THE ENDANGERED SPECIES ACT 56 (2007). Governor Winfield Dunn, responding to the farmers' arguments, sent a letter to Chairman Wagner on behalf of the State of Tennessee officially requesting TVA to scrap the Tellico project:

> The best interests of the state would best be served if TVA were to discontinue plans to impound the Little Tennessee River . . . . Impoundment . . . would reduce, rather than expand, recreational opportunities in Tennessee . . . . The lands which would be inundated by the Tellico Lake contain numerous sites of historical and archaeological interest, and the proposed reservoir would bury a great acreage of . . . cropland, pasturage, and woodland . . . . The Little Tennessee could best serve . . . as the focal point for a scenic river recreational gateway to the national [park] beyond . . . . Much of . . . the public monies already invested . . . can be reclaimed or turned to other uses. The Little Tennessee as it now exists is a waterway too valuable for the State of Tennessee to sacrifice.

Chairman Wagner sent a condescending reply letter to the Governor rejecting the state's request:

Steam plants burning strip-mined coal provided 90% of its total generation capacity.[23] Its internal inertial momentum, however, continued to push for building all dams on the list. Although external critics vigorously argued that those marginal dam sites were more valuable as flowing rivers and agricultural communities,[24] there was no practicable way to halt the agency's "iron triangle" drive to continue building dams.[25] By the mid-1970s there were only two unfinished dams remaining,[26] and TVA was proceeding on construction of both of them.

TVA's final dam was the Tellico Dam, slated to eliminate what was perhaps the richest, most valuable, cultural, ecological, historical, and economic valley resource in the region, by impounding the Little Tennessee's last 33 miles flowing through gently-rolling farmland west of the Smoky Mountains. The Little Tennessee in those miles was a river of startling clarity and richness that had been flowing for 200 million years, containing the very oldest sites of 10,000 years of continuous human habitation, a centuries-old farm community, more than 15,000 acres of the nation's best agricultural soils, the finest trout-fishing water east of Montana, and a dozen Cherokee historical sites including Chota, Toskegee (where the Cherokees' great leader, Sequoyah, was born), and Tennessee Town, the site that gave its name to the river and the state. It was the region's last remaining stretch of big, high-quality river for flowing water recreation.

Most observers then and now assumed the TVA dam was being built to provide hydro-power. The facts are far more bemusing. Unable to justify the Tellico Dam for any of the usual dam benefits—hydro, flood control, water

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> Your letter does not appear to raise any new or different factors from those which were fully considered by both TVA and the Congress before construction of the Tellico project was commenced . . . . The course of action you have proposed would sacrifice the much broader benefits which can be realized through comprehensive development as provided by the Tellico project.

Wagner then lectured the Governor for 34 paragraphs about the project's benefits in the same terms he had long been touting—"a full range" of industrial, recreational, and urban residential development benefits—and noted the political insignificance of the river's defenders.

[23] *See* WILLIAM CHANDLER, THE MYTH OF TVA: CONSERVATION AND DEVELOPMENT IN THE TENNESSEE VALLEY, 1933–1983 (1984). Mr. Chandler developed a statistical analysis demonstrating that non-TVA counties adjacent to counties under the development aegis of TVA generally fared as well as or better than the TVA counties.

[24] Tennessee Citizens for Wilderness Planning, a citizens group based in Oak Ridge, Tennessee, was a leading critic of the "bureaucratic irrationality" that kept pushing to build dams which their analyses showed were more destructive than beneficial.

[25] "Iron triangles" are the classic political science rubric for the powerful insider alliances that form and dominate within government around economic initiatives.

[26] The Columbia Dam on the Duck River in the low rolling countryside near Madisonville, Tennessee and the Tellico Dam on the Little Tennessee southeast of Knoxville, 30 miles West of the Great Smoky Mountains.

supply—[27]starting in 1959, despite local opposition, the TVA chairman had urged his staff to drum up a new suite of economic justifications to support it.[28]

> Any power or flood control benefit would be insignificant. . . . [But] it may only depend on how ingenious and resourceful we can be in finding a basis for evaluating [the] project's usefulness. . . . Come . . . and bring all the optimism you have.[29]

Two primary justifications were ultimately formulated by the TVA staff for their last dam—enhanced recreation benefits, and shoreland development of a hypothesized Model City to be built by the Boeing Corporation on condemned farmland and to be named Timberlake after an early British visitor to the valley.[30]

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[27] Under the existing federal law and Senate Document 97, S. DOC. NO. 97, 87TH CONG., 2d SESS. (1964), every federal agency, when spending tax payer dollars, had to have a theoretically profitable benefit-cost ratio—for every taxpayer dollar spent, the proposed project has to be able to claim to earn at least $1.01 over 100 years. Beyond hyperbolic benefit projections, agency planners were helped in projecting their positive ratios by the fact that they could treat the cost of taxpayer dollars as interest-free, or nearly so.

[28] For a history of the internal agency deliberations, *see* WHEELER & MCDONALD, *supra* note 22; STEPHEN J. RECHICHAR & MICHAEL R. FITZGERALD, THE CONSEQUENCES OF ADMINISTRATIVE DECISION: TVA'S ECONOMIC DEVELOPMENT MISSION AND INTRAGOVERNMENTAL REGULATION (1983). These two books are excellent sources of background data on the history and merits of the controversy and TVA's adamancy in pushing the dam in the face of the law and critical analysis on the merits. The TVA can self-authorize projects if they fit its charter, and Wagner was seizing upon Section 22 of the TVA Act which authorizes "the proper use, conservation, and development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this chapter . . ." TVA Act § 22, 16 U.S.C. § 831u (1994).

[29] Interview of Aubrey Wagner, Chairman, Tennessee Valley Authority, KNOXVILLE J. (Sept. 23, 1964). Wagner had stated in September 1961 (when he was Director and shortly thereafter Chairman of the TVA) that the remaining unbuilt dams—those on the larger tributaries like Tellico—were not economically feasible. Wagner stated, "[The] benefits [of these remaining, unbuilt dams] are not nearly great enough alone to justify the total cost of the projects." Public Works Appropriations, 1962: Hearings on H.R. 9076 Before the Subcomm. of the Senate Comm. on Appropriations, 87th Cong., 1st Sess. 73 (1961) [hereinafter Hearings on H.R. 9076]. Later, during the same hearing, Wagner stated that all dams that one could "justify" had been built, and that the other dam project proposals remaining on the original list "fall far short" of being justifiable under the TVA Act. *Id.* at 81. *See also* WHEELER & MCDONALD, *supra* note 22.

[30] The official Benefit-Cost ration as of the 1972 environmental impact statement:

Benefit-Cost Ratio (later downgraded):
DIRECT ANNUAL BENEFITS:

Recreation	$1,440,000
Shoreline development	$714,000
Flood control	$505,000

Neither of these claims was a standard justification for a federal dam project. Both were vociferously challenged by the farmers who would lose their lands and the boaters and fishermen who cherished the extraordinary recreational values of this last high-quality flowing river resource.

From the start the farmers and their fishermen and conservationist allies followed a classic environmental protection strategy in challenging the project they opposed, putting together a targeted analysis of *benefits, costs,* and *alternatives*. They worked to show the benefits claimed for the project were extensively exaggerated, the true costs were being substantially minimized, and feasible alternatives that would far better serve the public interest were being systematically ignored.

Citizen research showed the Tellico Dam's claimed benefits based on recreation and land development, the project's primary justifications, were not credible.[31] The project's costs in terms of loss of agricultural production, flowing river recreational benefits, historical and cultural resources, not to mention the value of a stable agricultural community, were substantial but virtually ignored in the agency's EIS.[32] Alternative development designs for the river and its valley

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Navigation	$400,000
Power	$400,000
Fish & wildlife	$220,000
Water supply	$70,000
Redevelopment	$15,000
Total Direct Annual Benefits:	$3,760,000
DIRECT ANNUAL COSTS:	
Interest and amortization	$2,045,000
Operation & maintenance	$205,000
Total Annual Costs:	$2,250,000
Benefit-Cost Ratio (later downgraded):	**1.7: 1**

TENNESSEE VALLEY AUTH., TELLICO DAM PROJECT EIS I-1-49 (1972) (a copy is on file with the author).

In subsequent national economic reviews by the US Government Accountability Office and the God Committee, all these numbers were determined to be substantially inaccurate. TVA had admitted that the "power" benefit was "insignificant" and could not justify the project; it was based on diverting water through a small canal into an adjacent reservoir that had generators (the Tellico Dam was not big enough to justify generators). "Navigation" benefits were based on hypothetical barge traffic that was always unlikely and never materialized.

