American society since the 1960s make an external vision of the rule of law even more important than before. In a society where so many values are open to contest, language may be the main thing we share in common. In a society where "the pie" is not expanding (the economy is stagnant), dividing the pie by an objective criterion becomes ever more critical.

A less complicated approach may also be more democracy-enhancing, because it places responsibility for updating statutes on the shoulders of the people and their legislators, rather than their unelected (federal and some state) or not-often-elected (most state) judges. Recall Judge Keen's argument that hard cases generating inequitable results should trigger a popular outrage that changes statutes more usefully and more democratically than judicial updating through a Hart-and-Sacks purpose approach. As potential examples of this phenomenon, consider the following cases.

TVA v. HILL

United States Supreme Court, 1978
437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117

CHIEF JUSTICE BURGER delivered the opinion of the Court.

[The Endangered Species Act of 1973, 87 Stat. 884, codified as amended at 16 U.S.C. § 1531 *et seq.*, authorized the Secretary of the Interior to declare species of animal life "endangered" and, upon such designation, triggered various protections for such species. Section 7 of the Act specified that all "Federal departments and agencies shall, * * * with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the] Act by carrying out programs for the conservation of endangered species * * * and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary * * * to be critical." 16 U.S.C. § 1536 (1976).

[Pursuant to the statute, the Secretary declared the snail darter (*Percina tanasi*) an endangered species and designated a portion of the Little Tennessee River as the only remaining natural habitat of the snail darter. That part of the river, however, would be flooded by operation of the Tellico Dam, a $100 million Tennessee Valley Authority (TVA) project that was under way in 1973 and was almost completed by 1976, when environmentalists sought an injunction against the dam's operation. The district court denied relief. It found that the dam would destroy the snail darter's critical habitat, but it noted that Congress, though fully aware of the snail darter problem, had continued to fund the Tellico Dam after 1973. The court concluded that the Act did not justify an injunction against a project initiated before enactment. The court of appeals reversed and ordered the lower court to enjoin completion of the dam.]

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat

of such species . . . ." 16 U.S.C. § 1536 (1976 ed.). (Emphasis added.) This language admits of no exception. Nonetheless, petitioner urges, as do the dissenters, that the Act cannot reasonably be interpreted as applying to a federal project which was well under way when Congress passed the Endangered Species Act of 1973. To sustain that position, however, we would be forced to ignore the ordinary meaning of plain language. It has not been shown, for example, how TVA can close the gates of the Tellico Dam without "carrying out" an action that has been "authorized" and "funded" by a federal agency. Nor can we understand how such action will "*insure*" that the snail darter's habitat is not disrupted. * * *

Concededly, this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds. But examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.

[Chief Justice Burger examined statutes enacted in 1966 and 1969, which sought to discourage the taking of endangered species. Congressional hearings in 1973 revealed that strategies of encouragement had not abated the "pace of disappearance of species," which appeared to be "accelerating." H.R. Rep. No. 93–412, p. 4 (1973). The dominant theme of the hearings and debates on the 1973 Act was "the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources." Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. Rev. 315, 321 (1975). Congressional committees expressed the "incalculable" value of lost species.]

Section 7 of the Act * * * provides a particularly good gauge of congressional intent. As we have seen, this provision had its genesis in the Endangered Species Act of 1966, but that legislation qualified the obligation of federal agencies by stating that they should seek to preserve endangered species only "*insofar as is practicable and consistent with their primary purposes* . . . ." Likewise, every bill introduced in 1973 contained a qualification similar to that found in the earlier statutes. * * * This type of language did not go unnoticed by those advocating strong endangered species legislation. A representative of the Sierra Club, for example, attacked the use of the phrase "consistent with the primary purpose" in proposed H.R. 4758, cautioning that the qualification "could be construed to be a declaration of congressional policy that other agency purposes are necessarily more important than protection of endangered species and would always prevail if conflict were to occur."

What is very significant in this sequence is that the final version of the 1973 Act carefully omitted all of the reservations described above. [The Senate bill contained a practicability reservation; the House bill had no qualifications. The Conference Committee rejected the Senate version of § 7 and adopted the House language. Explaining the Conference action, Representative Dingell pointed out that under existing law the Secretary of Defense has discretion to ignore dangers its bombing missions posed to the near-extinct whooping crane. "[O]nce the bill is enacted, [the Secretary of Defense] *would be required to take the proper steps*." Another example was the declining population of

grizzly bears, whose habitats would have to be protected by the Department of Agriculture. "The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and every agency of government is committed to see that those purposes are carried out. The agencies of Government can no longer plead that they can do nothing about it. *They can and they must. The law is clear.*" 119 Cong. Rec. 42913 (emphasis added by the Chief Justice).]

