A TALE OF TWO CASES

Daniel A. Farber

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Two cases, decided almost twenty years apart, provide a vivid picture of how environmental law evolved in the meantime. The first, *TVA v. Hill*, was a dramatic vindication of the urgent need to safeguard endangered species. In order to save an obscure fish, the Court upheld a last-minute injunction against the completion of a dam. The second, *Babbitt v. Sweet Home*, also was resolved in favor of endangered species, blocking an effort to release land developers from the Endangered Species Act’s (“ESA”) coverage. But the tone of the two opinions differed. Unlike *TVA v. Hill*, the opinion in *Sweet Home* was low-key and technical. Where *TVA v. Hill* found it necessary to recount Congress’ reasons for protecting endangered species, *Sweet Home* seemingly took such goals for granted.

The two cases also grew out of different approaches to environmental regulation. Unlike the draconian mandate applied in *TVA v. Hill*, the program involved in *Sweet Home* relied as much on negotiation as on direct regulation; it also focused on preserving ecosystems rather than individual animals. Like environmental law in general, the ESA had made gains in sophistication—and hopefully, in effectiveness—but perhaps at the cost of losing some of its early

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* McKnight Presidential Professor of Public Law, Henry J. Fletcher Professor of Law, and Associate Dean for Research and Faculty, University of Minnesota.
2. *See id*. at 195.
fervor." In a microcosm, these two cases encapsulate much of the intervening development of environmental law and hint at its future.

I. TVA v. HILL

TVA v. Hill may be the best-known case in environmental law. It involved a dam construction project on the Little Tennessee River, a trout stream flowing through a historic area of Tennessee. Near the river is Fort Loudon, which served as an English outpost during the French and Indian War. In addition, several archaeological sites and the old Cherokee sacred capital of Echota are located near the river.8 With scant regard for history or nature, the Tennessee Valley Authority ("TVA") began construction of the Tellico Dam in 1967.9 The dam would flood some sixteen thousand acres of land, converting the stream into a thirty-mile-long reservoir.10 Construction was stalled by a series of lawsuits until late 1973, when a federal court decided that the environmental impact statement had finally been hammered into an acceptable form.11

Like the ancient theatrical device of deus ex machina, rescue arrived at the last moment and in unexpected form—perhaps pisces ex machina is more appropriate, for the unlikely hero was a three-inch fish called the snail darter, discovered by an ichthyologist just before the earlier injunction was dissolved.12 Opponents of the dam succeeded in having the snail darter proclaimed an endangered species, with the Little Tennessee River designated as its critical habitat.13 They then returned to federal court, seeking a new injunction against completion of the dam. The District Court denied the injunction for several reasons: the project was eighty percent complete; a large portion of the $78 million already spent on the dam would be wasted; and the dam had continued to receive congressional support in the form of renewed appropriations.14 Rejecting these arguments, the Court of Appeals

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6 Interestingly enough, however, religious reasons have recently begun to figure among the justifications for saving endangered species. See John Copeland Nagle, Playing Noah, 82 MINN. L. REV. 1171 (1998).
7 For an excellent study of the case by one of the key participants, see Zygmunt J.B. Plater, In the Wake of the Snail Darter, 19 U. MICH. J.L. REFORM 805 (1986).
9 See id. at 157.
10 Id.
11 Id. at 157-58.
12 Id. at 158-59.
13 Id. at 161-62.
14 Id. at 162-66.
reversed and ordered the entry of an injunction.\footnote{Id. at 168-69.}

Perhaps surprisingly, not only did the Supreme Court affirm the
injunction, but the opinion was by Chief Justice Burger, who was by no
means a flaming environmentalist. Although he did come to the
defense of an endangered fish in another notable case,\footnote{See Cappaert v. United States, 426 U.S. 128 (1976).} there is little
reason to believe that the opinion was motivated by Burger’s personal
enthusiasm for environmental protection.\footnote{Indeed, Burger initially voted with the dissent. See Richard J. Lazarus, Restoring What’s Environmental About Environmental Law in the Supreme Court, 47 U.C.L.A. L. REV. 703, 714 (2000).} Rather, Burger seemed
centered about ensuring fidelity to legislative mandates.