[31] *See* KEITH E. PHILLIPS, THE TENNESSEE VALLEY AUTHORITY'S TELLICO PROJECT: A REAPPRAISAL (1971) (research analysis prepared for a citizen group by Professor Phillips and his graduate students at the University of Tennessee) [reprinted with extensive rebuttals as Volume III of the TVA EIS: TENNESSEE VALLEY AUTHORITY, ENVIRONMENTAL STATEMENT, TELLICO PROJECT VOL. III].

[32] *See, e.g.*, TENNESSEE VALLEY AUTH., ENVIRONMENTAL STATEMENT, TELLICO PROJECT I-1-6-7(1972) (a page and a half of text denigrating the recreational fishing resource). *See also id.* at I-1-31 (17 lines devoted to agriculture, a number of them denigrating the land's importance relative to the project's claimed benefits); *Id.* at I-1-35-38 (three pages recounting history and suggesting that a sufficient amount of historical

were extraordinarily beneficial at a fraction of the dam project's cost. Beyond continued agriculture and a feasible industrial park at a major river crossing, in particular the attractive alternatives included creation of a tourist route carrying travelers from the two neighboring Interstate highways on a scenic road through eleven colonial and Cherokee sites in the riverside farmlands, and thence into the Great Smoky Mountains National Park.[33]

Years later most of the citizens' arguments were retrospectively determined to have been accurate, and all of the TVA cost-benefit calculations to be unfounded.[34] As with citizen objections raised against prior marginal dam projects, however, in the years the Tellico project got underway federal agencies had no need to respond to citizen criticisms. For the greater part of the twentieth century there was no meaningful legal forum for citizens to raise effective arguments against politically potent pork barrel projects.[35]

Most Americans who heard about the Tellico Dam saga over two decades never realized that a major part of the project benefits TVA claimed to justify the dam was based on the involuntary eminent domain taking of 60 square miles of private lands[36]—more than 300 family farms and homes—with most of the land condemned not for the dam's reservoir but for development and resale by a private

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value would survive reservoir impoundment). The EIS as a whole contains more than 150 pages, predominantly asserting the economic virtues of a reservoir-based project. *See also* TENNESSEE VALLEY AUTH., ENVIRONMENTAL STATEMENT, TIMBERLAKE NEW COMMUNITY (1976).

[33] *See* map, "River-Based Alternative Development," in ZYGMUNT J.B. PLATER, SETTING IT STRAIGHT: A THIRTIETH ANNIVERSARY GATHERING IN MEMORY OF THE LITTLE TENNESSEE RIVER AND ITS VALLEY 10 (2010), *available at* http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1280&context=lsfp (last visited May 15, 2012). A similar map may be found appended to the citizens' Supreme Court brief at Plater et al., Brief for Appellees, Tennessee Valley Auth. v. Hill, No. 76-1701, U.S. Sup. Ct., filed Mar. 1, 1978, at 63.

[34] *See* God Committee analysis, *infra* note 60.

[35] *See*, *e.g.*, Envtl. Def. Fund v. Tennessee Valley Auth., 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974); Envtl. Def. Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972); Envtl. Def. Fund v. Corps of Eng'rs, 325 F. Supp. 728 (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); United States v. W. Virginia Power Co., 122 F.2d 733 (4th Cir. 1941), *cert. denied*, 314 U.S. 683 (1941); Cape Henry Bird Club v. Laird, 359 F. Supp. 404 (W.D. Va. 1973); Envtl. Def. Fund v. Corps of Eng'rs, 348 F. Supp. 916, 924 (N.D. Miss. 1972); Montgomery v. Ellis, 364 F. Supp. 517 (N.D. Ala. 1973).

[36] The other major benefit claim, "recreation," incorporated major logical flaws only later acknowledged in the 1979 God Committee analysis. *See infra* note 60. Several TVA economists tried to object internally that it was inappropriate for them to ignore the exceptional existing flowing-river recreation (which could be trebled if minimally managed) and tourism potentials for the river, and that it was wrong to insert recreation diverted from the surrounding 24 existing recreational reservoirs into Tellico Dam's "net regional benefit" calculation. Faced with threats from leadership, the critical TVA economists went silent or left the agency, and the composite calculations remained. *See* RECHICHAR & FITZGERALD, *supra* note 28.

Fortune 500 company, the Boeing Corporation from Seattle.[37] Most of the condemned farms in the 60-square mile project area had little or no acreage taken for the proposed reservoir, sometimes only 2 acres out of 100; most of the condemned private acreage was non-reservoir land being taken by the federal agency for resale.[38]

The hypothesized model city development was thus particularly infuriating for local farmers and other citizens.[39] Athelstan Spilhaus, a noted futurist, had prepared an experimental design for a city in Minnesota that never proved practicable. Harking back to the agency's role in the Great Depression, TVA planners hypothesized that a model industrial city of 50,000 people should be built on the banks of a Tellico Reservoir—though no clear reason indicated why such a city would need a dam, nor why industrial development would or should be attracted to the edge of the Great Smoky Mountains National Park.[40] Even after Boeing abandoned the project on economic grounds the TVA leadership asserted that a model city would generate up to 26,000 jobs and large economic gains, and those numbers continued to provide the basis for the dam's "shoreland benefits." Despite the pleas of farmers traveling to Washington D.C., TVA's justifications for the dam were uncritically approved by the appropriations committees that

[37] An acreage overview of the Tellico Project: 38,000 total project acres; previous existing river acreage, 1,841 acres; reservoir area, 16,500 acres; lands condemned for reservoir, 14,659 acres; lands condemned, or bought under threat of condemnation, for resale and real estate development, 23,341 acres [*approximately 62%*].

The Boeing Corporation initially had been interested in developing a new town, Timberlake, to diversify its airframe business which was flagging after the federal government cancelled the U.S. supersonic transport (SST) project.

[38] Examples include properties owned by the Davis, Ritchey, and Moser families.

[39] The recreational benefit claims were likewise undercut by economic logic. Several TVA economists objected that it was inappropriate to ignore the exceptional existing flowing-river recreation (which could be trebled if minimally managed) and tourism potentials for the river, and that it was wrong to count recreation diverted from the surrounding 24 existing reservoirs as a net regional benefit. Faced with threats from leadership the critical TVA economists went silent or left the agency. *See* RECHICHAR & FITZGERALD, *supra* note 28.

[40] The "Foster Hypothesis" attempting to establish a rationale was drafted by the late Michael Foster, TVA's Director of the Division of Navigation Development and Economic Studies. It asserted based on personal hypothesis that a combination of water, rail, and highway transport routes would generate jobs and industrial development wherever such elements occurred together. *See* TENNESSEE VALLEY AUTH., TIMBERLAKE NEW COMMUNITY (1974) (draft environmental impact statement). Proceeding from this hypothesis, the TVA defended its dry land condemnations by predicting that large industries were likely to come to Timberlake that would need large, undivided tracts, which the TVA wanted to be certain would be available when needed for industrial development. *See* Hearings on H.R. 9076, *supra* note 29, at 22 (testimony of Aubrey Wagner, Chairman, TVA).

distribute taxpayer dollars to pork barrel projects in seemingly every congressional district in the nation.[41]

In the 1960s, however, the legal topography of the United States began a remarkable change. Galvanized by the civil rights and consumer protection movements, by gradually swelling opposition to the Vietnam War, and by the raucous anti-establishment "Woodstock" populism of the Sixties, the legal system suddenly opened up to broader, more active public interest citizen participation.[42] Expansive applications of traditional tort law, and a dramatic expansion of citizen standing in court actions based on public law, opened the legal system to a wide

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[41] In the U.S. Congress statutes are promulgated and subsequently subjected to occasional oversight in the subject matter committees like the Committee on Commerce, or the Committee on Environment and Public Works, usually via subordinate process in relevant subcommittees. In the realm of public works projects they are the vehicles by which new projects and programs are "authorized." (TVA actually is an exception, and self-authorizes some of its own projects). The Appropriations Committees in both chambers have a more restricted but ultimately more politically potent role; no money can be spent for authorized statutory, or administrative, programs and projects if they are not given annual appropriations by the appropriations committees. The appropriations ccommittees thus, unlike the substantive committees, meet every year on every ongoing project and program doling or withholding money. The political power inherent in this "pork" function is so great that members of the committees are generally prohibited from sitting on any other committee, and rules exist in both chambers prohibiting substantive provisions being attached to the multi-billion dollar, virtually un-vetoable, appropriations bills. *See, e.g.*, Rules of the House of Representatives, Rule XXI, cl. 2, H.R. Doc. No. 277, 98th Cong., 2d Sess. 564 (1985); Standing Rules of the Senate, Rule XVI, cl. 4, S. Doc. No. 1, 98th Cong., 2d Sess. 14-15 (1984). House Rule XXI, cl. 2 sets formal requirements for appropriations bills, including the clause, "No amendment to a general appropriation bill shall be in order if changing existing law." Senate Rule XVI is to similar effect.