It is against this legislative background that we must measure TVA's claim that the Act was not intended to stop operation of a project which, like Tellico Dam, was near completion when an endangered species was discovered in its path. While there is no discussion of precisely this problem, the totality of congressional action makes it abundantly clear that the result we reach today is wholly in accord with both the words of the statute and the intent of Congress. The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated provisions of the Act, but in literally every section of the statute. All persons, including federal agencies, are specifically instructed not to "take" endangered species, meaning that no one is "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" such life forms. 16 U.S.C. §§ 1532(14), 1538(a)(1)(B) (1976 ed.). * * *

[TVA also argued that Congress' continued funding of the Dam reflected a congressional judgment, embodied in appropriations statutes, that the Dam not be shut down. Appropriations committees were aware of the effect of the Dam on the snail darter.] There is nothing in the appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act. * * * To find a repeal of the Endangered Species Act under these circumstances would surely do violence to the " 'cardinal rule . . . that repeals by implication are not favored.' " *Morton v. Mancari*, 417 U.S. 535, 549 (1974), quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). * * *

The doctrine disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an *appropriations* measure." *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 785 (D.C. Cir. 1971). This is perhaps an understatement since it would be more accurate to say that the policy applies with even *greater* force when the claimed repeal rests solely with an Appropriations Act. * * * When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. [The Chief Justice also pointed to House Rule XX(2), which forbids amendments to appropriations bills which seeks to "chang[e] existing law." See also Senate Rule 16.4.] Thus, to sustain petitioner's position, we would be obliged to assume that Congress meant to repeal *pro tanto* § 7 of the Act by means of a procedure expressly prohibited under the rules of Congress.

[Chief Justice Burger rejected TVA's urging the Court to balance the harms of shutting down the dam against the dangers to the snail darter. Not only did the Court not consider itself competent to calibrate such a balance, but Congress had already made the judgment that no cost was too high to allow the

federal government to imperil a species.] [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.

[JUSTICE POWELL's dissenting opinion, joined by Justice Blackmun, argued that the Court's opinion "disregards 12 years of consistently expressed congressional intent to complete the Tellico Project" and is "an extreme example of a literalist construction, not required by the language of the Act and adopted without regard to its manifest purpose." Citing *Holy Trinity Church*, Justice Powell contended that the Court ought not read the broad language of § 7 so sweepingly and, instead, ought to narrow the language so as to avoid "absurd results." He would have construed the "actions" governed by § 7 to be only those taken *after* 1973, when the statute was enacted.]

[JUSTICE REHNQUIST dissented on the ground that the legitimate debate over the statute's meaning properly informed the district court's decision not to enjoin work on the dam.]

GRIFFIN v. OCEANIC CONTRACTORS, INC.

Supreme Court of the United States, 1982
458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973

JUSTICE REHNQUIST delivered the opinion of the Court.

[In February 1976, Danny Griffin contracted to work as a senior pipeline welder on board vessels operated by respondent in the North Sea. The contract specified that petitioner's employment would extend "until December 15, 1976 or until Oceanic's 1976 pipeline committal in the North Sea is fulfilled, whichever shall occur first." The contract also provided that if Griffin quit the job prior to its termination date, or if his services were terminated for cause, he would be charged with the cost of transportation back to the United States. Oceanic reserved the right to withhold $137.50 from each of petitioner's first four paychecks "as a cash deposit for the payment of your return transportation in the event you should become obligated for its payment." On April 1, 1976, Griffin suffered an injury while working on the deck of the vessel readying it for sea. Oceanic refused to take responsibility for the injury or to furnish transportation back to the United States, and continued to retain $412.50 in earned wages that had been deducted from Griffin's first three paychecks for that purpose. He returned to the United States and on May 5, began working as a welder for another company operating in the North Sea.

[In 1978 Griffin brought suit against respondent under the Jones Act, § 20, 38 Stat. 1185, as amended, 46 U.S.C. § 688, and under general maritime law, seeking damages for respondent's failure to pay maintenance, cure, unearned wages, repatriation expenses, and the value of certain personal effects lost on board respondent's vessel. He also sought penalty wages under Rev.Stat. § 4529, as amended, 46 U.S.C. § 596, for respondent's failure to pay over the $412.50 in earned wages allegedly due upon discharge. The District Court found for Griffin and awarded damages totalling $23,670.40.]