Besides being a landmark in environmental law, \textit{TVA v. Hill} is also a
paradigmatic application of the principle of legislative supremacy—the
principle that the legislature, not the judiciary, has the ultimate say
about public policy.\footnote{See Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 GEO. L.J. 281, 291-98 (1989).} Chief Justice Burger’s opinion emphasized that
such policy decisions are the province of Congress and that Congress
had laid down an unequivocal rule in the ESA. Burger ended the
opinion with a rousing quotation from a play about Thomas More; the
quotation ends with More’s pledge to give even “the Devil benefit of
law.”\footnote{\textit{TVA}, 437 U.S. at 195 (quoting ROBERT BOLT, A MAN FOR ALL SEASONS (1962)).}

The major issue before the Court was whether the dam violated
that the statute should not apply to a project so close to completion.\footnote{\textit{TVA}, 437 U.S. at 173.} Burger rejected this argument based on the text and legislative history
of section 7.\footnote{See \textit{id.} at 173-80.} As to the text, section 7 flatly directs the Secretary of
the Interior “to insure that any action authorized, funded, or carried
out” by federal agencies does not “jeopardize the continued existence of
any endangered species” or result in the destruction of critical
habitat.\footnote{16 U.S.C. § 1536(a)(2).} This seemingly unqualified statutory command does not hint
at any exception for projects that are already underway. “One would
be hard pressed,” said Burger, “to find a statutory provision whose
terms were any plainer.”\footnote{\textit{TVA}, 437 U.S. at 173.} As to the legislative history, the record was
replete with statements about the absolute imperative of saving endangered species, including some specific references to on-going
programs.25

The most troubling question was raised by the dam’s continued financial support from Congress during the litigation,26 which suggested that Congress’ real attitude toward endangered species might be less absolutist. But the appropriations process occurs on a separate track from substantive lawmaking. Given the limited legal significance of appropriations bills, according to Justice Burger, Congress’ continued financial support for the project was not a reliable indication of Congress’ understanding of the Endangered Species Act.27 Nor did Burger see room for the exercise of equitable discretion in the face of such a clear statutory mandate.28 Both conclusions seem well-founded: ad hoc spending decisions should not be used to rewrite broad mandates, and courts have little business striking a new balance when Congress has laid down national priorities.29

There were two dissents. Justice Powell, joined by Justice Blackmun, said the majority decision “casts a long shadow over the operation of even the most important projects, serving vital needs of society and national defense.”30 He argued that the statute should not apply to a substantially completed project.31 Then-Justice Rehnquist was doubtful about the statutory interpretation issue but argued that the injunction should be denied on the basis of equitable discretion.32 Given the difficulty of the statutory issue, the public benefits of the dam, and the government’s good faith, Rehnquist was satisfied that “the District Court’s refusal to issue an injunction was not an abuse of its discretion.”33

If the dissenters’ arguments had been accepted, the statute’s effectiveness in controlling federal agencies would have been undermined by easily manipulatable standards of reasonableness, an open invitation for unsympathetic judges to undercut protection of endangered species. If there was any danger after TVA v. Hill, it was the opposite: perhaps in political terms the statute had become too strong for its own good.

25 Id. at 176-88.
26 Id. at 158.
27 See id. at 189-93.
28 Id. at 193-95.
29 See Farber, supra note 18.
30 TVA, 437 U.S. at 195-96 (Powell, J., dissenting).
31 Id. at 196.
32 Id. at 211 (Rehnquist, J., dissenting).
33 Id. at 213.
II. THE EVOLUTION OF ENDANGERED SPECIES PROTECTION

Justice Powell closed his dissent with a prediction that the congressional response to TVA v. Hill would be swift and harsh. "There will be little sentiment," he predicted, "to leave this dam standing before an empty reservoir, serving no purpose other than a conversation piece for incredulous tourists." Congress ultimately approved the dam, but the legislative response was more measured than Powell anticipated.

Congress did amend the ESA to create for a special cabinet-level committee empowered to grant exemptions from the statute under narrow circumstances, where no reasonable alternative existed to a significant and clearly beneficial project. But the "God squad" (so called because it held the power of life or death over a species) unanimously refused an exemption for the Tellico Dam, on the ground that the project's benefits were unclear. One member of the committee, economist Charles Schultze, said "[t]he interesting phenomenon is that here is a project that is 95 percent complete, and if one takes just the cost of finishing it, against the total benefits and does it properly, it doesn't pay, which says something about the original design!" Congress then passed a bill specifically mandating completion of the dam. Despite having been reversed by Congress in its maiden effort, the committee continued to exercise its exemption power quite sparingly in later cases.