[42] *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975). The breakthrough decision on legal standing for citizens in the environmental area was the Storm King Mountain case on the Hudson River. Scenic Hudson Conference v. Fed. Power Comm'n, 354 F.2d 608 (2nd Cir. 1965) (holding that a statute may create new interests and rights, thus giving standing). In the area of consumer and civil rights a little-recognized milestone was Judge (later Chief Justice) Warren Burger's decision in Office of Commc'n of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), *appeal after remand*, 425 F.2d 543 (D.C. Cir. 1969). *See generally* Zygmunt J.B. Plater, *From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981 (1994).

Broad reactions in the American public against official status quos in the 1960s arose from a number of vivid exposures to civic dysfunctions. Television revealed horrific scenes of state officials loosing dogs and water cannons on citizens protesting segregation, even children, while federal officials did nothing. Ralph Nader's work highlighted a wide range of unacknowledged injuries caused by everyday consumer products. Rachel Carson's *Silent Spring* chronicled a pervasive thoughtlessness in chemical usage that revealed human society's interconnection with natural ecosystems and the dangers lurking in failures to make production decisions holistically. The Vietnam draft brought the dubious realities of our bloody intervention in Indochina politics into the breast of families across the nation.

spectrum of participants.[43] In systemic terms the United States transitioned away from a "di-polar" system of societal governance, where industry and economic powers are counterbalanced by public agencies, toward a more multi-centric, inclusive, pluralistic process of governance.[44]

Beginning in 1970, a parade of several dozen major environmental protection statutes, often echoed by state corollaries, marched into the law books.[45] Most of these statutes explicitly granted citizens standing to enforce them when the official agencies failed to do so.[46] With the help of citizen enforcement in the courts, these statutes began to create a credible mandatory structure of protections against environmental excesses.

Down in Tennessee, the farmers and their allies immediately seized upon NEPA to challenge the Tellico Dam, and won an injunction asserting that TVA

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[43] *See generally* ZYGMUNT J.B. PLATER, ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY 241–52 (4th ed. 2010) [hereinafter NATURE, LAW & SOCIETY].

[44] For a bit more on the "di-polar-to-multicentric" rubric, noting how the "official" di-polar players all too often gravitate too closely toward one another, *see* Zygmunt J.B. Plater, *The Exxon Valdez Resurfaces in the Gulf of Mexico . . . and the Hazards of "Megasystem Centripetal Di-Polarity,"* 38 B.C. ENVTL. AFF. L. REV. 389, 393–95 (2011).

[45] In the early 1970s, Congress passed and President Richard Nixon signed an unprecedented volume of statutes—the National Environmental Policy Act of 1969, the Clean Air Amendments of 1970, the Occupational Safety and Health Act of 1970, the Fish and Wildlife Coordination Act, the Noise Control Act of 1972, the Clean Water Act of 1972, the Natural and Scenic Rivers Act, the Coastal Zone Management Act, and at least two dozen more. There were more than 30 significant environmental statutes passed in the three years after the National Environmental Policy Act. In terms of legislative volume, only President Carter's years come close, with 20 legislative acts in an equivalent span, many of which merely amended and fine-tuned prior acts. These modern statutory systems addressed ecological and economic values and problems that had not been adequately acknowledged or accounted for in previous public and private law.

[46] *See* Toxic Substances Control Act §§19(d), 20(c)(2), 15 U.S.C. §§2618(d), 2619; Endangered Species Act of 1973 §11(g)(4), 16 U.S.C. §1540(g)(4); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1270(d); Deep Seabed Hard Mineral Resources Act §117(c), 30 U.S.C. §1427(c); Clean Water Act (Federal Water Pollution Control Act Amendments of 1972 §505), 33 U.S.C. §1365(d); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §1415(g)(4); Deepwater Port Act of 1974, 33 U.S.C. §1515(d); Safe Drinking Water Act §1449(d), 42 U.S.C. §300j-8(d); Noise Control Act of 1972 §12(d), 42 U.S.C. §4911(d); Energy Sources Development Act, 42 U.S.C. §5851(e)(2); Energy Policy and Conservation Act, 42 U.S.C. §6305(d); Solid Waste Disposal Act, 42 U.S.C. §6972(e); Clean Air Act §304, 42 U.S.C. §§7604, 7607(f); Powerplant and Industrial Fuel Act, 42 U.S.C. §8435(d); Ocean Thermal Energy Conservation Act, 42 U.S.C. §9124(d); Outer Continental Shelf Lands Act, 43 U.S.C. §1349(a)(5). The Marine Mammal Protection Act, however, lacks such a provision. Significantly, most of these grants of enforcement standing also provide for certain litigation fee awards if appropriate, *e.g.*, "The court, in issuing any final order in any suit brought pursuant to [this Act] may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." ESA §11(g), 42 U.S.C. §1540(g)(4).

could not proceed with the dam without a valid environmental impact statement (EIS).[47] When the agency ultimately produced an EIS sufficiently detailing the negative effects of the dam, however, the federal courts allowed it to proceed.[48] NEPA is a procedural statute, with no substantive environmental mandates. When the Tellico injunction was dissolved, most of the 300 farmers and other landowners in the project area gave up hope the dam project could be stopped.

In October 1974, a year after the passage of the federal Endangered Species Act of 1973, as TVA was gearing up to finish the dam after the NEPA injunction's 16-month stay, one of my students, Hiram "Hank" Hill, was looking for an environmental law term paper topic. He had heard about the discovery of the little darter over beers with some ichthyology graduate students, and asked did I think it might be a sufficient topic for a 10-page research paper? Yes, I thought it might! In a very short time both of us were meeting with the farmers still resisting the dam. At a Saturday night potluck meeting at historic old Fort Loudon, then still standing on the banks of the Little Tennessee River, Asa McCall, a grizzled old farmer who had been holding off the TVA condemnation marshals for years through grit and perseverance, took off his hat, scratched his head, and said, "I've never before heard of this little fish, but I say if it can save our farms we have to give it a try." He passed his hat around, and the $29 kicked in by the little group that evening was the start of the snail darter litigation campaign.

The ESA's Section 7 as it stood in 1974 was short, sweet, and virtually unknown, although that soon changed.[49] During the darter litigation, the statutory provision remained deceptively simple. It had only 128 words total, but if one carefully parsed the paragraph, a mere 27 words hidden within it could be read to create two new and drastic causes of action with *substantive*, not procedural, mandates—

> ESA§7. (16 USC §1536) INTERAGENCY COOPERATION. The Secretary [of Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter.

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[47] Envtl. Def. Fund v. Tennessee Valley Auth., 339 F. Supp. 806 (E.D. Tenn. 1972), *aff'd*, 468 F.2d 1164 (6th Cir. 1972), *stay denied*, 414 U.S. 1036 (1973).

[48] Envtl. Def. Fund v. Tennessee Valley Auth., 371 F. Supp. 1004, 1006 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466, 468 (6th Cir. 1974). The text of the EIS emphasized the project's claimed benefits and minimized its negatives and alternatives. The citizens' assertion of the EIS' inadequacy, as so often in NEPA procedural litigation, lost to the courts' deference to agency discretion.

[49] As we prepared the darter litigation, there were two other cases proceeding under ESA § 7: a suit to block an interstate highway interchange on habitat of sandhill cranes (*Grus canadensis*), Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359 (5th Cir. 1976), and a dam case in the Midwest eventually dismissed for failure to prove harm to endangered Indiana bats (*Myotis sodalis*). Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976). As Tennessee Valley Auth. v. Hill moved through the courts, it was joined by Patrick Parenteau's suit against the Greyrocks Dam based on harm to whooping cranes (*Grus americanus*). Nebraska v. Rural Electrification Admin., 23 F.3d 1336 (D. Neb. 1978).

> ***All*** other ***federal agencies shall***, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such action necessary to ***ensure that actions authorized, funded, or carried out***[50] by such agencies [1] ***do not jeopardize*** *the* ***continued existence of*** such ***endangered species*** or threatened species or [2] ***result in*** the ***destruction*** or modification ***of habitat*** of such species which is ***determined*** by the Secretary, after consultation as appropriate with the affected States, to be ***critical***.[51]

The paragraph is clearly not a paragon of legislative style, and legislators who voted for it in large majorities can be forgiven for not realizing that it contained actionable provisions.[52] But note that when you parse the italicized words, the paragraph produces two statutory causes of action defining violations for which the remedies of the ESA can be invoked: [1] jeopardizing a species' continued existence, and [2] destroying or modifying critical habitat.[53] After getting the darter listed on the official endangered species list, in a story told elsewhere,[54] the citizens filed suit, took the case up through the courts, and in the Supreme Court ultimately won the 6-3 decision declaring that TVA had to obey the law.[55]

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[50] Endangered Species Act of 1973, 16 U.S.C §§ 1351-1544 (1973) (emphasis added). What federal actions does that *not* cover?

