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ENFORCING THE ENDANGERED SPECIES ACT AGAINST THE STATES

JEAN O. MELIOUS*

"The federal government needs to butt out—this is our state."¹
—Washington State Senator Marilyn Rasmussen

I. INTRODUCTION

A big federal stick, the Endangered Species Act (ESA),² drives many state and local efforts to preserve biodiversity. The ESA commands all citizens and political subdivisions to avoid the "take" of species.³ In practical terms, however, the federal government⁴ cannot control all of the activities that determine whether species will survive. Most species listed as threatened or endangered under the ESA⁵ live on non-federal land.⁶ Furthermore, many of the problems that endangered species face cannot be solved without the use of powers, including land use controls and water

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⁴ The ESA is implemented by the Department of the Interior, for non-marine species, and by the Department of Commerce, for most marine species, including anadromous fish. 16 U.S.C. § 1532(15) (1994); 50 C.F.R. pt. 17.2(b); 50 C.F.R. pts. 222.23(a), 227.4 (1998) (designating listed species over which the Secretary of Commerce has jurisdiction). The functions of the Secretary of the Interior have been delegated to the United States Fish and Wildlife Service and those of the Secretary of Commerce to the National Marine Fisheries Service. 16 U.S.C. §§ 1532(15), 1533(a)(1) (1994) (statutory authority to delegate).
⁵ The Endangered Species Act's "take" prohibition applies to wildlife species listed as endangered or threatened in 50 C.F.R. pt. 17.12. 50 C.F.R. pts. 17.3 & 17.21 (1999).
⁶ More than ninety percent of the listed species for which FWS was responsible as of May 1993 have habitat on nonfederal lands. Approximately two-thirds of the listed species have over sixty percent of their total habitat on nonfederal lands. See U.S. GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 1 (1994).
rights administration, that are within the domain of state and local
governments.\(^7\)

As a result, the role of states in ESA compliance is increasing
dramatically. States are proactively preparing their own programs in order
to avoid species listing, to manage state lands, and to coordinate state,
federal, and private efforts to protect species over wide geographical
areas.\(^8\) Furthermore, many states have entered into contractual
arrangements with private landowners under the Habitat Conservation
Plan provisions of the ESA.\(^9\) Because of the reciprocal obligations that
these contracts create, private parties may need to enforce the state’s
contractual obligations.\(^10\) Thus, both environmental interest groups and
private parties have a strong interest in the enforceability of states’
obligations under the ESA.

In light of these important and desirable developments in the
federalism of the ESA, the United States Supreme Court’s recent use of
the Eleventh Amendment to the United States Constitution to reduce
private party enforcement rights against states comes at a critical moment
for biodiversity. This obscure and impenetrable area of constitutional
federalism could significantly affect the litigation strategy of interest
groups, while providing a difficult obstacle to private parties who want to
assert contractual rights against states.\(^11\)

The text of the Eleventh Amendment, which appears innocuous
enough, simply provides that citizens of one state may not sue citizens of
another state in federal court; nor may foreign citizens sue a state in

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\(^7\) A. Dan Tarlock, *Biodiversity Federalism*, 54 Md. L. Rev. 1315, 1318 (1995); see also
and local land use controls, is “the toughest problem the [Endangered Species] Act faces”
[internal quotation omitted]).

\(^8\) See infra, text accompanying notes 55-81.


\(^10\) See infra, text accompanying notes 105-112.

\(^11\) The definition of “state” under the Supreme Court’s Eleventh Amendment
jurisprudence includes state agencies. See, e.g., State Highway Comm’n v. Utah Constr.
Co., 278 U.S. 194, 199 (1929) (Eleventh Amendment immunizes state agency that was
“but the arm or *alter ego* of the State”). The rationale is that a plaintiff who successfully
sues an arm of the state has a judgment with “‘the same effect as if it were rendered
against the State for the amount specified in the complaint.’” Smith v. Reeves, 178 U.S.
436, 439 (1900).
In a recent series of Supreme Court cases, however, a five-member majority of the Court has found that the Eleventh Amendment is surrounded by a "penumbra" of state sovereign immunity that protects states from many private lawsuits brought under federal law. The Court's stated goal in this restriction of private lawsuits is to enhance the "dignity" of states and to prevent private parties from seeking to require states to comply with their federal obligations by conducting "raids on state treasuries."

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12 U.S. Const. amend. XI.
13 See Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding that Congress cannot abrogate state sovereign immunity to suit in federal court under its Commerce Clause authority); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) (finding a constitutional "penumbra" that limits the scope of an exception to state sovereign immunity when state officials are sued for prospective relief); Alden v. Maine, 527 U.S. 706 (1999) (expanding the Eleventh Amendment's "penumbra" in holding that Congress cannot abrogate state sovereign immunity to suit in state court); Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding that although Congress can, in theory, abrogate state sovereign immunity when legislating under the Fourteenth Amendment, such legislation must be "appropriate" in addressing a Fourteenth Amendment evil or wrong; it was not necessary for Congress to address state infringement of patents, which was not shown to be significant enough for Congress to address through Fourteenth Amendment legislation); and Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that no waiver of state sovereign immunity will be found when a state voluntarily engages in activities regulated by federal law).
14 See Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 665 (1999) (Stevens, J., dissenting): "The full reach of [Seminole Tribe's] dramatic expansion of the judge-made doctrine of sovereign immunity is unpredictable; its dimensions are defined only by the present majority's perception of constitutional penumbras rather than constitutional text." Majority opinions prefer to refer to the penumbra by formulations such as "the original understanding" (Alden v. Maine, 527 U.S. at 726), "the founders' understanding" (Id. at 734), and the "essential principles of federalism" (Id. at 748).
15 See, e.g., Alden v. Maine, 527 U.S. at 715 ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity . . .").
16 Id. at 720 (quoting D. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801 at 196 (1997)). The majority opinion in Alden v. Maine goes so far as to suggest that states should be able to ignore federal obligations if they decide that they have more important fiscal goals:
A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of the State may have a legitimate claim for
Environmental groups are likely to be less than impressed by the states' "dignity" when the states conduct activities harmful to endangered species or fail to comply with obligations to protect species. Private property owners may not appreciate the characterization of their efforts to require states to comply with contractual obligations under the ESA as a "raid on state treasuries." Because of their Eleventh Amendment immunity, however, states may be able to prevent environmentalists and landowners alike from direct efforts to enforce the states' obligations. Private parties may have to rely on surrogate implementation efforts including waiting for the federal government to sue the states, focusing on enforcement of county, municipal, or other non-state obligations, or pursuing the enforcement of state species-protection laws in state court rather than suing under the ESA in federal court.

None of these surrogates is perfect. Federal enforcement efforts are limited by budget, by politics, and by the fact that federal interests may not be concurrent with private interests. Even assuming that the state has applicable law, local politics may ensure that state courts are less-desirable forums for suits against the states than federal courts. These factors must be weighed against persistent calls from commentators of all ideological stripes to provide states with an increased role in endangered species protection.17

This article will first discuss the role of the states under the Endangered Species Act, identifying state linkages with the federal

compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made.

Id. at 750-51 (emphasis added). As Justice Souter, joined by Justices Breyer, Ginsburg, and Stevens, noted in dissent, "[t]he 'judgment creditor' in question is not a dunning bill-collector, but a citizen whose federal rights have been violated . . . ." Id. at 803.

17 See, e.g., William J. Snape, III & Heather L. Weiner, Recipe for Reauthorization of the Endangered Species Act, 5 DUKE ENVT'L. L. & POL'Y F. 61, 65 (1995) (The authors, lawyers for Defenders of Wildlife, state that "[i]n order to effectively address localized threats to listed species and their habitats, much of the authority now vested in the federal government should be transferred to or shared with state governments."); J.B. Ruhl, Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?, 66 U. COLO. L. REV. 555, (1995) (Although "the ESA simply does not get where biodiversity conservation policy says we should be headed," id. at 588, regional planning efforts under state endangered species protection initiatives "hold promise as a means of biodiversity protection." Id. at 600, n.130); Mark Squillace, Applying the Park City Principles to the Endangered Species Act, 31 LAND & WATER L. REV. 385, 397 (1996) ("By promoting greater state involvement, the FWS can help instill a sense of ownership in the ESA program . . . ").
government and areas in which states exercise independent authority to implement species preservation programs. It will then discuss constraints on enforcement efforts against the states, focusing on sovereign immunity barriers erected by the Court's recent Eleventh Amendment cases. After an evaluation of possible enforcement options available to private parties, the article will conclude that the issue of state enforceability will have substantive and strategic implications for the future development of ESA federalism.

II. THE ROLE OF THE STATES UNDER THE ENDANGERED SPECIES ACT

A. State Roles in Endangered Species Preservation

Congress passed the ESA in 1973, when "cooperative federalism" was in vogue and issue-by-issue environmental regulation was the norm. Some ESA "proponents envisioned that it would be implemented under a cooperative federalism model similar to that embodied in the Clean Water Act." The ESA has not adopted this cooperative federalism model, however, in which the federal government dictates the content of programs and state governments carry out the programs. Because all biodiversity issues, like all politics, are local, and because states have traditionally exercised primary authority over wildlife and natural resource regulation, a model is emerging that "allows state and local governments to define the content of federal mandates." This model has been referred to as "partnership federalism."

This state contribution to the content of the ESA's mandates is developed and implemented through the states' many roles in biodiversity preservation, discussed in the following sections.

19 See, e.g., A. Dan Tarlock, Local Government Protection of Biodiversity: What Is Its Niche?, 60 U. Chi. L. Rev. 555, 557-58 (1993). While pollution control is highly-centralized—"the federal government formulates technology-forcing standards and the states implement them"—biodiversity protection, in contrast, "is becoming more decentralized and site-specific"). Id. at 557.
20 Tarlock, supra note 7, at 1351.
21 Id.
1. States as Proprietors

The most obvious state role in endangered species preservation is as proprietor of land and natural resources. The Washington State Department of Natural Resources (DNR) Habitat Conservation Plan (HCP), for example, includes 1.63 million acres of DNR timberland within the range of the northern spotted owl. The DNR holds these lands in trust for designated beneficiaries, including public schools, certain counties, and state prisons. DNR has a fiduciary responsibility to the trusts, which had resulted in land management practices that conflicted with the ESA. During the course of HCP negotiations, participants have observed that DNR’s primary goal was to achieve regulatory certainty for its management activities and to ensure that any plan that developed was in the best interest of the trusts. This proprietary role thus may oblige states to balance species preservation issues with their obligations to produce income for state citizens, a role that has the practical effect of establishing economic concerns as an important aspect of species preservation programs.

2. States as Resource Managers

Resource management, including the management of game species, fisheries, timber, and water resources, is another important state role—“As successors to the Crown, the states retained jurisdiction over common property resources, including fish and game.” State management of fish and game species has significant potential to lead to


direct conflicts with the ESA through the implementation of policies or management practices that may implement other state goals at the expense of endangered or threatened species.  

State management of timber resources, which includes both state-owned land and state legislation that influences private forestland management, constitutes another direct link to the ESA. State timber management was an important factor in many of the bitter battles over the spotted owl in the Pacific Northwest and remains controversial in the era of large-scale salmon listings.

Finally, the state role in water resources is an issue that will assuredly increase in importance, particularly in the water-starved west. One commentator has noted that

[1]n two of the three federal court decisions involving water rights and the ESA, the use of existing water rights were significantly curtailed to protect endangered species. In the third case, all the water from a new federal reservoir was dedicated to endangered species protection . . . . No cases reported to date provide any assurance to appropriators that

24 See, e.g., Palila v. Hawaii Dept. of Land and Natural Resources, 471 F. Supp. 985 (D. Haw. 1979), aff'd 639 F.2d 495 (9th Cir. 1981) (finding state management of feral sheep and goats for hunting purposes violated ESA by destroying listed species' habitat); Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997) (finding state fisheries licensing scheme violated ESA); Ramsey v. Kantor, 96 F.3d 434 (9th Cir. 1996) (holding that Washington and Oregon state regulations governing fishing in the Columbia River, resulting in incidental take of listed Snake River fall chinook salmon, were authorized by a Section 7 incidental take statement issued for the relevant geographical area).

25 Thomas Lundmark, Methods of Forest Law-Making, 22 B.C. ENVTL. AFF. L. REV. 783, 785 n.11 and accompanying text (1995); see also id. at 792-97 (discussing state regulation and regulatory agencies).