This later history supports the Court's decision in TVA v. Hill. The appropriations bills for Tellico Dam did not reflect any general view about the meaning of the ESA but only the existence of powerful political support for a particular pork-barrel project. The amendments also confirm that Congress did not want the courts to strike the balance between preserving endangered species and other national goals. Rather, this value judgment was to be made by high-level, politically accountable officers of the executive branch. Only in exceptional cases was this executive body supposed to interfere.

After TVA v. Hill, the ESA was an all but absolute ban on activities affecting endangered species, with the only escape hatch being the rarely-used "God squad." But this draconian ban led to a seemingly

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31 Id. at 210.
37 Id.
untenable situation. Individual landowners were faced with potentially ruinous bans on development to save the last few members of a species, when the chances of saving that species were often quite small. Meanwhile, the government seemed powerless to intervene at an earlier time to protect the habitat on which the species relied.30 An obscure 1982 amendment proved to be the key to the solution. The amendment allowed the Secretary of the Interior to issue a permit to “take” members of an endangered species (e.g., by modifying their habitat).10 The permit can issue only if the taking is incidental to the project, a habitat conservation plan (“HCP”) is in place, and there will be no appreciable effect on the prospects of the species for survival.11 This might seem like a minor exception covering situations where legitimate hunting or fishing activity posed some risk of accidental harm to members of endangered species. But the “incidental take” concept is much broader. In fact, the provision has served as the basis for a sweeping new approach to protecting endangered species.12

HCPs have taken on a life of their own, with dramatic effect. For instance, habitat conservation plans for Southern California cover a 39,000 acre tract in coastal Orange County and over 150,000 acres in the San Diego area.13 This planning process, involving state and local officials, large landowners, environmental groups, and federal officials, was triggered by a federal threat to list the California gnatcatcher as an endangered species. Listing the gnatcatcher potentially could have frozen development in much of the remaining prime development land in Southern California. In lieu of listing, the Interior Department proposed to delegate regulation to the local planning groups. As the responsible federal official explained, “[i]f the Department approves these plans, they will be implemented in lieu of the normal Endangered Species Act regulations.”14 Thus, locally negotiated solutions have substantially replaced top-down federal enforcement of the ESA.

11 Id. § 1539(a)(2)(A).
12 A related innovation is the use of “Candidate Conservation Assurances” as an alternative to listing a species as endangered. See Nancy K. Kubasek, M. Neil Browne, and Michael D. Meuti, Cross-Examining Market Approaches to Protecting Endangered Species, 30 ENV. L. REP’R. 10721, 10726 (Sept. 2000).
14 George Frampton, Ecosystem Management in the Clinton Administration, 7 DUKE ENVTL. L. & POL’Y F. 39, 42 (1996).
This newer approach to protecting endangered species reflects not merely a shift in regulatory techniques, but also a change in environmental understanding. As originally enacted (and implemented in *TVA v. Hill*), the ESA focused on the protection of individual species from discrete destructive acts. Utilizing the growing scientific field of conservation biology, habitat conservation plans focus instead on ecosystem management with the broader goal of preserving biodiversity. This ecosystem orientation seems to have increasing influence on environmental thinking as a whole, although its full implications are yet to be determined.

### III. BABBITT v. SWEET HOME

Courts played little role in the development of this new approach, but they did have the ultimate say regarding its validity. The incentive to negotiate habitat conservation plans is simple: without a plan, the ESA may prevent land development. Habitat conservation plans not only provide room for current development, but also often have “no surprises” clauses that guard landowners against unexpected events. The necessary premise is that the ESA applies to habitat destruction on private lands. Private lands are not covered by section 7 (the provision at issue in *TVA v. Hill*). They are, however, covered by section 9 of the Endangered Species Act. The key question was whether section 9 applied to habitat modification, as opposed to hunting or fishing. Section 9 bans any “taking” of endangered species, with “taking” defined to include any effort to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” The Secretary of the Interior defined “harm,” in turn, to encompass “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” But was this regulation a permissible reading of the statute?

That issue was resolved in *Babbitt v. Sweet Home* Chapter of [Insert citation].

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16 See Frampton, supra note 14.  
18 See Kubasek, Browne & Menti, supra note 42, at 10750-27.  
Communities for a Great Oregon. The plaintiffs were landowners and logging interests in the Pacific Northwest and the Southeast. They allegedly suffered economic injury because of restrictions preventing the destruction of the habitat of two endangered species, the red-cockaded woodpecker and the northern spotted owl. Without the broad definition of harm in the Department of Interior's regulation, their land development activities would not have been covered by the statute.