[51] *Id.* § 1536 (emphasis added).

[52] *Id.* As the legislative history makes clear, several legislators well knew what Section 7's text mandated but, while placing significant clarifications into the committee records, the active potential for the section was not widely advertised. *See* Statement of Representative John Dingell, 119 Cong. Rec. 42913 (1973): "It is a pity that we must wait until a species is faced with extinction . . . but at least when and if that unfortunate stage is reached, the agencies of government can no longer plead that they can do nothing about it. They can, and they must. The law is clear." In hearings on the ESA bill held by Senator Marlow Cook of Kentucky, Administration witnesses testified to the senators present that the ESA "for the first time would prohibit another federal agency from taking action which does jeopardize . . . endangered species." U.S. Senate, Hearings on the Endangered Species Act of 1973 Before the Subcommittee on the Environment of the Senate Committee on Commerce, 93d Cong., 1st Session 7, 68 (1973).

[53] *Id.* Two further possibilities that we chose not to litigate at that early stage were an affirmative requirement for "conservation of endangered species," and the procedural requirement for "consultation," a process that had not been subject to administrative definition at that point in time. For tactical reasons, the first two causes of action were deemed more feasible to litigate.

[54] *See* 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) [hereinafter *Wake of the Snail Darter*].

[55] Tennessee Valley Auth. v. Hill, 437 U.S. 153, 195 (1978). "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt

Several vivid "environmental" moments in the Supreme Court oral arguments deserve note.

> The ATTORNEY-GENERAL [holding aloft a vial of formaldehyde containing a dead snail darter]: ". . . I have in my hand a darter, a snail darter, Exhibit No. 7 in the case when it was filed. And we brought that with us so you could see it. It's three inches. It is supposed to be a full grown snail darter, about three inches in length."
> JUSTICE BRENNAN: "Is it alive?"
> *[Laughter]*
> The ATTORNEY-GENERAL: "I've been wondering what it's in, if it is. It seems to move around. I've been puzzled over that."
> *[More laughter]*

The deprecatory humor of that interchange was somewhat shifted later in the session:

> JUSTICE POWELL: ". . . [W]hat purpose is served, if any, by these little darters? Are they used for food? . . . Are they suitable for bait?"
> COUNSEL: "No, Your Honor . . . . But ultimately there's a utilitarian purpose that is served precisely by the snail darter . . . . [I]t is highly sensitive to clean, clear, cool flowing river water. And after 68 dams through the TVA river system—68 of them, one after the other—the range of the snail darter has apparently been destroyed, one by one, until this last 33 river miles is the last place on Earth where the species, and human beings as well, have the quality of the habitat . . . .
> JUSTICE POWELL: "So that's the last place it's been discovered, I take it?"
> COUNSEL: "Your Honor, TVA has looked *everywhere* for snail darters." *[Laughter]* . . . It's a highly specialized fish . . . an indicator of water quality. Instead of a dead one, I've left with the clerk several prints, which were Exhibit No. 12 at trial, which show the species in its natural habitat along the bottom of the river . . . ."[56]

Surprisingly, at this moment the Clerk of the Supreme Court stood up and edged along behind the seated Justices, handing each a copy of the colorful exhibit lithograph, showing a pair of darters and the crystal clear beauty of the river coursing over a gravel shoal, far more meaningful than the dead fish in the vial. Citizens should never forget the value of graphics in conveying their arguments, and in this case the natural habitat and brown eyes of the cute little fish pictured in

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congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches."

[56] TVA Oral Argument, *supra* note 15. The Justice's food/bait question was separated by several interjections.

the exhibit print might have won over at least one vote.[57] The Supreme Court ultimately upheld the darter over the dam by a vote of 6 to 3, with Chief Justice Burger writing the majority opinion.[58]

The Supreme Court victory was not the end of the matter, however. As the citizens themselves had argued, an injunction from the Court would and should be the catalyst for "a remand to legislature,"[59] forcing Congress to do what the farmers had so long hoped for, an objective analysis of the true merits of the pork barrel dam versus the rich resources of the river and its valley. Congress soon began to craft and pass elaborate amendment provisions for ESA §7. The most significant amendment to Section 7 was the 1978 addition of an exemption process committed to a newly-created "Endangered Species Committee"—less reverently known as the God Committee or God Squad in recognition of the new entity's power to authorize extinctions if its Cabinet-level members decided that a balance

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[57] *Id.* Perhaps the most significant "non-ecological" moment in the oral argument was an exchange regarding a court's role in equitable balancing. In its essence the Tennessee Valley Auth. v. Hill decision was not an "environmental" decision, but rather an equity or separation of powers case: *how* should the competing statutory interests be balanced, and *by whom*—Congress or courts?

> JUSTICE BURGER: ". . . Do you suggest that any of the legislation passed here has abrogated the normal equity function of a United States District Judge in granting an injunction . . . ?"
> COUNSEL: "Not at all, Your Honor . . . . We do not advocate stripping . . . any court . . . of their equitable powers. Indeed . . . we rely on Your Honor's decision in *Rondeau v. Mosinee Paper Corporation*—that . . . equity courts 'have the full panoply of powers required *to enforce the laws of Congress*.'"
> JUSTICE REHNQUIST: "But *Hecht against Bowles* says you *don't* get an injunction automatically for a statutory violation!"
> COUNSEL: "That's correct, Your Honor. And we do not insist on an injunction. If petitioner agreed to obey the law voluntarily, as the Hecht Corporation did in that case, or as the Mosinee Paper Corporation agreed in Your Honor's [nodding again toward C.J. Burger] case . . ."
> JUSTICE BURGER: "Then you don't need an injunction . . . . It's academic."
> COUNSEL: "And the law would be complied with." *Id.*

[58] In announcing the outcome orally, Chief Justice Burger declared that "the case involves something more important than either a three-inch fish which is endangered as a species or even than the one hundred and twenty million dollar [sic] dam. As the majority of the Court sees it, some very important and fundamental principles of the separation of powers are at stake." Tennessee Valley Auth. v. Hill, Opinion Announcement, Thursday, June 16, 1978, 437 U.S. 153 (1978), *available at* http://www.oyez.org/cases/1970-1979/1977/1977_76_1701 [hereinafter TVA v. Hill Opinion Announcement].

[59] Plater et al., Brief for Appellees, Tennessee Valley Auth. v. Hill, No. 76-1701, U.S. Sup. Ct., filed Mar. 1, 1978, at 44 (citing Joseph L. Sax, who also happens to be the Wallace Stegner Center's first, and to date most eminent, Stegner Lecturer).

of public interests showed a strong necessity for doing so.[60] Section 7 mushroomed from its 1973 text of 129 words to its present total of 4,603.[61]

The conflict between the snail darter and the Tellico Dam was the Section 7 God Committee's first assignment.[62] For three months a staff of economists convened by the Committee prepared an accurate economic analysis of the TVA project. Based on the economists' study, the God Squad unanimously determined the dam project, even with 95% of its budget spent, still did not make sufficient economic sense to justify spending even the last 5% of its appropriated costs. The decision was to save a valley rich in historical, cultural, and ecological values that would produce substantial economic benefits for the region.[63]

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[60] 16 U.S.C. § 1536(h)1)(A)(ii) (1988). The Committee is composed of seven members: the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and one presidentially appointed representative for each of the states affected by the project in question. 16 U.S.C. § 1536(e)(3). Section 1536(h) reads in pertinent part:

> The Committee shall grant an exemption . . . if, by a vote of not less than five of its [seven] members voting in person [i.e. the Cabinet officers themselves, no delegates]—
> (A) it determines on the record [after a full hearing] that—
> (i) there are no reasonable and prudent alternatives to the agency action;
> (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;
> (iii) the action is of regional or national significance; and
> (B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement . . . .

[61] 16 USC § 1536, *amended by* Pub. L. No. 95-632, § 3, 92 Stat. 3752 (1978); Pub. L. No. 96-159, § 4, 93 Stat. 1226 (1979); Pub. L. No. 97-304, §§ 4(a), 8(b), 96 Stat. 1417, 1426 (1982); Pub. L. No. 99-659, Title IV, § 411(b), 100 Stat. 3741, 3742 (1986); Pub. L. No. 100-707, Title I, § 109(g), 102 Stat. 4709 (1988).

[62] For the God Committee's first meeting the 1978 amendments coupled the darter case with Professor Patrick Parenteau's whooping crane injunction against Greyrocks Dam. Nebraska v. Rural Electrification Admin., 23 F. 3d 1336 (8th Cir. 1994). In the latter case, the committee affirmed a negotiated settlement that provided for protections of the crane, while allowing the creation of the Greyrocks reservoir. *See* Endangered Species Committee, Transcript of Hearing of Jan. 23, 1979 (on file with author).