27 See, e.g., Threatened Status for Three Chinook Salmon Evolutionarily Significant Units (ESUs) in Washington and Oregon, and Endangered Status for One Chinook Salmon ESU in Washington, 64 Fed. Reg. 14,308, 14,325-26 (1999) (to be codified at 50 C.F.R. pts. 223 and 224) ("Examples of federal actions likely to affect chinook salmon in the listed ESUs include authorized land management activities of the USFS [United States Forest Service] and BLM [Bureau of Land Management] . . . . Such activities include timber sales and harvests . . . ."). A federal district court judge recently ruled that twenty-four Oregon timber sales could not go forward until the federal government ensured that they will not harm listed salmon. Barbara Rothstein, Judge Blocks 24 Timber Sales; Says Assessment of Fish on Oregon Parcels Not Done, THE NEWS TRIBUNE (Tacoma, Wash.), Oct. 1, 1999, at B8.
their water use will be protected against the claims of endangered species protection.\textsuperscript{28}

When states allocate water among competing users by issuing water rights, the effects on endangered species could lead to state ESA liability.\textsuperscript{29} States also make a host of licensing and regulatory decisions relating to irrigation and power production. To the extent that these decisions harm listed species, they are likely to lead states into the regulatory web of the ESA.\textsuperscript{30}

3. States as Permit Authorities under Other Federal Environmental Laws

In addition to their natural resource management role, states also have permit authority under the cooperative federalism provisions of other federal environmental laws. The issuance of permits under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES),\textsuperscript{31} in particular, has the potential to affect endangered species by allowing the discharge of pollutants that could directly harm aquatic organisms or modify their habitat. Pursuant to the Clean Water Act, most states have established and administered their own permit programs, subject to federal Environmental Protection Agency (EPA) approval and oversight.\textsuperscript{32}

States that issue NPDES permits, unlike federal agencies, are not subject to the ESA's requirements to consult with FWS or NMFS prior to issuing a permit that could jeopardize a listed species.\textsuperscript{33} In evaluating state programs, however, the EPA has taken into account the need for state agencies to consider the impacts of permits on endangered species. In two recent cases, the Tenth and Fifth Circuit Courts of Appeals have addressed

\textsuperscript{28} Aiken, \textit{supra} note 7, at 124.

\textsuperscript{29} One court has held that state water rights do not prevail over the restrictions set forth in the Act. \textit{See United States v. Glenn-Colusa Irrigation District}, 788 F. Supp. 1126, 1134 (1992). This holding, combined with the view of causation expressed by the court in \textit{Strahan v. Coxe}, 127 F.3d 155 (1st Cir. 1997) (finding that state action which specifically allows licensed parties to harm species violates the ESA), creates the possibility of state ESA liability based on the issuance of water rights. Parties would still have to show, however, that the issuance of water rights actually killed listed species by reducing water levels to the point at which the species could no longer survive. \textit{See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon}, 515 U.S. 687, 697 n.9 (1995) (holding activities that "harm" species must "actually kill or injure" the species).

\textsuperscript{30} \textit{See generally} Aiken, \textit{supra} note 7 (discussing Platte River water projects and the ESA).

\textsuperscript{31} 33 U.S.C. §§ 1311(a), 1342 (1994).

\textsuperscript{32} Id. § 1342(b).

EPA requirements that conditioned approval of state NPDES programs on the implementation of a process for federal review of permit impacts on listed species. In both cases, the American Forest & Paper Association (AFPA), a trade association that includes pulp and paper manufacturers\textsuperscript{34} challenged the EPA requirements. The Tenth Circuit dismissed the challenge based on standing, while the Fifth Circuit upheld the challenge, holding that the EPA had exceeded its authority.\textsuperscript{35}

In the Fifth Circuit case, \textit{American Forest & Paper Assn. v. EPA},\textsuperscript{36} the court reviewed EPA's decision to require the Louisiana Department of Environmental Quality (LDEQ) to submit proposed NPDES permits to FWS and NMFS for review. If the federal agencies objected to the permit and LDEQ did not modify it, EPA would exercise its veto authority over the permit.\textsuperscript{37} The court first found that the AFPA had standing to sue because its members included permit holders in Louisiana.\textsuperscript{38} Although the AFPA did not allege that any of its members had applied for a new permit or sought to modify an existing one, the court found that AFPA's allegation that injury was imminent was sufficient for standing purposes.\textsuperscript{39}

The court then rejected EPA's legal argument. EPA contended that the Clean Water Act\textsuperscript{40} directs EPA to promulgate guidelines governing state permitting programs under the Act.\textsuperscript{41} EPA then pointed to the ESA provision\textsuperscript{42} requiring federal agencies to consult with FWS and NMFS before undertaking any "agency action."\textsuperscript{43} Considered together, EPA argued, these provisions authorized EPA to adopt the challenged rule.\textsuperscript{44} The Fifth Circuit disagreed, however, holding that the Clean Water Act required EPA to approve state programs if they met nine specified criteria and that EPA did not have discretion to add a tenth criterion, based on ESA concerns.\textsuperscript{45} The court concluded that

\textsuperscript{34} American Forest & Paper Ass'n v. EPA, 154 F.3d 1155, 1158 (10th Cir. 1998).
\textsuperscript{35} 154 F.3d at 1160; American Forest & Paper Ass'n v. EPA, 137 F.3d 291, 298 (5th Cir. 1998).
\textsuperscript{36} 137 F.3d 291 (5th Cir. 1998).
\textsuperscript{37} \textit{Id.} at 294.
\textsuperscript{38} \textit{Id.} at 296.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} 33 U.S.C. § 1314(i) (1994).
\textsuperscript{41} 137 F.3d at 297.
\textsuperscript{43} American Forest & Paper Ass'n v. EPA, 137 F.3d 291, 297 (5th Cir. 1998).
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.} at 297-98.
[T]he ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their existing authority in a particular direction. The upshot is that EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the [Clean Water Act].

In the Tenth Circuit case of the same name, in contrast, petitioner AFPA did not succeed in convincing the court that its members would pass the “injury in fact” requirement of standing. The case involved Oklahoma's NPDES program. EPA and the Oklahoma Department of Environmental Quality (ODEQ) signed a Memorandum of Agreement (MOA) committing them to consult on permit applications to ensure compliance with the ESA. The agreement further provided that ODEQ would consult with FWS when NPDES permits would affect sensitive water, that ODEQ would identify based on FWS information. If ODEQ and FWS could not agree on modifying the permit application to avoid harming the listed species or its habitat, EPA could object to the permit and assume permitting authority.

The AFPA did not identify any of its members as currently discharging into sensitive waters or intending to discharge into sensitive waters. The court found that its members had not shown injury in fact, rejecting the AFPA’s generalized argument that the mere existence of the consultation provisions, and of EPA’s possible veto, ensures increased costs and delays that injured its members.

These cases demonstrate another area in which private parties have a strong interest in the states’ role under the ESA. While the AFPA was concerned over what it viewed as an excessively stringent interpretation of the ESA, other interest groups have expressed concern that states may not be sufficiently restrictive in their application of the ESA. These concerns

46 Id. at 299.
47 American Forest & Paper Ass'n v. EPA, 154 F.3d 1155 (10th Cir. 1998).
48 Id. at 1159-60.
49 Id. at 1156-58.
50 Id. at 1157.
51 Id.
52 American Forest & Paper Ass'n v. EPA, 154 F.3d 1155, 1159 (10th Cir. 1998).
53 Id. The court distinguished the Fifth Circuit's ruling in American Forest & Paper Ass'n v. EPA, 137 F.3d 291 (5th Cir. 1998), by noting that the two consultation programs may have been different. The Oklahoma program only referred to "sensitive waters" while the court did not discuss the scope of the Louisiana rule. American Forest & Paper Ass'n v. EPA, 154 F.3d 1155, 1160 n.8 (10th Cir. 1998).
have been particularly prominent during the preparation of statewide programs intended to avoid federal listing of species, discussed in the following section.

4. States as Content-Providers: State Plan Formulation to Avoid Federal Regulation under the ESA

The lesson of the spotted owl has come home to roost in a number of states facing large-scale listings under the ESA. Rather than waiting for the ESA "train wreck" to hit, these states have attempted to take a proactive role by developing a plan to protect species before they are listed. This approach is intended to avoid the imposition of federal regulations that state citizens might resent and to involve local decision-makers in the formulation of plans.

The State of Oregon, for example, developed the Oregon Coastal Salmon Restoration Initiative Plan (OCSRI) in response to the National Marine Fisheries Service's (NMFS) proposed rule listing an Oregon run of coho salmon as a threatened species. In 1995, Governor John Kitzhaber directed a wide range of state agencies to develop new programs and implement measures intended to preserve salmon. The state’s role in this program was substantive and significant, as indicated by the fact that new state resources were required for implementation. The state clearly

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56 These agencies included the Oregon Department of Fish and Wildlife, Oregon Economic Development Department, Oregon Department of Agriculture, Water Resources Department, Department of Environmental Quality, Oregon Department of Forestry, Oregon Department of Transportation, Oregon State Marine Board, Oregon Parks and Recreation Department, and the Division of State Lands. Oregon Coastal Salmon Restoration Initiative, Original Draft Plan, 1996; CHAPTER VI-A PART I, Management Measures for State Agencies (by agency), available at http://www.oregon-plan.org/CHAP-6-A-1.html.

57 The Oregon budget for the biennium beginning July 1, 1997, provided approximately $10 million to add sixty-three new technical staff to the state Departments of Agriculture, Environmental Quality, Fish and Wildlife, Forestry, Water Resources, and Land Conservation and Development. Threatened Status for Southern Oregon/Northern
would not be acting solely as a conduit for federal money or the implementation of federal directives; under NMFS supervision, it would be taking the initiative to propose and implement salmon enhancement measures and would be responsible for the enforcement of these measures.

Oregon forwarded the OCSRI to NMFS in 1997, for consideration in NMFS' decision regarding the listing of the coho salmon. NMFS "welcomed adoption of the OCSRI by Oregon and believed it would provide significant protections for Oregon Coast [Evolutionarily Significant Unit of coho] in a number of areas," especially with respect to harvest and hatchery measures. NMFS was concerned, however, that the habitat measures included in the OCSRI would not be sufficient to ensure coho survival. Based on a Memorandum of Agreement (MOA) with the Governor of Oregon, NMFS proposed to provide the state with specific guidance on the measures that would be needed for habitat protection.

Based on the OCSRI, in conjunction with federal efforts, NMFS concluded "the Oregon Coast coho is not likely to become endangered in the interval between this decision and the adoption of improved habitat measures by the State of Oregon." NMFS accordingly determined not to list the Oregon Coast coho run as a threatened species, a decision that "relie[d] heavily on continued implementation of the OCSRI (in accordance with the MOA) . . . ." NMFS proposed to review this listing decision within three years.

In Oregon Natural Resources Council v. Daley, a federal district court subsequently overruled NMFS' reliance on the OCSRI to support its determination not to list the Oregon run. One basis for the court's decision was the fact that NMFS had relied on a state plan that promised to implement a new state regulation; the regulation had not, in fact, been adopted at the time that NMFS made its listing determination. Because such measures were speculative and could not provide assurances that the


58 Id. at 24,603.
59 Id. at 24,605.
60 Id.
61 Id. at 24,607 (May 6, 1997) (to be codified at 50 C.F.R. pt. 227).
62 Id. at 24,608.
63 Id.
64 6 F. Supp. 2d 1139 (D. Or. 1998).
65 Id. at 1160-61.
66 Id. at 1153.
promised activities would be effective, if they were implemented at all, the
court concluded that “NMFS may only consider conservation efforts that
are currently operational, not those promised to be implemented in the
future.” The court then held that, “for the same reason that the Secretary
may not rely on future actions, he should not be able to rely on
unenforceable efforts. Absent some method of ensuring compliance,
protection of a species can never be assured.”

If other courts follow this reasoning, the enforceability of state
promises will become an important issue in ESA listing decisions. It is an
issue that will reappear in various parts of the country over the next few
years. In Maine, for example, environmental and trout-fishing groups
have sued FWS and NMFS to have the Atlantic salmon listed under the
ESA. The lawsuits target the federal agencies’ 1997 decision not to list
Atlantic salmon as a threatened species because the state-developed Maine
Atlantic Salmon Conservation Plan substantially reduced threats to the
species. The environmental groups, including Defenders of Wildlife,
sued first, stating that “the state plan holds a lot of promise to help in the
recovery of these fish. But it is not an adequate substitute for listing.”
Trout Unlimited held off from filing a similar suit, hoping that the state
would address its concerns that the Maine Plan did not adequately protect
salmon. When Trout Unlimited, together with the Atlantic Salmon
Foundation, finally decided to sue, they characterized their lawsuit as a
“last resort effort” based on frustration with “Maine’s failure to adequately
fund the Plan,” as well as “lack of enforcement and lack of
accountability.”

67 Id. at 1154.
68 Id. at 1155 (emphasis added). This ruling does not affect the importance of the state
role in regard to species that have been listed under the ESA. In fact, NMFS and the
stated that he withdrew the appeal to avoid the possibility of a federal court ruling against
the state plan, because such a ruling would disrupt NMFS’ plans to increase its reliance
on local efforts to restore salmon. Jonathan Brinckman, Oregon Abandons Fight with
69 See Orna Izakson, Agencies Face Suit Over Atlantic Salmon Listing, BANGOR (Me.)
70 Withdrawal of Proposed Rule to List a Distinct Population Segment of Atlantic Salmon
(Salmo Salmar) as Threatened, 62 Fed. Reg. 66,325, 66,337 (Dec. 18, 1997) (to be
codified at 50 C.F.R. pts. 17 and 425).
71 See Izakson, supra note 69.
72 Id.
73 ATLANTIC SALMON AND THE ENDANGERED SPECIES ACT: QUESTIONS AND ANSWERS,
available at http://www.tu.org/article_list.html?XP_PUB=pr&XP_TABLE=articles.db
&XP_RECORD=199908122. Among the groups’ specific complaints were the state’s
The Maine litigants may face mixed precedents. A California federal district court recently refused to follow Daley when ruling on a summary judgment motion that challenged FWS’ decision not to list the flat-tailed horned lizard as a threatened species. In *Defenders of Wildlife v. Babbitt*, the court noted that the decision not to list the lizard was based in part on the protections included in a federal-state Conservation Agreement. The court held that the reliance on the Conservation Agreement was proper, stating that “[t]his court does not find *Daley* persuasive.” The court found that the Conservation Plan was “operational” because it had been executed a month before FWS withdrew its decision not to list the lizard. Furthermore, it was the product of a two-year process that made FWS’ reliance on the plan “reasonably foreseeable.” The court added “it is irrelevant whether the conservation agreement relied upon is mandatory or voluntary—as long as states attempt to make continuing conservation efforts, they may be considered by the FWS.”