Before the case reached the Supreme Court, it had already given rise to some noteworthy disputes in the D.C. Circuit. The same panel decided the case twice, with two, opposite outcomes. In the first round, the "harm" regulation was upheld, but on rehearing, the panel reversed course. The swing vote was Judge Williams, who originally upheld the regulation on the basis of the 1982 amendment but argued in his panel opinion in the second round that the amendment was irrelevant. Ironically, in support of this conclusion, he relied in part on TVA v. Hill, where the Court had refused to give weight to congressional understandings contained in later appropriations bills. But Judge Williams apparently had more fundamental concerns about the regulation. The broad definition of "harm," he said, "vests the Department with authority to supervise the use of privately owned land in vast tracts of the United States, even to the point of forbidding modest clearing efforts conducted in the interest of fire protection in populated areas." Congress did not, Judge Williams added, "hang so massive an expansion of government power on so slight a nail" as the mention of "harm" in section 9. Notably, however, one of the dissenters from denial of rehearing en banc was Judge Silberman, a stalwart conservative, who argued that Williams had failed to give sufficient deference to the agency's interpretation of the statute. On appeal to the Supreme Court, Judge Silberman's view prevailed.

In his opinion for the Court, Justice Stevens began his analysis with the text of section 9. He found support for the broad interpretation in

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52 Id. at 692.
54 Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994).
55 See id. at 1471.
56 Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 30 F.3d 190, 193 (D.C. Cir. 1994).
57 Id. at 193.
58 Id. at 194-95.
the dictionary definition of “harm,” the broad purpose of the ESA as articulated in *TVA v. Hill*, and the 1982 amendment authorizing habitat conservation plans (which would have made no sense unless habitat modifications were covered by the statute in the first place). He also rejected the argument that “harm” must have a limited meaning because the words surrounding it in the statute involve the direct use of force. He observed that some of those other words (such as “kill”) may actually involve indirect harms. In any event, given the degree of deference owed to the agency’s interpretation of the statute, the text provided sufficient support for the broad definition of harm.

A careful examination of the legislative history, particularly that of the 1982 amendment, was also said to support the regulation. Indeed, in considering the 1982 amendment, Congress had habitat modification specifically in mind. Both the House and Senate committee reports “identified as the model for the permit process a cooperative state-federal response to a case in California where a development project threatened incidental harm to a species of endangered butterfly by modification of its habitat.”

Justice O’Connor joined the Court’s opinion, but subject to a caveat. She stressed that she understood the regulation to be limited to “significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals,” adding that application of the regulation “is limited by ordinary principles of proximate causation.” But her understanding of harm was not limited to physical injury—for instance, she said, “[T]o make it impossible for an animal to reproduce is to impair its most essential physical functions” and thereby inflict “actual injury.”

Justice Scalia wrote a vigorous and lengthy dissent, joined by Justice Thomas and Chief Justice Rehnquist. The centerpiece of the dissent was his assertion that the word “take,” as applied to wildlife, is “as old as the law itself,” and means “to reduce those animals, by killing or

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51 Id. at 697-98.
52 Id. at 700-02.
53 Id. at 703.
54 Id. at 704-07.
55 Id. at 707.
56 Id. at 708-49 (O’Connor, J., concurring). The proximate cause test was applied in *Strahan v. Case*, 127 F.3d 155 (1st Cir. 1997) (holding that the state’s issuance of fishing permits was proximate cause of harm to whales caught in nets).
57 515 U.S. at 710. See *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996), cert. denied, 117 S. Ct. 942 (1997) (holding that activities that disrupt breeding constitute taking).
capturing, to human control.”

“IT should take the strongest evidence,” he said, “to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense.”

Justice Scalia is probably right that habitat modification is not the first meaning of the word “take” that would spring to the mind of a fish-and-game specialist reading the statutory language.

Admittedly, the language of section 7 falls short of unmistakably mandating coverage of habitat modification, and it is hard to be certain what (if anything) Congress thought about this issue when it first enacted the ESA. But the 1982 amendment, in its historical context, does seem to endorse the government's reading, though a formalist like Justice Scalia would be loathe to admit that the statute as a whole had evolved. In any event, while Justice Scalia's reading may not be impermissible, under the Chevron doctrine he had the burden of showing that the agency's contrary interpretation was not merely wrong but unreasonable. His dissent fell short of overcoming the textual argument in favor of covering habitat modification. Statutory terms such as “kill” and “harass” cover impacts on species that might be accomplished through habitat modification—you can kill a nesting equally effectively by shooting it or by chopping down the tree. And it is a commonplace that a person can be “harassed,” not merely by a direct physical assault, but by the creation of a hostile environment.