[63] *See id*. Because no detailed study had been prepared of the proposed "Cherokee Trail" tourist route up through the valley to the Great Smoky Mountains National Park—the most promising potential economic element of river-based project alternative developments—it was not included in the Committee's positive economic analysis of non-dam development.

The God Committee's Tellico Dam verdict was a significant precedent in policy terms as well: endangered species protection can encourage constructive alternative development planning that actually improves the overall public consequences of such projects and programs. The little endangered species, by its strategic legal situation in the midst of a contested environmental case, had created the only forum practically available for successfully asserting the real public interest of this complex matter, in economic as well as ecological and aesthetic terms.

Despite the God Committee's unanimous economic verdict against the dam, however, the media virtually ignored this dramatic reversal of the public's derisive reigning caricature of a small fish blocking a huge and critically needed hydroelectric dam. In public opinion the snail darter remained an icon of environmental extremism and foolishness, and this permitted anti-regulatory political blocs in Washington to engineer an overturning of the Supreme Court and God Committee verdicts.

Late one day, four months after the God Committee's economic verdict upholding the darter and its river, in forty-two seconds in an emptying House chamber, TVA's pro-dam public works allies slipped a rider onto an appropriations bill repealing all laws hindering the Tellico Dam, and ordered the reservoir's completion.[64] After a half-hearted veto threat by President Carter[65] and a last-

[64] *See* Zygmunt J.B. Plater, *Those Who Care about Laws and Sausages Shouldn't Watch Them Being Made*, L.A. TIMES, Sept. 2, 1979, at A23, *reprinted in Energy and Water Development Appropriations for 1982 -- Part 9: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 97th Cong., 1st Sess. 314–16 (1981). The maneuver violated Rule XXI, cl. 2 of the Rules of the House of Representatives which, evidently responding to the dangers inherent in allowing appropriations bills to amend substantive laws, provides: "Nor shall any provision in any [appropriation] bill or amendment thereto changing existing law be in order . . . ." H.R. Doc. No. 403, 96th Cong., 1st Sess. 525 (1979) (96th Congress preamble printed over 95th Congress, 2nd Session document). The rider did nothing else but amend existing laws, but in order to enforce compliance with Rule XXI, a timely point of order had to be made. The House Appropriations Committee engineered its move so that none of the few representatives present would understand what was being done, so no point of order was made. More complete statements of the amendment's content were inserted in the Congressional Record, but none were actually made on the floor when the rider was being considered. Only the first 17 words of the amendment (up to "authorized") were actually made on the floor. Of course, no references were made to "Tellico," "Little Tennessee River," "endangered species," "snail darter," or any other phrase that would have given their fellow members notice of the amendment's content. Most students of American government do not know that the Congressional Record is not a complete record of congressional debates, and thus is not properly cited as an official record. *See* U.S. CONST. art. 1, §5, cl. 3 (journal of each chamber as bare bones statement of its proceedings); N. David Bleisch, *The Congressional Record and the First Amendment: Accuracy Is the Best Policy*, 12 B.C. ENVTL. AFF. L. REV. 341 (1985).

[65] Carter's position with regard to the Tellico controversy exemplified the difficulties he experienced with his conciliatory and diplomatic approach to the presidency. Carter stated that he hoped his concession in not vetoing the bill would stimulate congressional

minute constitutionally-based lawsuit brought by the farmers' Cherokee Indian allies,[66] the TVA was ultimately able to finish the dam, close the gates, and flood the valley on November 28, 1979.

Before the river began disappearing beneath the stilled waters of a Tellico reservoir, emergency transplants carried whatever snail darters could be salvaged to several other Tennessee locations; some of those transplantations appear to be working successfully.[67] In the following two years, no economic development came to the project lands that had been condemned from family farms. Embarrassed, TVA proposed to the state that the Tellico lands be developed as a major regional toxic waste disposal facility.[68] Subsequently, TVA has transferred a major portion of the project lands to a housing development corporation affiliated with the Walmart Corporation and several other resort developers, and the reservoir today is lined with magnificent "McMansions," golf courses, and marinas for wealthy retirees.[69] A small industrial park (in the same location as the larger industrial development area that had been proposed in the citizens' alternative development plan) has a dozen enterprises with roughly 200 employees.[70] Up and down the narrow, twisting, shallow reservoir, boaters cruise past the tops of farmers' silos, still poking up forlornly from the greenish water.

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support for benefit-cost control legislation reviewing the economic feasibility of water projects. Presidential Statement on Signing H.R. 4388 into Law, 1979 PUB. PAPERS 1760 (Sept. 25, 1979), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=31421 #axzz1nF5GIJxU. Carter's decision not to veto also reflected his ongoing political battles with Congress over the SALT II Treaty, the Department of Education, and Panama Canal legislation. Politically, Carter may well have decided that despite the economic merits of the case he could ill-afford a tough stance on behalf of a publicly derided two-and-a-half-inch fish when he needed congressional support on other issues.

[66] Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). The citizens' coalition was able to put together a challenge based on the First Amendment right to free exercise of religion and the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1982), which recognized the preexisting constitutional rights violated by federal projects impacting sacred lands, including Indian burial grounds. That effort also failed.

[67] *Wake of the Snail Darter*, *supra* note 54.

[68] Tipped off by a friend within TVA, the author passed the news to a contact in the United Press, and within 24 hours the proposal was abandoned. *See* Steve Holland, *Hazardous Waste Dump Proposed for Tellico*, NASHVILLE TENNESSEAN, Sept. 29, 1982; John Moulton, *Tellico Waste Dump Plan Barred*, KNOXVILLE NEWS-SENTINEL, Sept. 29, 1982, at A1. These articles were published on the same day, with the latter being an evening edition story. Note how quickly the toxics plan was shelved in response to pointed media coverage, in contradistinction to the passivity and ineffectiveness of media coverage of the dam's demerits.

[69] The farmers who received an average of $330 per acre for their lands, and between $5,000 and $12,000 apiece for homes and barns, later saw as their former lots sold for $150,000 per half acre and million-dollar homes.

[70] *See* TELLICO RESERVOIR DEV. AGENCY, TELLICO INDUSTRIES AND PRODUCTS (2007).

III. THE ETHICS, FUNCTIONS, AND PRACTICALITIES OF CITIZEN SUITS USING ENDANGERED SPECIES AS CANARIES IN THE COAL MINE

In its ultimate resolution, the snail darter-Tellico Dam controversy was, depending upon the observer, a protracted waste of time or a frustrating case of what-might-have-been. The facts revealed in the God Committee's dramatic eleventh-hour economic analysis, however, reinforce the conclusion that over an extended period of 20 years the citizens' persistent arguments had been correct from the start.

In the words of Charles Schultze of the Council of Economic Advisors, "here is a project that is 95% complete, and if one takes *just the cost of finishing it against the [total project] benefits*, and does it properly, it doesn't pay. Which says something about the original design!"[71]

The Tellico Dam project was a large, destructive mistake that, despite its markedly negative merits, rolled along without hindrance through the official corridors of government.

But was it unethical, hypocritical, for the dam's citizen opponents to use the endangered fish and ESA Section 7 when they fully understood that most members of Congress voting for the Act did not intend the statute to be capable of obstructing a pork barrel public works project? Did the citizen coalition really care about the endangered snail darter, as the Chief Justice doubted, saying it was just "a handy handle"?[72]

True, for Asa McCall and other farmers it was clearly their homes and farms they cared about, not the darter. For trout fishermen, it was the river. For the Cherokees, it was saving a sacred cultural place. For the university biologists, it was an ecological mandate to preserve natural biota in natural ecosystems. For the author and his students, it was a mix of motives, perhaps including an iconoclastic wish to oppose official authority that was harming the environment. It is simply not realistic to assert that any of the citizens would have mounted such a long and painful campaign for the darter if only the fish was at stake. But for many the darter became more than a leveraged technicality—it was an embattled piece of anciently-evolved creation, a vibrant little symbol of rich and complex natural systems being impacted by narrow short-term human agendas, and a metaphor of what was happening to flowing rivers, Native American culture, and rural communities. As Jimmie Durham, a Cherokee who chaired the International Indian Treaty Council, hoping that Chota and the sacred valley would be saved stated, "[T]hat fish is . . . a Cherokee fish and I am its brother."[73]

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[71] Charles Schultze, Chairman, President's Council of Economic Advisers, Endangered Species Committee, Tellico Dam and Reservoir Project 25–26 (Jan. 23, 1979) (unpublished transcript of public hearing, on file with author) (emphasis added).

[72] *See* TVA Oral Argument, *supra* note 15.