The question of the importance of establishing that states will actually implement their plans, rather than simply promising to take species-protective measures, has arisen in various contexts outside the issue of whether or not to list a species. In Texas, the Fifth Circuit abstained from hearing a case under the ESA in deference to a state plan that had not yet been implemented. In California, FWS relied on a state plan for habitat conservation in determining to list the California gnatcatcher as threatened, rather than endangered. These programs are discussed below.

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failure to install fish weirs to prevent escaped aquaculture fish from entering rivers and the state’s refusal to ban the use of non-native strains of salmon on fish farms. Dieter Bradbury, *Fishing Groups Sue U.S. to List Salmon as Endangered; Trout Unlimited and the Atlantic Salmon Federation Argue that Maine’s Conservation Efforts Have Failed*, PORTLAND PRESS-HERALD (Me.), Aug. 13, 1999, at 1A.


*Id. at 7.*

*Id. at 22.*

*Id.*

*Id. at 22 n.6.*

*Id. at 22.*

Sierra Club v. City of San Antonio, 112 F.3d 789 (5th Cir. 1997), discussed *infra*, notes 171-182 and accompanying text.

See *infra*, notes 119-122 and accompanying text.
B. ESA Provisions and Programs Affecting State Activities

1. Prohibition Against Take

The ESA defines states and state agencies as "persons," which generally subjects the states to the ESA's blanket prohibition against the "take" of endangered species. The courts have found that the actions of state entities can violate Section 9's prohibition against take. The take prohibition encompasses significant habitat modification or degradation as well as the direct killing, harming, or harassing of species. Thus, if state ownership or regulation of endangered species habitat causes an illegal take of endangered species, whether through direct effects on species or through significant habitat modification, the state could be found to have violated Section 9.

Because the ESA is not a strict liability statute, the issue of state causation of harm is important in determining the extent of potential Section 9 liability. In finding that the Hawaii Department of Natural Resources violated Section 9 by maintaining feral sheep and goats in the endangered palila bird's critical habitat, the court cited both the agency's

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82 The ESA provides as follows:
The term "person" means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any entity subject to the jurisdiction of the United States.
83 Section 9 of the ESA provides that "it is unlawful for any person" to "take" any endangered species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(B) (1994).
84 See, e.g., Palila v. Hawaii Dep't of Land and Natural Res., 471 F. Supp. 985 (1979), aff'd, 639 F.2d 495 (9th Cir. 1981); Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997).
85 "[T]ake means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect . . . ." 16 U.S.C. § 1532(19) (1994). "Harm" is defined as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife . . . ." 50 C.F.R. § 17.3 (1999).
acts (allowing the grazing to occur) and omissions (failing to remove the feral sheep and goats) in finding a taking.\footnote{Palila v. Hawaii Dep’t of Land and Natural Res., 471 F. Supp. 985, 995 (D. Haw. 1979) (“The undisputed facts bring the acts and omissions of defendants clearly within [the definitions of take]"), aff’d, 639 F.2d 495, 497-98 (1981) (observing further that “[t]he Act requires the affirmative preservation of an endangered species.” Id. at 497 (citations omitted)).}

More recently, in \textit{Strahan v. Coxe},\footnote{127 F.3d 155 (1st Cir. 1997).} the First Circuit held that Massachusetts’ commercial fishing regulatory scheme likely constituted a taking of the endangered right whale.\footnote{Id. at 165-66.} Although the state defendants argued that state licensure activity cannot be a “proximate cause” of a taking,\footnote{Id. at 163.} the court found that the licensing made it impossible for a licensed commercial fishing operation to use gillnets or lobster pots without risk of taking a right whale.\footnote{Id. at 164.} The court distinguished this situation from other licensing schemes, such as the licensing of automobiles whose drivers solicit or cause federal crimes.\footnote{Id.} Car drivers have to make a conscious and independent decision to violate federal law; in contrast, the court reasoned, the fishing license specifically provided for operations that are likely to result in a violation of federal law.\footnote{127 F.3d at 164 (citation omitted).} The court concluded that “[t]he causation here, while indirect, is not so removed that it extends outside the realm of causation as it is understood in the common law.”\footnote{Id. at 165-66.}

The precise state actions that would constitute a take under Section 9 will vary depending on the species and the program involved. The case law to date indicates, however, that state programs that “take” species, as well as state licensing programs that specifically allow activities that “take” species, could lead to liability under Section 9. In order to avoid such liability, states may take advantage of flexible ESA mechanisms intended to meet the needs of species while also providing non-federal parties with assurances about the extent of their species preservation obligations.
2. Flexible Methods of ESA Compliance: Habitat Conservation Plans, Candidate Conservation Agreements, and Special Rules for Threatened Species

a. Habitat Conservation Plans

Section 9's take prohibition, discussed in the previous section, can paralyze states, private landowners, and other non-federal parties, who frequently cannot be sure in advance whether their planned activities will or will not constitute a take. Habitat Conservation Plans constitute one response to this problem. The HCP process is governed by Section 10 of the ESA, which authorizes the issuance of a permit allowing the taking of listed species when the taking occurs incidentally during otherwise legal activities. The taking must also comply with an approved conservation plan, known as an HCP. Section 10 incidental take permits can be issued to states, alone or in combination with federal, municipal, and tribal entities, corporations, associations, private individuals, and planning authorities such as watershed councils.

95 For federal agencies, Section 7 of the ESA establishes a consultation procedure that can result in the issuance of an “incidental take statement,” specifying the measures that the agencies must take to protect species. This process allows federal activities to proceed with a minimum of disruption and uncertainty. Under limited circumstances, states may be able to “piggyback” onto a Section 7 permit. See Ramsey v. Kantor, 96 F.3d 434 (9th Cir. 1996) (Oregon and Washington were not required to obtain Section 10 incidental permits in order to issue regulations governing the harvest of salmon because an existing Section 7 permit addressed incidental take under the regulations). But see Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231, 1245-1246 n.16 (11th Cir. 1998) (stating that Section 7 incidental take statements only apply to applicants and criticizing Ramsey as “unpersuasive”).


98 The HCP must show the impact that will likely result from the taking, the steps the applicant will take to minimize and mitigate the impact, the availability of funding for mitigation, alternatives to the action and why alternatives are not being pursued, and any other measures deemed to be necessary or appropriate. See 16 U.S.C. § 1539(a)(2)(A) (1994). When all of these factors have been adequately addressed and FWS or NMFS has also determined that “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild,” the agency can issue an incidental take permit. See 16 U.S.C. § 1539(2)(B) (1994).

The use of HCPs escalated over the past decade, as the Clinton administration emphasized their use to implement regional multi-species planning efforts and as private landowners sought the certainty provided by an incidental take permit. States have been involved in many of the HCPs prepared to date, particularly in regional plans involving multiple species. States participate in HCPs as applicants because they are landowners, as discussed above, or because the state is a useful entity for coordinating the efforts of many jurisdictions, groups, and private landowners over a broad geographical scale. In Wisconsin, for example, three forest products companies requested that the Wisconsin Department of Natural Resources (DNR) lead a state-wide HCP for the Karner blue butterfly. DNR, which owns some—but not all—of the land affected by the HCP, is the primary applicant and will be applying for the incidental take permit. Even when a state is not the applicant, the federal agencies encourage applicants to invite and include state agencies that can use their existing authorities, expertise, or land in support of HCP development and implementation.


See supra, text accompanying notes 22-30 (discussing state HCPs focusing on state land management).


HCP HANDBOOK, supra note 99, at 3-8.
State participation in HCPs, which cover an estimated 250 species, is extremely important to private parties because of the contractual nature of HCP implementation. HCPs frequently are accompanied by implementing agreements (IAs), which are contracts specifying all parties' obligations and establishing procedures for amendment and enforcement of the HCP. While FWS' Regional Directors have discretion to determine whether an implementing agreement should accompany an HCP, most regional or large-scale HCPs that address significant portions of a species' range or that include numerous activities or landowners involve negotiation of an implementing agreement.

An IA will generally define the obligations, benefits, rights, authorities, liabilities, and privileges of all signatories and other parties to the HCP; assign responsibility for planning, approving, and implementing specific HCP measures; specify the responsibilities of state and federal agencies in implementing and monitoring the HCP; provide for specific measures to implement mitigation; establish a process for amendment of the HCP; and provide for enforcement of HCP measures and for remedies if parties fail to perform their obligations under the HCP. These contracts govern relationships that may last for as long as 100 years. IA obligations may, and frequently do, involve the parties in complex reciprocal obligations. States may agree to accept specified private obligations in satisfaction of state legal requirements, for example, while further agreeing to undertake other obligations in satisfaction of federal obligations. In order to ensure that HCPs will continue to provide a useful forum for multiple parties to work out their mutual, and reciprocal, obligations under the ESA, it will be important to ensure that IAs can be enforced against the states.

106 HCP HANDBOOK, supra note 99, at 3-36 - 3-37.
107 Id. at 3-36.
108 Id.
b. Candidate Conservation Agreements

Candidate Conservation Agreements are intended to promote efforts to preserve unlisted species. The goal of the policy is to encourage non-federal landowners to take precautions that will avoid the listing of the species. If non-federal property owners fulfill all of their obligations under the agreement and the species is listed anyway, however, the property owner would still be allowed to "take" the species, or to modify habitat, up to levels specified by the permit.

In 1998, the federal government entered into forty Candidate Conservation Agreements with private landowners or state and local governments. Non-federal parties' abilities to enforce state obligations to protect species under these agreements may arise in the future.

c. Section 4(d) Rules for Threatened Species

All listed species do not receive the same protections under the ESA. Section 9's "take" prohibition applies only to endangered, not to threatened, wildlife species. Section 4(d) of the ESA grants FWS and NMFS the discretion to extend Section 9 protection to threatened species. FWS has extended Section 9 protection to threatened species by regulation. To complicate matters, however, the regulation carves out an exception to the applicability of the take prohibition when a "special rule" has been adopted. Special rules issued under this section are known as 4(d) rules.

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10 "[T]he targets of Candidate Conservation Agreements are proposed and candidate species of fish, wildlife, and plants; species likely to become candidate species in the near future may also be included." Draft Safe Harbor Policy and Candidate Conservation Agreements Draft Policy, Notices; and Safe Harbor and Candidate Conservation Agreements; Proposed Rule, 62 Fed. Reg. 32,177, 32,185 (proposed June 12, 1997).
11 Id. at 32,186.
13 "The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant part of its range." 16 U.S.C. § 1532(20) (1994).
14 "The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) . . . with respect to endangered species . . . ." 16 U.S.C. § 1533(d) (1994).
15 50 C.F.R. pt. 17.31(a).
16 50 C.F.R. pt. 17.31(c). Special rules for mammals, birds, reptiles, amphibians, fishes, and crustaceans are found at 50 C.F.R. pts. 17.40—46.
Although Section 4(d) was part of the ESA when it was enacted in 1973, the Department of the Interior has only recently begun to employ 4(d) rules frequently as a means of easing land use conflicts. While the federal government could, in theory, use 4(d) rules to preempt state and local land-use controls, it has instead used 4(d) rules to incorporate state or local land-use mechanisms to protect species. An example of this is the application of section 4(d) to the threatened coastal California gnatcatcher. The 4(d) rule first applies Section 9’s take prohibition to the gnatcatcher and then provides an exemption for activities for the incidental take of species resulting from activities conducted pursuant to the State of California’s Natural Community Conservation Planning Act (NCCP). The NCCP requires the preparation of a “NCCP Plan,” which the 4(d) rule requires to meet the standards for approval of an HCP.