More importantly, the statute does use the word “harm,” and that word in ordinary English usage comfortably covers habitat destruction. It would be peculiar to say that Mrs. O'Leary's cow did not “harm” the people of Chicago when she kicked over the lantern that started the Chicago fire and destroyed their habitat. Likewise, a bombing that destroyed Central Park would harm the people of New York even if no one was killed or wounded. Thus, “harm” includes more than bodily injury. As a matter of ordinary English usage, someone who destroys the breeding grounds of an endangered species

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67 Id. at 717 (Scalia, J., dissenting).
68 Id. at 719. Justice Scalia's approach to this case exemplifies his larger, textualist agenda in statutory interpretation. See WILLIAM N. ESKRIDGE, et al., LEGISLATION AND STATUTORY INTERPRETATION 227-36 (1990).
69 Justice Scalia's strong presumption in favor of traditional common law meanings is, however, seemingly in need of justification. A reasonable member of Congress might have had in mind the ancient meaning of the term “take” in game law, but this is not necessarily the most likely understanding for a contemporary legislator. After all, the statute was not an amendment to other game or fishing laws, but instead was an aggressive addition to the new corpus of federal environmental law. A member of Congress who wanted to know what the word meant would have been as likely to look at the plain language of the definition section of the bill as to consult a treatise on game law.
or eliminates their food supply surely harms them. Justice Scalia's insistence that the statute *unambiguously* precludes the agency's interpretation seems difficult to sustain. Perhaps Justice Scalia's sense of certainty had less to do with the clarity of the text than with the policy concerns expressed by Judge Williams in the lower court. Such concerns figure in the opening paragraph of the dissent, where Justice Scalia remarks that the agency interpretation "imposes unfairness to the point of financial ruin not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." Like Judge Williams, however, Scalia seems to have misunderstood the ultimate practical effect of the regulation. The regulation was largely designed to underwrite a system of negotiation rather than one of unilateral federal imposition on landowners.

IV. CHANGE AND CONTINUITY IN ENVIRONMENTAL LAW

*Sweet Home* and *TVA v. Hill* mark some important changes, as well as some substantial continuities, in environmental law. Perhaps most important is a somewhat surprising continuity. Since *TVA v. Hill* was written, a rightward-turning Republican party has directed considerable fire against government regulation, particularly under the leadership of Ronald Reagan and later Newt Gingrich. This move to the right has clearly had an effect on the Supreme Court, as shown by Justice Scalia's dissent in *Sweet Home.* Scalia seems to be firmly supported by Chief Justice Rehnquist and by Justice Thomas. Justices O'Connor and Kennedy have supported Justice Scalia's approach from time to time, but often, as in *Sweet Home,* they have cast their votes in favor of the environment. Considering the fierceness of the political attack on environmental regulation, its continued ability to attract significant support from the Court (as well as from the public generally) is remarkable. Despite what one might have expected from

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1 515 U.S. at 711. Ironically, the reference to conscription seems to suggest that the government is "taking" the landowner's property, which would be a considerably broader usage of the term than the kind of physical seizure which Justice Scalia would demand before finding that an endangered species had been "taken."

2 For a discussion of the views of the individual Justices and of what may be a trend toward weaker support on the Court for environmental values, see Lazarus, supra note 17.

3 Justice Thomas has expressed open skepticism about environmental protection in at least one opinion. See PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700, 735 (1994) (Thomas, J., dissenting) (characterizing environmental interests as parochial, in contrast with the national interest in generating electricity). See also Citizens Against Burlington, Inc. v. Busey, 598 F.2d 190 (D.C. Cir. 1979) (Thomas, J.), in which he took an uncommonly narrow view of the definition of alternatives under NEPA. Judge Buckley, himself a noted conservative jurist, said in dissent that Thomas' opinion would "undermine" NEPA and make the requirement that an EIS discuss reasonable alternatives into "an empty exercise." *Id.* at 210.
the intervening political events, environmental protection has remained a powerful force in the American legal system. In the end, this continuity of support may be the most important point of comparison between the two cases. Given the broad support that environmental values now command in American society, there is every reason to expect this feature of the two opinions to endure into the future.