[73] Statement of James Durham, Chairman, International Indian Treaty Council (also representing National Indian Youth Council), in Hearings on Endangered Species, Serial

But the fish's salvation clearly was a means to an end, not by itself a determinative motivation. A continuing implication of hypocrisy thus understandably dogged the citizens throughout the ESA battle. Although no similar criticism is directed at the insider blocs and lobbyists operating in Washington, there appears to be a general assumption that public interest citizen advocates should have "pure" unmixed motivations, and they appear tainted when other personal concerns, albeit non-economic, are implicated.

Here it may be relevant to utilize the Al Capone analogy: Capone was convicted under federal law for income tax evasion,[74] not for the murder, racketeering, gambling, prostitution, bribery, extortion, and other state crimes he'd surely committed, for which, however, owing to widespread corruption in the judiciary and constabulary of Chicago, effective state prosecutions were simply not possible.

The darter-dam case quite closely parallels the Capone prosecution. But for the opportunistic use, by citizen plaintiffs, of a legal instrument extending beyond its legislatively intended scope, the official mechanisms of government would not have been able to address the important civic facts. So why was the ESA's latent Section 7, prosecuted by citizen action, arguably necessary in the Tellico Dam case?

The problem was not that the agencies of government beyond TVA didn't know the Tellico Dam's economic justifications were false. (TVA staffers of course clearly knew but it was unrealistic to expect any institution, public or private, to self-censor itself when its leadership's internal drive is strong, or when its narrower institutional agendas conflict with the overall public's larger interest.) Beyond TVA, information that this particular project required critical review had long existed within government records. The farmers and their allies had repeatedly carried economic data to the congressional appropriations committees in Washington, including a scathing economic analysis prepared at the University of Tennessee in 1971 that also circulated within state government.[75] Even the Army Corps of Engineers, not known for its aversion to manipulated calculations in support of federal pork barrel projects, severely criticized TVA's benefit claims for Tellico Dam.[76] But no government agency ever initiated a review of the project's negative merits, and, as the district judge noted, federal courts do review a project's benefit-cost claims when funding has been approved by congressional appropriations committees.[77]

No. 95-40, Subcommittee on Fisheries and Wildlife Conservation and Environment, of the House Committee on Merchant Marine and Fisheries, at 650–51, June 20, 1978.

[74] *See* Capone v. United States, 56 F.2d 927 (7th Cir. 1932).

[75] *See* PHILLIPS, *supra* note 31.

[76] *See* MURCHISON, *supra* note 22, at 21.

[77] Hill v. Tennessee Valley Auth., 419 F. Supp. 753, 760-61 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978). Despite a number of attempts, court challenges to TVA's condemnations of farmlands—arguments that transfers to a private corporation were unconstitutional and that the project's justifications were arbitrary and capricious—all proved likewise ineffective. *See* Zygmunt J.B. Plater & William Lund

Official inertia did not change with discovery of the endangered darter in the middle of the dam project. Understandably, TVA did not voluntarily pause and reconsider its project when the potential violation surfaced.[78] Other federal agencies might have intervened, however. Several had conversations with TVA, but none attempted to enforce the law against the dam project. Within the Department of Interior, three divisions expressed concern about the dam's continuance in the face of the statutory violation—the U.S. Fish & Wildlife Service, the National Park Service, and the Bureau of Indian Affairs. No action was initiated by the Department of Interior, nor by the President's Council on Environmental Quality, the federal government's lead agency charged with overseeing and coordinating federal environmental protection efforts.[79] Congress, for its part, undertook no serious scrutiny of the merits of the darter-dam conflict until the Supreme Court prompted the congressional amendments creating of the God Committee analysis 19 years after the dam project planning had gotten underway.[80] Only the courts, pressured by citizens using the ESA's citizen suit provision, could be instigated to take on the issue directly, albeit with limited parameters.

Why would no official forum respond to the substantial issues raised by TVA's dam? Most obviously because there is no existing statute or governmental procedure straightforwardly holding public works projects to realistic economic projections and benefit-cost accountings from the perspective of the public interest. Pigs are likely to fly before Congress passes a "Federal Scrutiny of Dysfunctional Uneconomic Federal Projects and Programs Act." Even after the ESA had created a potential forum and opportunity for such public interest scrutiny of the contested TVA project, however, even the agencies whose missions were being compromised by the project could not move, leaving citizens to carry the burden.

Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFFAIRS L. REV. 661 (1989).

[78] Rather than pausing, the agency accelerated its condemnations, clear cutting, and bulldozing, increasing to three shifts a day, working through the night, in an apparent attempt to moot the anticipated judicial proceedings. This is the "sunk cost" strategy. *See* NATURE, LAW & SOCIETY, *supra* note 43, at 233–35. TVA's behavior was a major factor prompting a subsequent amendment to the ESA. *See* Jeffrey S. Kopf, *Steamrolling Section 7(d) of the Endangered Species Act: How Sunk Costs Undermine Environmental Regulation*, 23 B.C. ENVTL. AFFAIRS. L. REV. 393 (1996).

[79] The Department of Interior, however, did step in as amicus curiae to support the ESA case when the citizens had carried it to the Supreme Court. *See* APPENDIX, Comments of the Secretary of Interior, Brief of Appellant, Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (a copy is on file with the author).

[80] The Government Accountability Office (GAO), the accounting office reporting to Congress, presented an extremely critical analysis of the Tellico Project in 1977, but it was initiated by the deft maneuvers of citizens, not by legislators, and once presented to two committee chairmen it was ignored. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, COSTS, ALTERNATIVES, AND BENEFITS OF THE TELLICO WATER RESOURCES PROJECT (1977), *available at* http://archive.gao.gov/f0902c/102791.pdf.

The "Iron Triangle" phenomenon arguably provides the most salient explanation why official organs of government found it impossible to bring the TVA project to a public accounting, and why ultimately only an indirect, collateral statute, wielded by citizen volunteers, could do so. "Iron triangles," according to a standard political science rubric,[81] are formed by the alliance between a particular industry or economic interest, a governmental agency (or agencies), and a bloc of legislators that have an especially strong relationship with that economic sector; all three are typically served by a specialized cadre of lobbyists paid by the industry.[82] A typical example is the triangle between the timber industry, the U.S. Forest Service that promotes the industry in federal forests as well as being charged with regulating it, and Northwest legislators who promote the industry's interests and receive its financial support in campaign and PAC contributions.

In the water project field, TVA is part of a larger triangle constituting the Army Corps, the veteran (and often Southern) legislators chairing the appropriations committees, and the bloc of construction, real estate, and other economic interests that profit from taxpayer-funded dam and canal projects.

Each point of an iron triangle looks out for and serves the other two points in political and economic terms. The narrowed, focused interests of each of these triangles creates a powerful political status quo in their sector of governance, each point of the triangle motivated by its own intricate system of rewards. In government as well as geometry, triangles are the strongest of all geometric shapes.

Iron triangles also often form interlocked alliances. In the darter saga the public works water projects triangle worked closely with the timber, paper, electric generating, mining, and ranching triangles, aided by the anti-regulatory U.S. Chamber of Commerce, the industry-funded Heritage Foundation, and various business-oriented "public interest legal foundations."[83] Iron triangle alliances

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[81] *See* FRED POWLEDGE, WATER: THE NATURE, USES, AND FUTURE OF OUR MOST PRECIOUS AND ABUSED RESOURCE 286–89 (1982). Recent political science literature has increasingly been using the alternative semantic of "interest group networks." *See, e.g.*, Mark Thatcher, *The Development of Policy Network Analyses: From Modest Origins to Overarching Frameworks*, 10 J. THEORETICAL POL. 389 (1998), *available at* http://jtp.sagepub.com/content/10/4/389. To activist public interest participants in capital politics, however, the "network" phrase is anodyne, failing to convey the implication of entrenched power conveyed by the triangle rubric.

[82] The "iron triangle" term has useful descriptive application in a wide variety of special interest settings, some more benign than others. There are iron triangles for mining, oil and gas, chemicals, timber, ranching and rangelands, highway construction, pork barrel water projects, the defense procurement industry, as well as for education, medicine and hospitals, sewage treatment, NASA, and more. Public interest groups aren't profit-driven enterprises; hence they tend to be political outsiders and don't have iron triangles.

[83] The committee dockets for the darter hearings reflected a plethora of such blocks allied against the darter and the ESA. *See, e.g.*, Endangered Species, Part 1: Hearing on H.R. 10883 Before the Subcomm. on Fisheries and Wildlife Conservation of the H. Comm. on Merchant Marine and Fisheries, 95th Cong. iii-ix (Feb. 15, 1978); Amending the Endangered Species Act of 1973: Hearings on S. 2899 Before the Subcomm. on Resource

define the established "insiders" in Washington's political landscape. Their dominance in daily governance illustrates what the Tennessee citizens were up against, and helps explain why from the start veteran observers prophesied the citizens' attempt to save the fish and its river would inevitably fail. Likewise it helps explain how the political process could override the God Committee's economic verdict that had been requested by Congress itself—a unanimous verdict against the dam—ignoring it with impunity.