All of the 4(d) rules adopted to date for domestic species prohibit take of the threatened species and then provide for specified exemptions, generally determined by reference to state law. NMFS has

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118 Tarlock, supra note 7, at 1351.
120 50 C.F.R. pt. 17.41(b)(1).
121 50 C.F.R. pt. 17.41(b)(2).
122 50 C.F.R. pt. 17.41(b)(2)(ii) provides that FWS “shall monitor the implementation of the NCCP plan and may revoke its concurrence . . . if the NCCP plan, as implemented, fails to adhere to the standards set forth in 50 C.F.R. pt. 17.32(b)(2).” The referenced provision states the conditions under which an incidental take permit may be issued, including requirements to minimize and mitigate the impacts of taking and to ensure that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. 50 C.F.R. pt. 17.32(b)(2); see also supra text accompanying notes 31-53.
123 4(d) rules also cover nondomestic species such as primates (50 C.F.R. pt. 17.40(c)) and African elephants (50 C.F.R. pt. 17.40(c)).
124 See, e.g., 50 C.F.R. pt. 17.40 (g)(2) (Utah prairie dog may be taken on private land in accordance with the laws of the state of Utah, subject to conditions limiting number and time of takings); 50 C.F.R. pt. 17.41(b)(2) (incidental take of the coastal California gnatcatcher will not be considered a violation of Section 9 if it results from activities conducted pursuant to California NCCP); 50 C.F.R. pt. 17.42(a)(2)(ii) (any person may take an American alligator in accordance with the laws and regulations of the state of taking, subject to tagging and recordkeeping requirements); 50 C.F.R. pt. 17.42 (d)(1)-(2) (blue-tailed mole skink and sand skink may be taken in accordance with applicable state fish and wildlife conservation laws and regulations for conservation purposes); 50 C.F.R. pt. 17.43 (a)(1)-(2) (San Marcos salamander may be taken in accordance with applicable state law); 50 C.F.R. pts. 17.44(a)—(v) (fish species may be taken in accordance with
also followed this general pattern in addressing the large-scale salmon listings along the West Coast. This is demonstrated by its interim rule governing the take of threatened coho salmon in southern Oregon and northern California.\textsuperscript{125} NMFS first applied the prohibitions of Section 9.\textsuperscript{126} Reasoning that take “should not be prohibited when it results from a specific subset of activities adequately regulated by federal, state, and local governments,” NMFS then specified exceptions to the take prohibition, including the exception for incidental take contained in Section 10 of the ESA, governing HCPs.\textsuperscript{127} Exceptions further included a range of activities governed by state plans, including take of salmon in Oregon through ocean and freshwater fishing and incidental take in California through ocean fisheries, if conducted in accordance with the OCSRI or another state plan approved by NMFS.\textsuperscript{128} Similarly, in its final rule listing threatened species of chinook salmon in Washington and Oregon, NMFS stated that it may issue 4(d) rules applying modified Section 9 prohibitions “in light of the protections provided in a conservation plan that is adequately protective.”\textsuperscript{129} NMFS may incorporate existing conservation plans into the 4(d) rules\textsuperscript{130} and is soliciting programs and proposals to include in its 4(d) rules for salmon and steelhead species throughout the Pacific Northwest.\textsuperscript{131}


\textsuperscript{126} Id. (codified at 50 C.F.R. pt. 227.21(a)). NMFS has not adopted a regulation extending Section 9 to threatened species; it makes this determination on a case-by-case basis.

\textsuperscript{127} Id. (codified at 50 C.F.R. pt. 227.21(b)(1)).

\textsuperscript{128} Id. at 38,479—80 (codified at 50 C.F.R. pt. 227.22).


\textsuperscript{130} Id.

The use of 4(d) rules provides FWS and NMFS with considerable flexibility in responding to the listing of threatened species. This flexibility constitutes an inducement to the “greater use of threatened, rather than endangered, status for listed species.” This does not mean, however, that Section 4(d) provides the agencies with a convenient way to reduce the ESA’s regulatory strictures through a standardless delegation of their authority to the states. The ultimate backstop for the preservation of threatened species—and, perhaps, for endangered species as well—is the ESA’s conservation requirement. The ESA states that “the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.” This specific provision complements the ESA’s broader statement of purposes, which include providing “a means whereby the ecosystems upon which endangered and threatened species depend may be conserved” and “a program for the conservation of such endangered and threatened species.” The ESA defines “conservation” as “the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” Although the duty to conserve has long been described as “latent” and characterized by “tremendous breadth but little

132 Meltz, supra note 117, 382-83, text accompanying nn.79-80.
133 “Backstop” is used to indicate a provision that could, in a worst-case scenario, require the federal agencies to implement protective regulations for threatened species. To date, this backstop has not been necessary because both FWS and NMFS have generally approached 4(d) rules by applying Section 9 and then providing for exceptions. Because the agencies are not required to apply Section 9, however, it is possible that future 4(d) rules under a less ESA-sympathetic administration could attempt to provide lesser protections for threatened species. The conservation obligation would remain as a backstop under these circumstances.

It could be argued that ESA Section 4(f), which requires the federal agencies to “develop and implement plans . . . for the conservation and survival of . . . threatened species.” (16 U.S.C. § 1533(f)(1) (1994)) would constitute another backstop. In practice, however, most recovery plans have not been implemented to any significant extent. See J.B. Ruhl, Section 7(a)(1) of the “New” Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies’ Duty to Conserve Species, 25 ENVTL. L. 1107, 1115, nn.31-35 and accompanying text (1995).
135 16 U.S.C. § 1531(b) (1994). The ESA further provides that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species . . . .” Id. § 1531(c)(1).
136 Id. § 1532(3).
137 Ruhl, supra note 133, at 1137; see also BEAN & ROWLAND, supra note 86, at 236 (While the history of the conservation duty under Section 7 bears out the characterization of the conservation duty of the ESA as “the monumental underachiever of the ESA
substance,"\textsuperscript{138} it remains the only mandatory obligation for threatened species preservation outside the Section 7 consultation requirement pertaining to federal agencies.\textsuperscript{139}

By listing species as threatened, rather than endangered, FWS and NMFS can promulgate special rules that, in effect, devolve ESA authority to the states. To the extent that the state programs are implemented through state, as well as federal, legislation, this may at least ensure that state courts will have jurisdiction to enforce state obligations. If no federal forum is available to enforce devolved ESA obligations, however, some states may find that deferential state courts will be satisfied with the appearance, rather than the actuality, of species protection. This possibility emphasizes the importance of active federal oversight over state ESA programs.

3. Cooperative Agreements

Section 6 of the ESA provides an explicit mechanism for state participation in the ESA through cooperative agreements. FWS and NMFS may enter into a cooperative agreement "with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species."\textsuperscript{140} The statute establishes a number of conditions for cooperative agreements, including a showing that "authority resides in the State agency to conserve resident species of fish or wildlife" and "the State agency has established acceptable conservation programs, consistent with the purposes and policies of [the ESA]," for the species at issue.\textsuperscript{141} In practical terms, FWS requires "passage of State legislation to enable one or more State agencies

\textsuperscript{138} Ruhl, \textit{supra} note 133, at 1112.

\textsuperscript{139} 16 U.S.C. § 1536(a)(2) (1994) requires federal agencies to consult with FWS and NMFS to ensure that the agencies' activities are not likely to jeopardize endangered or threatened species. Most commentators, and cases, have focused on the duty to conserve as part of federal agencies' responsibilities under ESA Section 7. The obligation also exists independently as a mandatory duty under Section 4. If the duty to conserve ever shakes its image as a "monumental underachiever," Section 4, rather than Section 7, may be responsible. The duty to conserve is the only mandatory duty protecting threatened species in non-federal contexts, while the duty to avoid jeopardy also protects species subject to Section 7 consultations.

\textsuperscript{140} \textit{Id.} § 1535(b).

\textsuperscript{141} \textit{Id.}
to conduct conservation activities for listed and candidate plants and animals" before entering into a cooperative agreement.\footnote{142}

When states enter into cooperative agreements, they become eligible for funding through the Cooperative Endangered Species Conservation Fund (Fund).\footnote{143} Grants may constitute up to seventy-five percent of program costs, or ninety percent when two or more states enter into a joint agreement.\footnote{144} States may use grants for recovery activities, such as population assessment and habitat restoration, for propagation and reintroduction of listed species, for initiating conservation activities before a species is listed, and for monitoring the status of recovered species.\footnote{145} Grants are also awarded to states for land acquisition in partnership with local governments and other interested parties.\footnote{146}

The Fund is partially financed by permanent appropriations from the General Fund, but the actual amount available for grants is subject to annual appropriations.\footnote{147} In 1998, grants to states totaled $21 million,\footnote{148} while the 1999 estimated total is $14 million.\footnote{149} As of late 1996, thirty-eight states and Puerto Rico had both plant and animal agreements, while twelve states and two territories had agreements only pertaining to animals.\footnote{150} While grants range from $1,000 to $235,000, the average grant is $100,000. The president's fiscal year 2000 budget proposes to supplement the Fund by a $66 million infusion from the Land and Water

\footnote{143}CATALOGUE OF FEDERAL DOMESTIC ASSISTANCE 15.615: COOPERATIVE ENDANGERED SPECIES CONSERVATION Fund (Sept. 9, 1999) available at http://aspe.os.dhhs.gov/cfda/P15615.htm#i34.
\footnote{145}CATALOGUE OF FEDERAL DOMESTIC ASSISTANCE, supra note 143. Funded projects have ranged from activities relating to the reintroduction of the black-footed ferret to cowbird control to protect the least Bell’s vireo to American burying beetle surveys. \textit{Id.}
\footnote{146}BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2000 [hereinafter BUDGET FY 2000], APPENDIX, 567.
\footnote{147}The permanent appropriation is an amount equal to five percent of receipts deposited to the federal aid in wildlife and sport fish restoration accounts. \textit{Id.}
\footnote{148}Of the 1998 total, $8 million is specifically designated for “land acquisition/HCPs.” \textit{Id.} at 566.
\footnote{149}Of the 1999 total, $6 million is specifically designated for “land acquisition/HCPs.” \textit{Id.}
Conservation Fund.\textsuperscript{151} The budget attributes this funding increase to “the Administration’s commitment to making new tools available, and working with states, tribes, local government and private partners.”\textsuperscript{152} From a legal perspective, however, the cooperative agreement is an awkward tool for federal/state partnerships because of the ESA’s confusing treatment of preemption. This issue is discussed in the next section.

4. Preemption

The ESA contains preemption provisions in Sections 6(f)\textsuperscript{153} and 6(g)(2),\textsuperscript{154} governing cooperative agreements with the states, and in Section 4(d),\textsuperscript{155} governing the preservation of threatened species when states have entered into cooperative agreements. Unfortunately, Section 6 and Section 4 do not mesh well together.

Section 6(f) provides that state law regulating the taking of an endangered or threatened species “may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.”\textsuperscript{156} If this were the only provision governing preemption, the law would be clear. Section 4(d), however, requires the promulgation of regulations necessary for the conservation of threatened species and states that “such regulations shall apply in any State which has entered into a cooperative agreement pursuant to [Section 6(c)] only to the extent that such regulations have also been adopted by such State.”\textsuperscript{157}

This provision appears, in theory, to allow states with cooperative agreements to stymie federal regulations by refusing to adopt these regulations. The state program would then be less protective than the federal program. In practice, however, it is likely that this problem would only arise if the federal government attempted to adopt new regulations after entering into a cooperative agreement. When entering into new

\textsuperscript{151} BUDGET FY 2000 APPENDIX, 566. This is a substantial sum in ESA terms; the entire 1998 ESA program budget for both the Department of the Interior and the Department of Commerce was $107 million. BUDGET FY 2000, 101 (Table 6-1).
\textsuperscript{152} BUDGET FY 2000, APPENDIX, 567. The budget also proposes an additional $100 million matching fund program for west coast salmon habitat restoration. BUDGET FY 2000, APPENDIX, 100.
\textsuperscript{154} Id. § 1535(g)(2).
\textsuperscript{155} Id. § 1533(d).
\textsuperscript{156} Id. § 1535(f).
\textsuperscript{157} Id. § 1533(d).
cooperative agreements, the federal government has the authority to determine whether the state program is “adequate and active,”\(^{158}\) whether the state agency has authority to conserve threatened and endangered species,\(^ {159}\) and whether the state agency has established “acceptable” conservation authority, “consistent” with the ESA.\(^ {160}\) If the state were to refuse to adopt federal requirements, the cooperative agreement could simply be denied.

Section 6(g)(2), which also applies to states with cooperative agreements, presents a similar problem. This provision states that the takings prohibition “shall not apply” to threatened or endangered species\(^ {161}\) within any state, except to the extent that the taking is contrary to state law.\(^ {162}\) Section 6(c) is captioned “Transition,” and Congress may have intended this provision to apply only during the initial implementation of the Act. The law does not specify this limitation, however, and the courts that have considered Section 6(g)(2) have not viewed its application as limited by time restrictions.