Although the two opinions share a common support for environmental protection, there are also some important contrasts. The two cases represent two different eras of environmental regulation. *TVA v. Hill* was from the era of top-down regulatory edicts, characterized by command-and-control regulations and stern threats of enforcement. In short, it represents what is in many ways a "law enforcement" model of environmental protection. In contrast, the HCPs involved in *Sweet Home* illustrate a growing trend away from command-and-control regulation.

HCPs epitomize a new stress on negotiation, market mechanisms, and shared governance in environmental law.\(^{74}\) The Clinton Administration, in particular, promoted a broad EPA effort to "reinvent" environmental regulation.\(^{75}\) The best known example was Project XL, in which the agency attempted to negotiate with individual sources to reduce their net environmental impact below what could be achieved by full compliance with existing regulatory standard. As described by some early enthusiasts, Project XL had "the potential to make truly revolutionary changes in the way companies are regulated in the United States."\(^{76}\) While Project XL may not have lived up to these early claims, regulatory reinvention is still very much alive and well. This new model of environmental protection is not as yet sharply defined—nor is it free from controversy. The older model

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\(^{76}\) Beth S. Ginsberg and Cynthia Cummins, *EPA’s Project XL: A Paradigm for Promising Regulatory Reform*, 26 ENV. L. REP. 10050 (1996). Project XL was supposed to foster company-created pilot projects based on performance standards rather than "one size fits all" technology based controls. Advocates for XL hoped to foster technological innovation and reduce compliance costs, with increased use of pollution prevention, multimedia approaches, and market-based controls. *Id.* at 10050. EPA has also encouraged similar efforts by state governments. See Draft Agreement between EPA and Wisconsin, INSIDE EPA, Feb. 12, 1999, at 13.
Another significant shift took place between *TVA v. Hill* and *Sweet Home*. Both cases involved deference, but to different institutions. *TVA v. Hill* involved deference to Congress as the font of public policy. *Sweet Home* ultimately turned on deference to an administrative agency. This difference in the two opinions tracks a major change in policymaking activity. *TVA v. Hill* was near the end of the great heyday of congressional policymaking on the environment. That era had been marked by major legislative initiatives on environmental disclosure statements, air and water pollution, hazardous waste, and endangered species. By the time *Sweet Home* was decided, Congress had been mired in a legislative deadlock for almost twenty years. The major policymaking initiatives were coming from EPA and other executive departments, which initiated new ideas like habitat conservation plans and Project XL. Congress still played an obstructionist role but it was no longer a source of regulatory creativity. The best bet is that, at least for the near future, Congress will continue to play a secondary role in policy innovation.\(^7\)

In sum, *TVA v. Hill* and *Sweet Home* both illustrate the continuing commitment of the American legal regime to environmental protection. But the environmental policy initiative has shifted between different branches of government, and more significantly, the preferred mode of legal intervention has begun to evolve from ukase to negotiation. The newer initiatives, however, build on the older approach. Without the background threat of regulatory enforcement upheld in *Sweet Home*, negotiations would fail for lack of incentives.

What will be the next big regulatory development which may become the possible foundation for yet a third major Supreme Court opinion? One of the lessons of the past two decades is that environmental policy, unlike some habitat conservation plans, lacks any "no surprises" guarantee. On the contrary, we have been continually surprised by scientific knowledge, causing us to reevaluate


\(^7\) For a discussion of the political deadlock over the ESA, see Michael J. Bean, *Endangered Species, Endangered Act?*, 41 ENVTL. 12, 37-38 (Jan./Feb. 1999). Whether this trend continues depends in part on whether elections continue to result in closely divided government, but even during the beginning of the Clinton Administration, when Congress and the executive were from the same political party, meaningful environmental legislation seems to have been stymied. Whether the current Bush Administration will have greater success, given the tenuous Republican control of Congress, remains to be seen.
old environmental threats as we become aware of others.\textsuperscript{70} We have also had many unexpected twists and turns in the regulatory road, as we have experimented with various techniques of environmental protection.\textsuperscript{80} As TVA \textit{v.} Hill and \textit{Sweet Home} illustrate, there are only two safe predictions about the future of environmental law: it will be like the past in important respects, and it will also be surprisingly different.


\textsuperscript{80} On the need for continued regulatory experimentation, see \textit{id.} at 183-98.