In this political context, public interest citizen critics are regarded somewhat skeptically as marginal outsiders out of step with the rhythms of capital politics, unless they can mobilize media coverage, capacity to fund public relations campaigns, or other means to rally votes in congressional districts. When they lack funds and media support, one of the few ways a citizen group can get systemic leverage is by winning an injunction, so the snail darter coalition's only practicable avenue was the courts. To the accusation of hypocrisy for using the darter and Section 7, their fundamental retort was that this was the only existing legal avenue by which the public values in the river, the farmlands, other valley resources, and the fish, could be defended. And in using Section 7 to defend the darter against extinction, they were doing precisely what the ESA purported to mandate, safeguarding an endangered species' survival against an existential threat.

From the beginning, moreover, it was clear that a darter-dam injunction would not end the story. The citizens' meta-strategy focused on the injunction to force the political system for the first time to address the challenge to the dam seriously on its merits. And that is what occurred—what the darter coalition's mentor Joseph Sax had described as a *de facto* "remand to the legislature." In his oral announcement of the Supreme Court's decision, Chief Justice Burger declared prophetically, "The matter is now in the hands of Congress . . . . The commitment to the separation of powers is too fundamental and too important for us to preempt congressional action,"[84] and Congress soon thereafter gave us the God Committee. Based on the injunction, which was based on an exposure of facts showing threats to human welfare as well as to the welfare of the snail darter, the fish had operated as a canary in the coal mine.

It is probably useful to note that, just by their very existence in a place, not all endangered species operate as canaries in a coal mine. Many species are assailed and become extinct purely through the impact of natural forces and evolutionary

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Protection, S. Comm. on Environment and Public Works, 95th Cong. iii-iv (Apr. 13, 1978); Endangered Species, Part 2: Hearing on H.R. 10883 Before the Subcomm. on Fisheries and Wildlife Conservation of the H. Comm. on Merchant Marine and Fisheries, 95th Cong. iii-ix (June 20, 1978). For more on the phenomenon of industry-funded "public interest law foundations," see Oliver A. Houck, *With Charity for All*, 93 YALE L. J. 1415 (1984).

[84] TVA v. Hill Opinion Announcement, *supra* note 58. Speaking in dissent, Justice Powell mourned that "a great reservoir project designed to serve an impoverished area of Tennessee is ended," but noted, "if Congress acts expeditiously, the Court's decision probably will have no lasting adverse consequences. But I have not thought it to be the province of this Court to force Congress into otherwise unnecessary action to produce a result no one ever intended." *Id.*

conditions.[85] In other cases, where human initiatives threaten a species' welfare, the juxtaposition is just a coincidence. At one point during the darter saga in Washington, for example, the Metro subway system was being excavated throughout the capital area. At one particular site excavators discovered a colony of endangered tiger beetles living at a depth of more than 20 feet underground.[86] The beetles' status as an endangered species was not demonstrably related to any prior human activity, certainly not prior subway excavations, and did not operate so as to reveal flaws and dangers posed by the subway system.

The snail darter's endangerment in Tennessee, on the other hand, was directly attributable to the not-at-all-coincidental fact that most of its historical critical habitats had been sequentially destroyed by dams. The fish's existence in its last remaining significant habitat, in the last remaining stretch of the Little Tennessee River's cool, clean flowing waters, thereby served as a direct indicator of the severe impending loss of that resource for humans as well.[87] In a number of situations, the discovery of endangered species in the path of contested development projects provides project critics with an opportunity and forum to raise serious public interest questions about the projects' wisdom.[88] This role in many situations may indeed be salutary, ultimately important in protecting the public interest. The role of the endangered canary, however, is especially demonstrative and significant where the imminent harms to public welfare revealed by the species' plight are precisely the same harms that have led to the species' endangerment in the first place.

Coal miners who ignored a canary's warning were very likely soon to die. The modern warnings provided by endangered species, however, have generally not achieved the same acknowledgment and responsive reaction.[89] In the Tellico

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[85] George Will, in his piece on Darwin's birthday, ignores the practical and philosophical difference between human and otherwise natural causes of extinction. It's the extraordinary escalation of extinctions caused by human activities over the past century, that frames that important discussion. George F. Will, Op-Ed., *How Congress Trumps Darwin*, WASH. POST, Feb. 8, 2009, at B7.

[86] Interview with Keith Schreiner, Assistant Dir. of the U.S. Fish & Wildlife Serv. [September 1977]. Puzzled what to do about the beetle, the federal biologists apparently just took as many as they could somewhere else, evading the procedures and requirements of the ESA. No tiger beetle lawsuit was filed (although one might have been, had the taxi companies, trying at that time to halt the mass transit competition, learned of the beetle).

[87] This causal relationship was stressed in the oral argument, albeit without expressly invoking the canary, when Justice Powell had asked what the darters' human use value might be. TVA Oral Argument, *supra* note 15.

[88] *See, e.g.*, *Endangered Utah Fish Prompts Controversial Development Plans for Provo River*, FOX 13 NOW (Jan. 26, 2012, 10:29 PM), http://utahcountysouth.fox13now.com/news/news/67543-endangered-utah-fish-prompts-controversial-development-plans-provo-river.

[89] The first instinct of project proponents when a species conflict is identified (when it's not "shoot—shovel—shut up!") often is to propose the species' rapid transplantation to someplace else, ignoring the species' site-specific warning message. In more nuanced responses, procedures are invoked to mitigate some species losses and provide regulatory

Dam case, the darter's cautionary message on one hand was dramatically successful, leading to the nation's first intensive economic analysis of an ongoing public works water project, with a unanimous decision vindicating the darter, its citizen allies, and the rich resources of the river valley on solid economic grounds.

On the other hand, when the canary warning of an endangered species like the darter is proved to be so significantly relevant in identifying the threatened public interest in a matter, how can it then be so cavalierly ignored and overridden?

It was predictable that in the first days of the darter story the initial reaction of the media and the public to news of the darter-dam lawsuit would be skeptical and humorous. But the citizens bringing the case assumed, wrongly, that as the news coverage continued day after day there would be more and more exploration of the full story—the darter's survival in the region's last remaining major stretch of quality flowing river, the dam and reservoir's small scale, farmers losing their land for resale by Boeing and not for a lake, the federal agency's ludicrously manipulated benefit-cost claims, the model city that was a delusion from the start, the loss of a nationally significant fishing destination, the valley's historical treasures, the rich alternatives for a tourism route into the Great Smoky Mountains, and so on.

It was not to be. For more than two and a half years the persistent framing of the case in the press and in political debates continued to be of a silly little fish versus a gigantic hydroelectric dam. Although the darter's environmental case was in the decade's top three in terms of total media mentions, the coverage was superficial, no details. No national investigative reporter ever produced a story probing the realities of the case. The simple fact of the court injunction received instant broad coverage, from *The New York Times* to the sardonic news commentaries of Ronald Reagan.[90] Later, the dramatic revisionist fact of the God

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shields for development projects that implement negotiated habitat protection plans. *See* Zygmunt J.B. Plater, *The Embattled Social Utilities of the Endangered Species Act—A Noah Presumption, and a Caution Against Putting Gasmasks on the Canaries in the Coal Mine*, 27 ENVTL L. 845 (1997).

[90] *See, e.g.*, Warren Weaver, Jr., *High Court Bars Dam, Reprieving Rare Fish; But Justices Hint Congress Will Act to Permit T.V.A. Project*, N.Y. TIMES, June 16, 1978, at A1. Comments on the snail darter by the late President Reagan from his 1976 radio program:

> For those of you who haven't heard of or who only dimly remember hearing something about the "Snail Darter," let me offer an explanation. The "Snail Darter" is a minnow.
>
> Now that may not be biologically accurate, but to everyone but a biologist a tiny fish two or three inches long is a minnow. There are 77 or so varieties of Darters with 77 or so names and the differences between them are indistinguishable to everyone but a student of Ichthyology.
>
> What makes the Snail Darter unique among its cousins is that it is [on] the endangered species list, lives only (so far as we know) in a 17 mile stretch of

Committee verdict, revealing the darter's lawsuit had been anything but economically foolish, received little or no coverage.[91]

If during those years the American public had been shown the economic realities of the darter-dam case—and perhaps most dramatically the unknown story of the farmers' land being condemned so it could be transferred to a Fortune 500 company for resale—the congressional process would never have dared to override the injunction. But because the public image of the darter-dam case never caught up with reality, the iron triangle alliance could ignore the God Committee's revisionist verdict and order the completion of the dam and reservoir.[92]

Why did the darter's canary warning, increasingly sharpened over the last six years in terms of evidentiary proof and clarity, remain so marginalized and unchanged in public perception, a lack of recognition that ultimately allowed the merits to be politically ignored and finessed in such fashion?