The courts have limited Section 6(g)(2)’s apparent waiver, however, by reviewing it in the context of the purposes of the ESA and Section 6(f)’s preemption provision. In *Swan View Coalition v. Turner*,\(^ {163}\) plaintiff environmental groups contended that the Forest Service had allowed for road densities in the Flathead National Forest that modified habitat of the grizzly bear. Under the federal definition of take, which includes significant habitat modification, this would violate the ESA take prohibition.\(^ {164}\) The Intermountain Forest Industry Association (IFIA), a private party defendant in the case, argued that Montana law rather than the federal definition of take was controlling in the case because Montana was a party to a cooperative agreement.\(^ {165}\) Montana law does not define take to include harm or significant habitat modification.\(^ {166}\)

\(^{159}\) Id. § 1535(c)(1)(A).
\(^{160}\) Id. § 1535(c)(1)(B).
\(^{161}\) Id. § 1535(g)(2). An exception is made for species listed in Appendix I to the Convention on International Trade in Endangered Species or otherwise specifically covered by any other treaty or federal law. Id.
\(^{162}\) Id.
\(^{164}\) Id. at 936.
\(^{165}\) Id. The federal defendants did not join IFIA in this claim. This is an example of a situation in which the federal interest and the interests of a private party were not identical, highlighting one of the shortcomings of reliance on the federal government to enforce the ESA. See *supra*, text accompanying notes 4-17.
\(^{166}\) 824 F. Supp. at 938.
The court observed that IFIA, which relied on Sections 4(d) and 6(g)(2), had raised "compelling arguments." Nonetheless, the court held that the clear language of ESA Section 6(f), combined with "the overwhelming priority Congress has given to the preservation of threatened and endangered species," preempted the less-restrictive Montana law. A California district court that considered the same argument in the same year simply concluded, without explaining its reasoning, that the ESA preempts less-restrictive state law.

While the ESA's inconsistent language continues to pose a threat that less-restrictive state law may apply to states with cooperative agreements, the courts to date have rejected this line of reasoning as incompatible with the purposes of the ESA. Furthermore, when the Department of the Interior enters into cooperative agreements, it generally requires the states to acknowledge that the ESA will preempt any less-restrictive state law. If the use of cooperative agreements increases and states' sovereign immunity prevents direct enforcement against the states under the ESA, it is some consolation that state law will generally be as strict as the ESA.

This will not necessarily be the case in the Fifth Circuit, however, where the Court of Appeals' decision to abstain from an ESA case in favor of state law amounted to indirect preemption of the ESA. In *Sierra Club v. City of San Antonio*, the Fifth Circuit dismissed an ESA case brought by the Sierra Club in deference to Texas' adoption of a state program to control and manage the use of the Edwards aquifer. The Sierra Club had alleged that San Antonio and other public and private entities had taken endangered and threatened species by withdrawing water from the Edwards Aquifer. The Fifth Circuit vacated a preliminary injunction issued by the district court, holding that the Sierra Club did not have a substantial likelihood of success on the merits because federal court abstention from the ESA lawsuit was "manifestly warranted" under *Burford v. Sun Oil Co.*

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167 Id.
168 Id.
170 BEAN & ROWLAND, supra note 86, at 236.
171 112 F.3d 789 (5th Cir. 1997).
172 Id. at 792.
173 Id. at 793.
In *Burford*, a 1943 case, the Supreme Court had held that the federal district court should have abstained from hearing an oil company's suit against the Texas Railroad Commission to challenge the issuance of a drilling permit. The Fifth Circuit found that state regulation of oil and state regulation of water are similar. It viewed both as matters of great concern, vital to the economy of the state. Both are subject to comprehensive state regulatory schemes; the Fifth Circuit noted that the Edwards Aquifer Act "represents a sweeping effort by the Texas Legislature to regulate the aquifer, with due regard for all competing demands for the aquifer's water." The court further emphasized that "both the aquifer and the endangered species are entirely intrastate, which makes management of the aquifer a matter of peculiar importance to the state.

What the Fifth Circuit overlooked in applying "*Burford immunity*" to the ESA was that *Burford* involved a situation in which "[t]he federal government, for the present at least, has chosen to leave the principal regulatory responsibility [for each oil and gas field] with the states . . . ." The lawsuit in *Burford* was not based on federal question jurisdiction, as in *Sierra Club*, but on diversity jurisdiction. In fact, the *Burford* Court would not have abstained if jurisdiction in the case had been based on a federal question, rather than focusing solely on Texas state law. The case was decided by a 5-4 split; Justice Douglas, in a concurring opinion, emphasized that "[t]his decision is but an application of the principle . . . that 'federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.'" *Sierra Club*, in contrast, involved Texas' alleged refusal to carry out a policy contained in federal law.

*Sierra Club* may be an anomaly that will be limited to the Fifth Circuit, which recently stated—perhaps as a matter of wishful thinking—that the ESA "does not apply to the states." *Sierra Club* emphasized

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175 *Sierra Club*, 112 F.3d at 794.
176 *Id.* at 794.
177 *Id.* The court did not reach the issue of whether applying the Endangered Species Act under these circumstances is unconstitutional as a violation of the Commerce Clause. *Id.* at n.17.
178 *Burford*, 319 U.S. at 319.
179 *Id.* at 334.
181 American Forest & Paper Ass'n v. EPA, 137 F.3d 291, 294 (5th Cir. 1998). Presumably, in the context of the case (*see supra* notes 36-47 and accompanying text),
that the species at issue were only found in Texas, which appeared to have influenced the court's conclusion that the state was the proper source of power; this view conflicts with previous courts that have rejected Commerce Clause challenges to the ESA.\textsuperscript{182} The court also emphasized the advantages of the state scheme, which takes into account all competing demands; the court clearly based its holding on its belief that the state's water needs, rather than endangered species, were the proper regulatory focus.\textsuperscript{183} This approach contrasts with other courts that have held that the ESA requires agencies to place species preservation above their other responsibilities.

\textit{Sierra Club} may provide an advance glimpse of the fate of ESA enforcement efforts against states under the Supreme Court's current Eleventh Amendment jurisprudence. The Fifth Circuit declined to implement the ESA despite the facts that the state scheme had not been implemented and that the state law did not allow citizens' suits.\textsuperscript{184} This meant that once the case had been dismissed, the Sierra Club had absolutely no recourse for its allegations of ESA violations.\textsuperscript{185} The court seemed unperturbed by these factors, finding simply that a state entity, the Texas Natural Resource Conservation Commission, had authority to bring suit and that was sufficient.\textsuperscript{186} As the discussion of the Supreme Court's Eleventh Amendment cases in Section III below, will show, the Supreme Court has similarly turned a deaf ear to concerns that private parties with legitimate concerns vested in federal law will find themselves without a remedy.

\textbf{C. Conclusion}

Federalism under the ESA is evolving to include the states in ever-expanding roles in species preservation. It does not seem desirable, or even possible, to attempt to stop this trend; states have legitimate interests

\textsuperscript{182} See Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (stating that application of ESA prohibition against "take" to the Delhi Sands flower-loving fly does not exceed Congress' Commerce Clause power); see also Gibbs v. Babbitt, 214 F.3d 483, 493 (4th Cir. 2000), cert. denied 121 S. Ct. 1081 (2001) (stating federal ESA regulations protecting the endangered red fox on private land did not violate the Commerce Clause).

\textsuperscript{183} See Sierra Club v. City of San Antonio, 112 F.3d 789 (5th Cir. 1997).

\textsuperscript{184} See id.

\textsuperscript{185} See id.

\textsuperscript{186} See id.
in their natural resources, and state resources and local knowledge are crucial to the effort to preserve endangered and threatened species.

National species protection goals are unlikely to be achieved without strong state involvement, including the ability of states to experiment with alternative regulatory approaches. Conversely, the development of adequate state programs frequently is a response to strong federal environmental policies. In order to ensure that the national interest in species preservation affects the states' equation of interests, the ESA must continue to encourage states to take endangered species conservation seriously. The structure of state programs, and of the federal-state relationship under HCPs and cooperative agreements, can help to ensure that the states do so. Unfortunately, the federal/state structure has developed in an ad hoc fashion based on confusing and inconsistent legislative language. While FWS and NMFS currently ensure administratively that state programs will be consistent with the requirements of the federal ESA, the law does not necessarily require such protection—particularly with respect to threatened species, the category that encompasses many of the large-scale, controversial listings of the past decade.

Without a strong federal "hammer," some states may be tempted to envelop endangered species concerns within broader natural resource and economic development programs, and then to deny private parties the right to enforce the state programs. The possibility that the Supreme Court's Eleventh Amendment jurisprudence will encourage this approach is explored in the remainder of this article.

III. DUAL-LING SOVEREIGNS: CONGRESS, STATES, AND THE ELEVENTH AMENDMENT

A. The Supreme Court's Recent Eleventh Amendment Jurisprudence

Just as states' roles in ESA implementation are expanding, the Supreme Court has largely relieved states from the burden of defending themselves from private actions brought under federal law. The Court is effecting this change intentionally as part of its vision of "dual sovereignty,"\(^\text{187}\) which emphasizes the expansion of state power at the expense of the federal government.\(^\text{188}\)

\(^{187}\) The Court observed at the beginning of the decade that the "Constitution establishes a system of dual sovereignty between the States and the Federal Government." Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); see also David H. Rosenbloom & Bernard H. Ross,
In its first blockbuster Eleventh Amendment case, *Seminole Tribe v. Florida,* the Court invoked state sovereign immunity to prevent a damages lawsuit against a state from proceeding in federal court, despite the fact that the suit was based on a federal question. The court held that Congress may not, by adopting a federal statute, allow states to be sued (or abrogate the states’ Eleventh Amendment immunity) when legislating under pre-Eleventh Amendment constitutional powers, such as the Commerce Clause. More recently, in *Alden v. Maine,* the Supreme Court extended states’ sovereign immunity to lawsuits in state court, holding that Congress does not have the constitutional authority to subject nonconsenting states to private suits for damages in state courts. Other recent Supreme Court cases have further reduced the likelihood that

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*Toward a New Jurisprudence of Constitutional Federalism: The Supreme Court in the 1990s and Public Administration,* 28 AM. REV. OF PUB. ADMIN. 107, 110 (June 1998) (“By the end of the 1980s, dual sovereignty seemed overwhelmed by cooperative federalism . . . . [T]he 1990s have witnessed a dramatic shift. The Court sent a clear message to the legal community . . . [that] [i]t wanted to rethink and perhaps reconstruct constitutional federalism.”). *Seminole Tribe* may be viewed as a case illustrating “the importance that a narrow, but solid, five-Justice majority of the Supreme Court attaches to the constitutional underpinnings of ‘Our Federalism.’” Henry Paul Monaghan, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102 (1996). “‘Our Federalism’ represents a system in which the national government seeks to vindicate and protect federal rights and interests in ways that do not ‘unduly interfere with the legitimate activities of the States.’” *Id.* at 102, n.3 (quoting *Younger v. Harris,* 401 U.S. 37, 44-45 (1971)). *See generally* Louise Weinberg, *Fear and Federalism,* 23 OHIO N.U. L. REV. 1295 (1997).

In addition to its Eleventh Amendment decisions, the Supreme Court has also expanded state power through cases interpreting the Tenth Amendment (see *New York v. United States,* 505 U.S. 144 (1992); *Printz v. United States,* 117 S. Ct. 2365 (1997)), the Commerce Clause (see *United States v. Lopez,* 514 U.S. 549 (1995)), and the Due Process Clause under the Fourteenth Amendment (see *City of Boerne v. Flores,* 521 U.S. 507 (1997)). For a discussion of subsequent environmental cases affected by these cases, see Michael B. Gerrard, *Emerging Statutory and Constitutional Tools for States to Resist Federal Environmental Regulation,* 28 ENVTL. L. REP. 10,127 (Mar., 1998).

Although *Seminole Tribe* directly addresses the Indian Commerce Clause, it also applies to the Interstate Commerce Clause, as made explicit by the fact that the Court overruled *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989). *Seminole Tribe,* 517 U.S. at 63-64; *see also infra,* text accompanying notes 207-228.

private parties will find a loophole within the "rococo structure of rules and exceptions that make up Eleventh Amendment doctrine."  

A brief explanation of the Court's Eleventh Amendment jurisprudence barely needs to touch upon the actual text of the Eleventh Amendment. The Eleventh Amendment states, in its entirety, that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." According to the Supreme Court, however, the text of the Amendment is irrelevant. Over a century ago, in *Hans v. Louisiana*, the Court extended states' Eleventh Amendment immunity to federal lawsuits brought by a state's own citizens—a concept not included within the Amendment's text. The reasons for this, subsequently referred to by the Court as "the Eleventh Amendment's twin reasons for being," included a desire to preserve states from the affront


194 U.S. CONST. amend. XI.

195 The *Seminole Tribe* majority criticized the dissent for its "lengthy analysis of the text of the Eleventh Amendment," charging that this fidelity to the language of the Constitution "is directed at a straw man—we long have recognized that blind reliance upon the text of the Eleventh Amendment is "to strain the Constitution and the law to a construction never imagined or dreamed of."" 517 U.S. 44, 69 (1996) (citations omitted). In *Alden*, the court asserted that "the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 736 (1999).


196 134 U.S. 1 (1890).

197 Id. at 10.

to state sovereignty that would be created by lawsuits in federal courts\(^{199}\) and "the prevention of federal court judgments that must be paid out of a State's treasury."\(^{200}\)

This theme has been adopted, and expanded upon, over the course of the past century.\(^{201}\) The contemporary Court views fundamental federalism as the basis of this extension of the Eleventh Amendment, stating that the "presupposition" behind the Eleventh Amendment "has two parts: first, that each State is a sovereign entity in our federal system; and second, that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'"\(^{202}\)

\(^{199}\) *Hans*, 134 U.S. at 12-18. *Seminole Tribe* also relies on the "indignity" that would be suffered by a state if it were subjected to suit in federal court at the instance of private parties. *Seminole Tribe*, 517 U.S. at 58. This is not a universally accepted principle. As one commentator has observed, "[t]he idea that a state, an utterly abstract entity, has feelings about being sued by a private party when 'its' highest officials are regularly so sued surely strains credulity." Monaghan, *supra* note 187, at 132.

\(^{200}\) *Hess*, 513 U.S. at 48.

\(^{201}\) The development of Eleventh Amendment jurisprudence is ground that has been well and thoroughly covered; "[t]here seem to be nearly as many accounts as there are legal historians." Monaghan, *supra* note 187, at 103 n.12. Therefore, this article will only summarize the current state of the Supreme Court's Eleventh Amendment jurisprudence, rather than revisiting its history. In waves of articles each decade over the past thirty years, authors have attempted to show why *Hans* was incorrectly decided, and why the Supreme Court should adopt a narrower view of state sovereign immunity under the Eleventh Amendment. The result, as one commentator has observed, is that the anti-*Hans* scholars have managed to convince almost everyone except the Supreme Court. See Daniel J. Cloherty, *Exclusive Jurisdiction and the Eleventh Amendment: Recognizing the Assumption of State Court Availability in the Clear Statement Compromise*, 82 CAL. L. REV. 1287, 1301-02 (1994); see also *Seminole Tribe*, 517 U.S. at 66-70 ("The dissent . . . disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events."); *Hess*, 513 U.S. at 54 (Stevens, J., concurring) ("The doctrine of sovereign immunity has long been the subject of scholarly criticism. And rightly so, for throughout the doctrine's history, it has clashed with the just principle that there should be a remedy for every wrong.").


Because these general principles did not, in the past, immunize states from the wide range of private lawsuits currently caught in the Eleventh Amendment web, the Court has explicitly overruled two of its own precedents. In Seminole Tribe, the Court overruled Pennsylvania v. Union Gas Co., which had held that Congress had the power to abrogate state sovereign immunity through Commerce Clause regulation.\(^\text{203}\) In College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,\(^\text{204}\) the Court overruled Parden v. Terminal Ry. Co.,\(^\text{205}\) which had held that a state’s participation in a federally regulated business constituted an implied waiver of sovereign immunity.\(^\text{206}\) It is important to understand these cases, and to recognize the thoroughness with which the Court has rejected their reasoning, because the two overruled cases constituted important underpinnings of ESA enforcement against the states.

In Union Gas, a precedent that was only seven years old when the Court overruled it, the Court had rejected Pennsylvania’s assertion that its Eleventh Amendment immunity barred a private lawsuit brought under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).\(^\text{207}\) The Court first noted that it had already held that Congress may override states’ Eleventh Amendment immunity when it acts pursuant to the power granted under § 5 of the Fourteenth Amendment, but it must make its intent to do so “unmistakably clear.”\(^\text{208}\) In examining whether Congress had the same power under Commerce Clause legislation, such as CERCLA, the court first determined that CERCLA clearly expresses Congress’ intent to hold states liable for damage.\(^\text{209}\) The Court emphasized that CERCLA includes states within its definition of “persons”;\(^\text{210}\) that states were explicitly made liable for damages “to the same extent, both procedurally and substantively, as any non-governmental entity”\(^\text{211}\) under specified circumstances; and that the

\(^{204}\) 527 U.S. 666 (1999).
\(^{205}\) 377 U.S. 184 (1964).
\(^{206}\) Id. at 196-98.
\(^{209}\) Id. at 8.
\(^{210}\) Id. (citing 42 U.S.C. § 9601(21) (1994)).
\(^{211}\) Id. (citing 42 U.S.C. § 9601(20)(D) (1994)).
statute used similar language to describe state liability to the language that it used to waive federal liability.\textsuperscript{212}

Four members of the Court joined Justice Brennan in this portion of the opinion.\textsuperscript{213} Justice Scalia, who agreed that CERCLA clearly expressed Congress' intent to abrogate, dissented from the remainder of the opinion.\textsuperscript{214} This portion of the case held that the Commerce Clause granted Congress the authority to permit suits against states for money damages.\textsuperscript{215} The plurality reasoned that the Commerce Clause, like the Fourteenth Amendment, "with one hand gives power to Congress while, with the other, it takes power away from the States."\textsuperscript{216} It further emphasized that, "in many situations, it is only money damages that will carry out Congress' legitimate objectives under the Commerce Clause."\textsuperscript{217} To support this conclusion, the court examined CERCLA's need to enlist private parties to assist the federal government in its cleanup of hazardous waste sites. "[T]he Government's resources being finite," the plurality noted, "it could neither pay up front for all necessary cleansups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help" by enlisting private parties and allowing them to recover costs from other responsible parties.\textsuperscript{218} This reasoning resembles the federal logic of involving private parties in HCPs: federal resources would not extend far enough to accomplish all of the ESA's goals, and private efforts were needed in order to achieve the federal goal of species and habitat protection.

Justice White, who dissented to the plurality's opinion that CERCLA clearly expressed Congress' intent to abrogate state sovereign immunity,\textsuperscript{219} did agree with the plurality that Congress had the authority under the Commerce Clause to abrogate state sovereign immunity.\textsuperscript{220} He did not join the plurality decision because he did not agree with "much of

\textsuperscript{212} Id. at 10 (citing 42 U.S.C. §§ 9601(20)(D), 9620(a)(1) (1994)).
\textsuperscript{213} The Justices included Justice Brennan, writing for the court, and Justices Marshall, Blackmun, Stevens, and Scalia.
\textsuperscript{214} Justice Scalia was joined in dissent by Chief Justice Rehnquist and Justices O'Connor and Kennedy.
\textsuperscript{215} Union Gas, 491 U.S. at 23.
\textsuperscript{216} Id. at 16.
\textsuperscript{217} Id. at 20.
\textsuperscript{218} Id. at 21.
\textsuperscript{219} Justice White was joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy in the portion of the decision that dissented to the holding that CERCLA clearly stated Congress' intent to abrogate state sovereign immunity.
\textsuperscript{220} Union Gas, 491 U.S. at 45.
[Justice Brennan's] reasoning." This is all of the explanation that he gives for writing separately.

The fractured Union Gas decision was vulnerable to a change in the membership of the Court, which explains its rapid demise in Seminole Tribe. Chief Justice Rehnquist, writing for a five-Justice majority, emphasized that "[t]he Court in Union Gas reached a result without an expressed rationale agreed upon by a majority of the Court." Declaring that "[n]ever before the decision in Union Gas had we suggested that the bounds of Article III [establishing federal court jurisdiction] could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment," the court explicitly overruled the case. The Court held that

Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I [establishing Congress' powers] cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

A more venerable precedent was abandoned when College Savings Bank held that "[w]hatever may remain of our decision in Parden is expressly overruled." Parden, a 1964 case, allowed employees of a railroad owned and operated by Alabama to sue the state under the Federal

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221 Id. at 57.
223 U.S. CONST. Art. III, § 2, cl. 1 provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."
224 Seminole Tribe, 517 U.S. at 65.
225 Id. at 66 ("Reconsidering the decision in Union Gas, we conclude that none of the policies underlying stare decisis requires our continuing adherence to its holding . . . . We feel bound to conclude that Union Gas was wrongly decided and that it should be, and now is, overruled.").
226 U.S. CONST. Art. I, § 8, cl. 3 enumerates Congress' powers, including the power to "regulate Commerce with foreign nations, and among the several States, and with the Indian tribes."
227 Seminole Tribe, 517 U.S. at 72-73.
Employers' Liability Act (FELA).\textsuperscript{229} The \textit{Parden} Court found that the state had impliedly waived its Eleventh Amendment immunity to suit by its participation in federally regulated activity.\textsuperscript{230} The Court reasoned that

\[\text{[I]t is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business. Congress might well determine that allowing a regulable conduct such as the operation of a railroad to be undertaken by a body legally immune from liability directly resulting from these operations is so inimical to the purposes of its regulation that the State must be put to the option of either foregoing participation in the conduct or consenting to legal responsibility for injury caused thereby.}\textsuperscript{231}

The \textit{College Savings Bank} majority\textsuperscript{232} described the "constructive-waiver experiment of \textit{Parden}" as "ill conceived."\textsuperscript{233} Asserting that "[s]tate sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected,"\textsuperscript{234} the Court held that only express, not implied, waivers could waive such a constitutional right.\textsuperscript{235} The Court also perceived that the \textit{Parden} loophole could obliterate the \textit{Seminole} rule.

Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the anti-abrogation holding of \textit{Seminole Tribe}. Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin.\textsuperscript{236}

\textsuperscript{229} Parden v. Terminal Ry., 377 U.S. 184, 196 (1964).
\textsuperscript{230} Id. at 196-98.
\textsuperscript{231} Id. at 198.
\textsuperscript{233} Id. at 680.
\textsuperscript{234} Id. at 682.
\textsuperscript{235} Id. at 681-82.
\textsuperscript{236} Id. at 683.
As a practical matter, the theory of constructive waiver through participation in federal programs did not shield states from Congress’ attempts to impose liability through federal legislation. To adherents of dual sovereignty, this was the fatal flaw in the system.

The Court’s decisions in *Seminole Tribe* and *College Savings Bank* establish that Commerce Clause legislation cannot be enforced against the states for damages in federal court. Congress cannot abrogate states’ sovereign immunity under the Commerce Clause, nor can federal legislation be interpreted to require a constructive waiver of state sovereign immunity when states participate in federally regulated programs. Undeterred either by the text of the Eleventh Amendment or its own past precedent, the Court has given more weight to the dignity of the states than to the right of the states’ citizens to seek recourse for violations of legal obligations.

B. The Ex parte Young Exception

The Court has not, however, eliminated an exception to sovereign immunity for lawsuits seeking prospective declaratory or injunctive relief in order to end a continuing violation of federal law. This exception, known as the *Ex parte Young* doctrine, applies to lawsuits in federal court brought against state officers in their individual capacities. Under the doctrine, conduct in violation of federal law strips state officials of their official or representative character and subjects them to the consequences of their individual conduct.

When *Seminole Tribe* overruled *Union Gas*, the court emphasized that its holding would not eliminate “other methods of ensuring the States’ compliance with federal law,” including the *Ex parte Young* exception. In both *Seminole Tribe* and a subsequent case, *Idaho v. Coeur d’Alene Tribe*, however, the Court has limited the scope of the *Ex parte Young* exception. *Seminole Tribe* held that *Ex parte Young* could not be applied to the Tribe’s lawsuit against the Governor of Florida because the federal statute at issue created a “detailed remedial scheme” for enforcement against a state. The availability of an *Ex parte Young* action, the Court

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238 *209 U.S.* 123 (1908).
239 See *id.* at 155-56.
240 *Id.* at 159-60.
243 *Seminole Tribe*, 517 U.S. at 74.
reasoned, would supplant the statutory remedy for a judicially created remedy.\textsuperscript{244}

In \textit{Coeur d'Alene}, the Court addressed the issue of whether the Eleventh Amendment barred a federal court from hearing the Coeur d'Alene Tribe's claim that the Tribe, not the state of Idaho, owned the banks and submerged lands of Lake Coeur d'Alene.\textsuperscript{245} The Court of Appeals for the Ninth Circuit had found that the Eleventh Amendment barred all of the Tribe's claims against the state, but that the \textit{Ex parte Young} doctrine allowed claims for declaratory and injunctive relief to proceed against state officials.\textsuperscript{246}

Although the Court launched its analysis by reiterating that it did not "question the continuing validity of the \textit{Ex parte Young} doctrine,"\textsuperscript{247} it did stress that it would exercise strict oversight over the use of the doctrine.\textsuperscript{248} Writing for the Court, Justice Kennedy emphasized that the fictional distinction between the state and its officers should not be used to make the doctrine of sovereign immunity less "meaningful."\textsuperscript{249} "Application of the [\textit{Ex parte}] Young exception must reflect a proper understanding of its role in our federal system and a respect for state courts instead of a reflexive reliance on an obvious fiction."\textsuperscript{250}

The Court then turned to the Tribe's request for prospective injunctive relief to remedy the State's alleged violation of the Tribe's property rights, in contravention of federal law. The Court admitted that an "allegation of an on-going violation of federal law where the requested relief is prospective" would "ordinarily" invoke the \textit{Ex parte Young}

\textsuperscript{244} \textit{Id.} at 75-76.
\textsuperscript{245} \textit{Coeur d'Alene Tribe}, 521 U.S. at 264.
\textsuperscript{246} \textit{Id.} at 266.
\textsuperscript{247} \textit{Id.} at 269.
\textsuperscript{248} \textit{Id.}
\textsuperscript{249} Like all of the recent Eleventh Amendment cases, \textit{Coeur d'Alene} is a fractured opinion. The case was a 5-4 decision, with the majority consisting of Justice Kennedy joined (in part) by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. Only Chief Justice Rehnquist joined in the part of Justice Kennedy's opinion that was most restrictive of the \textit{Ex parte Young} doctrine. \textit{Id.} at 27081. Justice O'Connor, joined by Justices Scalia and Thomas, filed an opinion concurring in part and concurring in the judgment. \textit{Id.} at 288-98. Justice Souter wrote the dissent, joined by Justices Stevens, Ginsburg, and Breyer. \textit{Id.} at 298-319.
\textsuperscript{250} \textit{Id.} at 269 ("When suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation. This commonsense observation of the State's real interest when its officers are named as individuals has not escaped notice or comment from this Court.").
\textsuperscript{251} \textit{Id.}
\textsuperscript{252} \textit{Coeur d'Alene Tribe}, 521 U.S. at 270.
"fiction." The Court majority found the "far-reaching and invasive relief" sought by the Tribe to be "troubling," however, and worried that the suit would cause "offense to Idaho's sovereign authority and its standing in the Union."254

In order to avoid applying Ex parte Young to a case that it found so abhorrent, the Court created its own fiction. It found that "the declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title"255 that would shift the benefits of ownership and control from the State to the Tribe. Such an action would affect

Idaho's sovereign interests in its lands and waters... in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the Young exception inapplicable. The dignity and status of its statehood allow Idaho to rely on its Eleventh Amendment immunity.256

The Court's concern for the inviolability of state sovereignty over state resources may be limited to non-state ownership of navigable waters, the issue directly at stake in Coeur d'Alene. The Court could express, however, equal concern for the locus of control over state-owned resources, particularly in light of the Court's extreme deference to the dignity of the states as sovereigns. If the Court were to extend its reasoning in Coeur d'Alene to immunize state control over water and other state-owned resources, its reluctance to apply Ex parte Young could have important implications for enforcement of the ESA.