In part the failure of public recognition can be attributed to consistent effort by the iron triangle alliances to frame and perpetuate the issue in the standard cliché terms—environmental extremists, trivial fish, big dam, human progress. Many interests in the capital feared the scrutiny that an informed public could turn onto a wide variety of uneconomical projects and programs if the lessons of the

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> the Little Tennessee River and has held up a $116 million dam for four years. It is interesting to note that in this hassle it is a bureaucratic civil war—the Environmental Protection Agency versus the Tennessee Valley Authority. T.V.A. was building the dam.
>
> The thing that brought the "Snail Darter" (I still say its a minnow) back into the news was a recent action by the House Appropriations [Committee]. With an eye toward settling the dispute and getting the Tellico Dam completed, the Committee appropriated $9 million to transplant the fish, which they estimate number 10,000.
>
> It only takes a little arithmetic to figure out that comes to $900 per fish. Think about that the next time you use minnows for bait.

Ronald Reagan, broadcasts of October 18 & 29, 1977; October 18, 1978, quoted in Kiron Skinner et al., REAGAN'S PATH TO VICTORY, 214, 231, 367 (2003).

[91] *See* Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 ENVTL. L. 1, 16–17 (2002). If mentioned, it was portrayed typically in terms that the Committee was continuing the anachronism of a little fish blocking a big dam, more silliness.

[92] It was not that the legislators who voted to override all laws blocking dam completion did not know the facts. Interior Secretary Cecil Andrus, chairman of the God Committee, sent a personal letter to each of 535 Members of Congress detailing the stark findings of the Committee they had charged with determining the accurate public interest. *Id.* at 19. The legislative majorities that overrode the injunction and the economic record knew the facts, but they also knew that America did not know and so were able to follow the usual insider process unhindered. *Id.* at 19–20.

darter were not deflected.[93] Industry press materials, think tanks, and other public relations efforts repeatedly used the darter cliché in a drum-roll of derisive denigration of the Endangered Species Act, and by extension of other environmental regulatory programs.

More surprisingly, the media itself never moved very far beyond the cliché. The standard media text was ecology versus economic progress, often with an added punditry quip that the little endangered darter was itself endangering the political survival of the entire Endangered Species Act.[94] Talk radio was predictably even more strident and dismissive.

In part the press' lack of analysis of the story probably reflected its surface complexity and the modern journalist's need for facts to be easily comprehensible. News media are now broadly dominated by business concerns, with a desire to capture audience and market share with short, catchy accounts of issues and happenings. "My editor won't let me spend time on this," one reporter told the author. "It's too complicated, and anyway, we've already had several stories on environment this month. Indians, too."[95] In a media climate where presidential campaign soundbites have declined from roughly 43 seconds in 1968 to just 7.8 seconds in 2008,[96] the degree to which the media's role as the information supply for a democratic people's participation in government has devolved into market-based "infotainment" is a matter of substantial concern.[97]

There is, moreover, a distressing possibility that much of the public shares a further attribute with the press, deflecting attention away from thoughtful inquiry into the merits of issues in societal governance. It's not only that both may seek the

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[93] *See* Ward Sinclair, *'Pork Panic' Touched Off on Hill*, WASH. POST, June 26, 1978, at A1.

[94] *See, e.g.*, Drummond Ayres, *Controversy Over 3-Inch Fish Stalls the Mighty TVA*, N.Y. TIMES, Mar. 14, 1977, at 31, col. 1.

[95] Telephone interview with Aram Boyagian, ABC News, probably July 1979.

[96] *See* Craig Fehrman, *The Incredible Shrinking Sound Bite*, BOSTON GLOBE (Jan. 2, 2011), http://www.boston.com/bostonglobe/ideas/articles/2011/01/02/the_incredible_shrinking_sound_bite/; *Average Length of Presidential Candidate Soundbites on Network Evening News*, CTR. FOR MEDIA AND PUB. AFF., *available at* http://www.campaignlegalcenter.org/attachments/MEDIA_POLICY_PROGRAM/1126.pdf (last visited June 29, 2012); *The Incredible Shrinking Sound Bite*, NPR MORNING ADDITION (Jan. 5, 2011), *available at* http://www.npr.org/2011/01/05/132671410/Congressional-Sound-Bites (last visited June 29, 2012).

[97] "A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance: and a people who mean to be their own governors must arm themselves with the power which knowledge gives . . . ." Letter from James Madison to W. T. Barry (Aug. 4, 1822), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html; "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion . . . ." Letter from Thomas Jefferson to William C. Jarvis (1820), *available at* http://tcfir.org/opinion/Thomas%20Jefferson%20on%20Educating%20the%20People.pdf.

comfort of soundbite wisdom in a complicated and confusing world, or that both seem to distrust science and thoughtful intellectual inquiry.[98] Even more bemusing is the possibility that substantial fractions of the populace display a marked resistance to changing their minds once having taken a position. Of course neither journalists nor citizens generally enjoy eating crow, having to acknowledge mistakes or, worse, admitting they've been gulled by manipulated information. Once a view of a matter is framed and accepted as true, recent data indicates there is a deep inherent reluctance in many of us to change a position even when presented with clear evidence that it is false.[99] In several experiments, in fact, researchers at the University of Michigan found that "when misinformed people, particularly political partisans, were exposed to corrected facts in news stories, they rarely changed their minds. In fact, they often became even more strongly set in their beliefs. Facts, they found, were not curing misinformation. Like an underpowered antibiotic, facts could actually make misinformation even *stronger*."[100] It apparently is extremely psychologically threatening to many of us to have to admit we are wrong.

This aversion to thoughtful revision may indeed have had a bearing upon the fate of the snail darter and its canary message to America. In subsequent years, in myriad conversations with non-environmentalist citizens who remember the snail darter controversy, the spontaneous reaction at the mention of the fish that halted the dam is usually derisive laughter. Offered information demonstrating the darter case's economic common sense—including data from the Government Accountability Office and TVA itself—most dismiss the thought with a knowing smile and skeptical shake of the head. That is understandable. In the three years of heavy national coverage of the fish story, how many thousands, even millions of citizens had scoffed at the snail darter? How many conversations at water coolers, dinner tables, in talk radio shows and bars around the country, had archly derided the foolishness of the darter and its extremist eco-defenders? To reverse such a fixed presumed reality is too disturbing, too internally ego-bruising.

And so the darter remains a misbegotten icon, used by contemporary critics like Hannity, Beck, and Limbaugh to assail the federal government and

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[98] James Joyner, *More Americans Believe in Angels than Global Warming*, OUTSIDE THE BELTWAY (Dec. 8, 2009), http://www.outsidethebeltway.com/more_americans_ believe_in_angels_than_global_warming/ (discussing that the percentage of Americans who believe in angels: fifty-five; percentage of Americans who believe in evolution: thirty-nine; percentage of Americans who believe in anthropogenic global warming: thirty-six; percentage of Americans who believe in ghosts: thirty-four; percentage of Americans who believe in UFOs: thirty-four); James Owen, *Evolution Less Accepted in U.S. Than Other Western Countries, Study Finds*, NAT'L GEOGRAPHIC NEWS (Aug. 10, 2006), http://news.nationalgeographic.com/ news/bigphotos/21329204.html (only forty percent of Americans believe in evolution; Sweden & France: eighty percent).

[99] Joe Keohane, *How Facts Backfire, Researchers Discover a Surprising Threat to Democracy: Our Brains*, BOSTON GLOBE (July 11, 2010), http://www.boston.com/boston globe/ideas/articles/2010/07/11/how_facts_backfire/.

[100] *Id.*

environmental protection laws when in truth it could prove the contrary proposition: that good ecology can indeed make good economics. The canary tells us so.

In the future perhaps the media, the American populace, and, trailing them, Congress, will come to recognize that thoughtful inquiry, probing analysis, comprehensive and balanced decision-making, all are essentially important to a society's long-run sustainable welfare. Would the snail darter story today still end in the same canted outcome? Probably. But perhaps the blogosphere, currently an undisciplined cacophony of uncertain facts, random thoughts, and dubious analysis, can eventually seize upon the opportunities offered by instant global information transfer to remake the way governments and their people recognize and process the mass of information that will always be critical to societal wellbeing.

Viewed through the retrospective lens of history, the saga of the snail darter provides one more example of a bemusing modern truism: Scratch away at the surface of almost any environmental controversy, and pretty soon you're looking deep into fundamental questions of democracy.