C. Conclusion

The Supreme Court has erected an impressive set of hurdles for private parties who seek redress of state violations of federal law. These hurdles will apply to private parties seeking to enforce state obligations under the ESA. Although past cases have allowed private parties to sue states in federal court, Seminole Tribe and its progeny have forced private parties to focus on seeking only prospective injunctive relief against

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253 Id. at 281.
254 Id. at 282.
255 Id.
256 Id. 287-88.
federal officials under the volatile, ill-defined *Ex parte Young* exception. The following section discusses the history and current status of ESA cases that address the issue of state sovereign immunity under the Eleventh Amendment.

IV. ESA JURISPRUDENCE ADDRESSING STATES' ELEVENTH AMENDMENT IMMUNITY

A. Federal Jurisdiction Under the ESA

The ESA vests judicial review exclusively in federal courts, providing that the “district courts of the United States . . . shall have jurisdiction over any actions arising under this [Act].” The right of private parties to enforce the ESA is established by the citizen suit provision, which states that

Any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this [Act].

This provision, which has been part of the ESA since its adoption in 1973, clearly contemplates broad citizen enforcement of the Act, tempered by Eleventh Amendment constraints. It is not surprising, therefore, that state defendants to ESA lawsuits raised Eleventh Amendment sovereign immunity issues even before the Supreme Court started to focus on this defense as a way to expand state power.

Even before the ESA was adopted, the Eleventh Amendment was raised as a defense to a lawsuit claiming violation of a state’s obligation to protect endangered species. In *National Audubon Society, Inc. v. Johnson*, a 1970 case, Audubon asserted that the Texas State Parks and Wildlife Commission harmed wildlife resources when it authorized the dredging of bays for shell. In particular, dredging destroyed “the

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258 Id. at § 1540(g)(1)(A).
260 Id. at 1332.
natural food for the famous whooping crane, an almost extinct variety of bird.\textsuperscript{261} The lawsuit was based on state law, the Rare and Endangered Species Act of 1958, a predecessor to the ESA, and the Migratory Bird Treaty between the United States and Great Britain.\textsuperscript{262}

Audubon sued named state officials, who all asserted Eleventh Amendment immunity.\textsuperscript{263} Without referring to \textit{Ex parte Young} by name, Audubon attempted to invoke the \textit{Ex parte Young} exception to the Eleventh Amendment for state officers whose unlawful activities are viewed as occurring outside their official capacities.\textsuperscript{264} The court refused to allow the suit against the defendants in their individual capacities to go forward, however, finding that the members of the Parks and Wildlife Commission had not “so clearly acted beyond their official duties that I must enjoin their actions.”\textsuperscript{265} It dismissed the case as to all defendants, holding that the state of Texas was a necessary party that was immune to suit.\textsuperscript{266}

The court viewed the \textit{Ex parte Young} doctrine as an exception that could only be applied after reviewing the case on the merits.\textsuperscript{267} The court’s reluctance to allow the lawsuit to proceed was also influenced by the availability of state court review, since state law as well as federal law formed the basis of Audubon’s suit.\textsuperscript{268}

\section*{B. Palila: \textit{ESA at its Pinnacle, Eleventh Amendment at its Nadir}}

Most ESA practitioners are familiar with the \textit{Palila} cases,\textsuperscript{269} named after a Hawaiian bird, as interpreting the scope of the ESA’s

\begin{itemize}
  \item \textsuperscript{261} \textit{Id.}
  \item \textsuperscript{262} \textit{Id.} at 1333 (referring to Convention between the United States and Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702).
  \item \textsuperscript{263} \textit{Id.}
  \item \textsuperscript{264} \textit{Id.}
  \item \textsuperscript{266} \textit{Id.}
  \item \textsuperscript{267} \textit{Id.} at 1333-34.
  \item \textsuperscript{268} \textit{Id.} at 1334. The court noted that “[i]f, in fact, there has been some indiscretion in the issuance of the permits [required by state law], then this is a proper matter for the State Courts to decide, even to reaching the point of the constitutionality of their acts.” \textit{Id.}
  \item \textsuperscript{269} There are two sets of \textit{Palila} cases, sometimes referred to as “\textit{Palila I}” and “\textit{Palila II}.” The first set of \textit{Palila} cases, which addressed the impacts of feral sheep and goats, also required the district court to consider a broad range of attacks on the ESA. \textit{Palila v. Hawaii Dep’t of Land & Natural Res.,} 471 F. Supp. 985, 992-1000 (D. Haw. 1979), \textit{aff’d}, 639 F.2d 495 (9th Cir. 1981). The second set of cases focused on the issue of whether mouflon sheep “harmed” the Palila under the ESA. \textit{Palila v. Hawaii Dep’t of Land & Natural Res.,} 649 F. Supp. 1070, 1078-80 (D. Haw. 1986), \textit{aff’d}, 852 F.2d 1106
\end{itemize}
prohibition of "harm" and its applicability to habitat modification. The first Palila case also addressed fundamental issues relating to the enforceability of the ESA, however, including the most in-depth consideration of Eleventh Amendment issues to date.

The Palila parties did not raise the Eleventh Amendment as a defense; the court considered it on its own initiative. The court first determined that the Ex parte Young doctrine applied to the state officials named in the suit, reasoning that the relief requested by the plaintiffs could be interpreted as prospective equitable relief. The court observed, however, that the Eleventh Amendment did not bar a suit against the state itself "where Congress has clearly manifested its intent to abrogate constitutional immunity and the state has impliedly consented to be sued." The court then focused on the ESA's citizen suit provision, finding that Congress had intended to abrogate state immunity when it allowed private citizens to bring suit enjoining "the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution)." The court asserted that the statute's reference to the Eleventh Amendment did not "mitigate the force" of the provision, but that the reference "is most sensibly construed" as limiting the scope of injunctive relief against the state, so as to bar forms of equitable relief that would be tantamount to money damages. To interpret the Eleventh Amendment as creating a blanket sovereign immunity exception to private enforcement of the ESA, the court observed, would "seriously impair the achievement of the broad

(9th Cir. 1988). The discussion in this section focuses on the District Court's decision in Palila I.

270 See generally Palila, 471 F. Supp. 985.

271 In addition to the Eleventh Amendment argument discussed here, Hawaii raised a Tenth Amendment defense, claiming exclusive state sovereignty over the Palila. Id. at 992. The court held, however, that both the treaty origins of the ESA and the Commerce Clause supported the federal government's right to protect "any endangered species anywhere." Id. at 993-95.

272 Id. at 995-96.

273 Plaintiffs asked the Court to "enjoin the defendants from continuing to maintain any population of feral goats and sheep within the Palila's critical habitat . . . and compel defendants to prepare and implement a plan for complete and permanent removal of these feral animals." Id. at 996 n.42.

274 Id. at 996.

275 Palila, 471 F. Supp. at 997 (quoting 16 U.S.C. § 1540(g) (1994)).

276 Id.
congressional purposes underlying the Act and would lead to a right without an effective remedy." 277

This analysis is not in line with current Supreme Court Eleventh Amendment jurisprudence. The Court now views the Eleventh Amendment as embodying the states' inherent sovereignty. It would be unlikely to uphold the *Palila* court's rather cavalier dismissal of the ESA's explicit recognition that citizen suit authority might be limited by Eleventh Amendment immunity. 278 Nor would the Court be likely to share *Palila* 's concern that Eleventh Amendment immunity could unacceptably diminish the role of citizen enforcement. The Court majority has been notably unimpressed by its own dissenters' arguments that broad Eleventh Amendment immunity would leave citizens without a remedy. In *Seminole Tribe*, for example, the Court majority pointed out that the federal government could always sue states to enforce environmental laws, even if citizens were prevented from doing so. 279 Similarly, the ESA would not be unenforceable if citizens were barred from enforcement actions; the federal government would still have the authority to sue states. 280 The *Palila* court recognized that this possibility could affect the analysis of citizens' rights, but dismissed it on the grounds that "it is

277 Id. (footnote omitted).

278 See also infra text accompanying notes 305-340 (discussing recent cases decided under other environmental statutes, holding that the phrase "extent permitted by the eleventh amendment to the Constitution" (42 U.S.C. § 9659(a)(1) (2001)) does not abrogate state immunity). But see Strahan v. Coxe, 127 F.3d 155, 166 (1997) ("The very fact that Congress has limited its authorization to suits allowed by the Eleventh Amendment reinforces the conclusion that Congress clearly envisioned that a citizen could seek an injunction against a State's violations of the ESA."); F.J. "Rick" Dindinger II, *Seminole Tribe's Impact on the Ability of Private Plaintiffs to Bring Environmental Suits Against States in Federal Court*, 75 DENV. U. L. REV. 253, 261-62 (1997) (concluding, without discussing the significance of its reference to the Eleventh Amendment, that the Clean Air Act's citizen suit provision shows Congress' intent to abrogate state sovereign immunity).


The provisions of this [Act] and any regulations or permits issued pursuant thereto shall be enforced by the Secretary [of the Interior or the Secretary of Commerce], the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency of any State agency for purposes of enforcing this [Act].
evident from the language of the Act that private suits are of paramount importance in enforcing the Act." The current Supreme Court, in contrast, views citizens' suits under the ESA with a more jaundiced eye, as evidenced by its decision in *Lujan v. Defenders of Wildlife* to restrict the standing of citizens to sue under the ESA.

The first prong of *Palila*'s Eleventh Amendment analysis is therefore suspect, in light of the current Supreme Court's view both of the Eleventh Amendment and of the ESA. The second prong of *Palila*'s analysis has been overruled outright. When Congress has legislatively abrogated sovereign immunity, a state's waiver of immunity and consent to be sued will be implied from its participation in activities covered by federal legislation. The state of Hawaii had actively participated in the ESA's cooperative agreement provisions. As part of this program, the state passed its own law, the Hawaii Endangered Species Act. "Having bound itself under its own law to refrain from 'taking' federally-designated endangered species, having sought to secure financial advantages under the Endangered Species Act, and having sought to retain managerial control over resident wildlife," the court held that Hawaii had impliedly consented to suit under the ESA.

If this doctrine were still good law, it would form an attractive solution to Eleventh Amendment problems under the ESA. Unfortunately, the *Palila* court relied heavily on *Parden v. Terminal R. Co.*, which the Supreme Court explicitly overruled in *College Savings Bank*. The doctrine of applied consent to waiver can no longer be applied to states acting to implement the ESA. In fact, because *Palila*'s analysis of the Eleventh Amendment relied so heavily on doctrines that the Supreme Court has explicitly discredited, it actually supports the view that Eleventh Amendment sovereign immunity will shield states sued under the ESA.

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282 504 U.S. 555 (1992). *Lujan* held, *inter alia*, that persons who were not "perceptibly affected" by harm to an ecosystem could not show the degree of injury required for standing under the ESA. *Id.* at 566.
284 *Id.* at 998 (citing 16 U.S.C. § 1535); see also supra text accompanying notes 130-140.
286 *Palila*, 471 F. Supp. at 999.
288 119 S. Ct. 2219, 2228 (1999); see also supra, text accompanying notes 228-236.
C. Applying the Ex parte Young Exception to the ESA After Seminole Tribe: Strahan v. Coxe

In Strahan v. Coxe, the First Circuit addressed the Commonwealth of Massachusetts’ claim of Eleventh Amendment immunity to an ESA suit that postdated Seminole Tribe. The plaintiff, a member of the conservation organization Green World, contended that Massachusetts’ regulation of commercial fishing violated the ESA by harming endangered northern right whales. The district court granted summary judgment in favor of plaintiff’s claims. It then fashioned a remedy that required Massachusetts to “prepare a proposal . . . to restrict, modify or eliminate the use of fixed-fishing gear in coastal waters of Massachusetts . . . in order to minimize the likelihood additional whales will actually be harmed by such gear.” Although Massachusetts moved to dismiss the case on Eleventh Amendment grounds, the district court held that it had jurisdiction under the Ex parte Young exception for prospective injunctive relief against state officials.

On appeal, Massachusetts contended that its Eleventh Amendment immunity prevented the court from requiring it to implement regulations that would provide greater protection to northern right whales. This argument was based on the nature of the relief granted, not whether the Ex parte Young exception applied to the suit. Massachusetts argued that, although the district court could have ordered an injunction barring all Commonwealth licensing activity, it could not require specific types of future regulatory measures. The court rejected this argument, finding that the Ex parte Young exception only limits federal courts’ jurisdiction to hear a case. If a case requests prospective injunctive relief against state

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289 127 F.3d 155 (1st Cir. 1997).
290 Seminole Tribe was decided after initial briefing in the District Court but before the District Court ruled on the case. See Strahan v. Coxe, 939 F. Supp. 963, 980 (D. Mass. 1996) (“Emboldened by the Supreme Court’s recent ruling in Seminole Tribe . . . , defendants have mounted a reinvigorated argument, only lightly developed in the initial briefing on these motions, that the Eleventh Amendment bars any and all of Strahan’s claims against the Commonwealth under the ESA.”).
292 See id.
293 Id. at 990.
295 Strahan, 127 F.3d at 166. Massachusetts also raised the Tenth Amendment and the statutory scheme as bars to the injunctive measures ordered by the district court. Id.
296 Id.
297 Id.
officials, the court held that the *Ex parte Young* doctrine does not place limits on the scope of the equitable relief that may be granted.\textsuperscript{298}

**D. Conclusion**

Before the Supreme Court’s recent series of Eleventh Amendment decisions, *Palila* provided a strong basis for assuming that states did not have Eleventh Amendment immunity against suit under the ESA. *Palila* emphasized the importance of citizen suits to the statutory scheme; it also held that states impliedly waive their sovereign immunity to suit when they participate in federal schemes.\textsuperscript{299} The deference to citizens’ suits is suspect under current Supreme Court jurisprudence, however, while the doctrine of implied waiver has been explicitly overruled. Therefore, *Palila*’s analysis and holding do not reflect the current state of the law.

As *Strahan* indicates, suing state officials for prospective injunctive relief under the *Ex parte Young* exception provides one possible means of enforcing state roles under the ESA.\textsuperscript{300} Even assuming that the Supreme Court did not, and will not, narrow the scope of this exception substantially, however, the *Ex parte Young* exception will not address all of the problems of potential litigants. The following section discusses the future role of *Ex parte Young* and of other possible approaches to ESA enforcement actions against the states.

**V. LIVING WITH THE ELEVENTH AMENDMENT: HOW WILL THE ESA BE ENFORCED AGAINST THE STATES?**

**A. Introduction**

As states increasingly demand, and are delegated, authority under the ESA, the issue of enforcement must emerge as an important consideration in the assignment of responsibilities under the law. If states take on duties that simply cannot be enforced because of their Eleventh Amendment immunity, the ESA’s “teeth” may develop significant gaps.

Based on the Supreme Court’s recent cases and the emerging jurisprudence developing in District and Circuit Courts, the following

\textsuperscript{298} *Id.* at 167.


discussion addresses some of the constraints on, and opportunities available to, parties seeking to enforce states' ESA obligations.

B. Avoiding the Eleventh Amendment? Non-Commerce Clause Bases of the Congressional Power to Adopt the ESA

1. Threshold Issue: Clear Abrogation of State Sovereign Immunity

In National Ass'n of Home Builders v. Babbitt, the District of Columbia Circuit Court of Appeals upheld the ESA as a valid exercise of congressional power under the Commerce Clause. This was good news for the delhi sands flower-loving fly, which was the subject of the case, but this good news does not make the issue of Eleventh Amendment sovereign immunity any easier for the federal ESA agencies. As the Supreme Court has made clear, Congress may not abrogate state sovereign immunity through legislation adopted under the Commerce Clause. Therefore, as an exercise of the commerce clause, the ESA appears susceptible to state Eleventh Amendment sovereign immunity defenses.

This determination alone, however, does not necessarily toll the death knell for congressional abrogation of state sovereign immunity in the ESA. If another basis of congressional authority could be cited that formed an "appropriate" grant of power to abrogate state sovereign immunity, it still might be possible to argue that states are susceptible to suit under the ESA. To date, the court has identified only one appropriate grant of power: the Fourteenth Amendment. The following sections discuss the Fourteenth Amendment as a possible basis for the adoption of the ESA and also analyze the treaty power as a possible basis for abrogation of state sovereign immunity.

Before reaching the issue of an appropriate grant of power for abrogation, however, a threshold issue must be addressed: did Congress clearly express its intent to abrogate? As discussed above, Palila held that Congress had intended to abrogate state immunity when it allowed private citizens to bring ESA lawsuits enjoining "the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) . . .".

301 130 F.3d 1041 (D.C. Cir. 1997).
302 Id. at 1043.
303 See discussion infra Part V.B.2.
This interpretation of the ESA’s citizen suit language is increasingly suspect, however, and courts examining other environmental laws with similar citizens’ suit provisions have rejected it. The Second Circuit, for example, recently held that the exact same language contained in the Resource Conservation and Recovery Act (RCRA) does not abrogate state sovereign immunity.\(^3\)\(^{06}\) The court held that “[t]hese provisions do not unequivocally express Congress’s intent to abrogate sovereign immunity and subject states to suit. Far from evidencing a congressional intent to do away with sovereign immunity, these provisions are expressly limited by the Eleventh Amendment.”\(^3\)\(^{07}\) The Sixth Circuit has also upheld a case that found that, “by its very terms,” RCRA “operates within the Eleventh Amendment.”\(^3\)\(^{08}\)

Based on the logic of these cases, the ESA probably does not meet the threshold requirement of clear Congressional abrogation of state sovereign immunity. Even if the courts followed *Palila* rather than the RCRA cases, however, the likelihood that an appropriate grant of power would support this abrogation is slim, as discussed below.

### 2. Fourteenth Amendment

In an effort to defend the ESA against state sovereign immunity, it has been suggested that it is possible to argue that Congress adopted the ESA under the Fourteenth Amendment.\(^3\)\(^{09}\) This argument requires a finding that the ESA falls under the Equal Protection Clause because all citizens should enjoy the protection of environmental laws.\(^3\)\(^{10}\) As one court observed in addressing states’ Eleventh Amendment immunity to the Clean Water Act, however, the Supreme Court’s opinion in *Boerne v. Flores*\(^3\)\(^{11}\)

clarified the substantive scope of Congress’ power under the Fourteenth Amendment in such a way that litigation strategies of this type are likely to fail . . . . ‘The teaching of *Boerne* is that there must be a substantial constitutional hook: the principal object of the legislation must be to

\(^{306}\) Burnette v. Carothers, 192 F.3d 52 (2nd Cir. 1999).

\(^{307}\) *Id.* at 57.


\(^{309}\) See Dindinger II, *supra* note 278, at 265.

\(^{310}\) *Id.*

\(^{311}\) 521 U.S. 507 (1997).
address rights that are judicially recognized [as prohibited by the Fourteenth Amendment].\textsuperscript{312}

It is unlikely that courts will find that the “principal object” of the ESA is to implement equal protection under the laws. Therefore, efforts to rely on the Fourteenth Amendment as a basis for the adoption of the ESA probably would fail.

3. Treaty Jurisdiction

In addition to its grounding in the Commerce Clause,\textsuperscript{313} the ESA is explicitly based on the United States’ treaty obligations.\textsuperscript{314} Although many of these treaties are limited in scope, addressing only a few species, the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere\textsuperscript{315} (Western Convention) establishes a broader obligation. Under the Western Convention, the United States has a treaty obligation to provide “strict protection” for “living species of flora and fauna of aesthetic, historic or scientific interest.”\textsuperscript{316} Such species are to be protected by setting them aside as “nature monuments,” which are to be “inviolate . . . except for duly authorized scientific investigations or

\textsuperscript{312} Froebel v. Meyer, 13 F. Supp. 2d 843, 851 (E.D. Wis. 1998) (citation omitted).

\textsuperscript{313} See, e.g., Nat’l Ass’n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (upheld application of the ESA’s prohibition against “take,” as applied to a listed fly species, as a valid exercise of Congress’ power under the Commerce Clause).


\textsuperscript{316} Western Convention, supra note 315, at art. I § 3.
government inspection.” The ESA is the United States’ implementing statute for this treaty obligation. This treaty obligation might appear to provide the federal courts with an independent basis for ESA jurisdiction. Under the Supremacy Clause of the United States Constitution, treaties, along with the Constitution and federal law, comprise “the supreme Law of the Land.” Under international law, nations may not invoke the provisions of its internal law as justification for its failure to perform a treaty. If treaties constitute the supreme law of the land, which must be implemented regardless of conflicting domestic law, it might appear to follow that the United States’ treaty obligation to protect endangered species could be enforced against the states regardless of issues of Eleventh Amendment immunity.

The Supreme Court has responded to such reasoning, however, by applying the same precepts that it applied to other Eleventh Amendment lawsuits. “Behind the words” of constitutional provisions, the Court has noted, “are postulates which limit and control.” One such postulate is that “States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a ‘surrender of this immunity in the plan of the convention.’”

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317 Id.
318 The ESA designates the Secretary of the Interior and the Secretary of State as the United States’ representatives to the Western Convention. 16 U.S.C. § 1537a(e) (1999).
319 U.S. CONST. art. VI.
320 See, e.g., Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 27., 8 I.L.M. 679. The United States is one of a very few states (other examples include Afghanistan, Bolivia, and Luxembourg) that are not parties to the Vienna Convention. See ENVIRONMENTAL TREATIES AND RESOURCE INDICATORS (ENTRI) TREATY SELECTION, available at http://sedac.ciesin.org/pidb/texts/viennaconvention.html. Nonetheless, the United States has acknowledged that the Vienna Convention codifies customary law and may be binding even on nonparties. See, e.g., Luke T. Lee, The Law of the Sea Convention and Third States, 77 AM. J. INT’L L. 541, 553-54 (1983) (observing that while the United States has not ratified the Vienna Convention on the Law of Treaties, the Department of State, in its Letter of Submittal to the President, stated that ‘although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.’ . . . [T]he Restatement of the Foreign Relations Law of the United States (Revised) [accepts] the Convention ‘as presumptively codifying the customary international law governing international agreements, and therefore as foreign relations law of the United States even before the United States adheres to the Convention.’ [citations omitted]).
322 Id. at 322-23, (quoting THE FEDERALIST, No. 81).
circumstances of a foreign sovereign’s effort to sue a state, at least, the Supreme Court has held that the Constitution did not include such a plan of surrender. The court reached the same conclusion in a case that upheld the state of Alaska’s Eleventh Amendment immunity against suit by sovereign Indian tribes.

Both of these suits addressed whether Eleventh Amendment immunity was affected by the fact that the plaintiff was a sovereign, not the issue of whether the treaty power constitutes an appropriate grant of power for the abrogation of state sovereign immunity. They do indicate, however, that the Supreme Court does not find that international concerns are of sufficient importance to allow for an inroad on state sovereign immunity. To the contrary, the Court has reasoned that international concerns should not be forced on the states, which have no power to adjust the terms of treaties.

The Supreme Court’s jurisprudence in the field of foreign relations and the Eleventh Amendment thus does not support the proposition that it is likely to uphold the treaty power as an appropriate basis for abrogation. The Court has warned that the Eleventh Amendment can bar suits that invoke the federal question jurisdiction of

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323 Id. at 330.
325 This evaluation of the relationship between states’ rights and state affairs is reinforced by a recent set of cases that upheld the Commonwealth of Virginia’s decision to execute Angel Francisco Breard, a Paraguayan national. In denying an application for a stay of execution, the Supreme Court upheld a Fourth Circuit ruling (Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998)) that barred the Republic of Paraguay’s claims of treaty violations on Eleventh Amendment grounds. Breard v. Greene, 118 S. Ct. 1352 (1998) (per curiam). Paraguay had alleged that Virginia had violated its rights under the Vienna Convention on Consular Relations, April 24, 1963, [1970] 21 U.S.T. 77, by failing to inform Breard of his rights under the treaty and by failing to inform the Paraguayan consulate of Breard’s arrest, conviction, and sentence. The Supreme Court rejected Paraguay’s argument that the treaty claims should be heard in federal court because the treaty is the “supreme law of the land,” noting that “although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself.” Id. at 1355. Although the International Court of Justice had ordered the United States to postpone the execution to give it time to consider Paraguay’s claim that the execution violated the United States’ treaty obligations, the Supreme Court denied the relief sought by both Breard and Paraguay. Over the objections of the State Department, Breard was executed two hours after the Court announced its decision. Vazquez, supra note 193, at n.42 and accompanying text. If international opinion and human life stand for so little when the Court balances them against states’ Eleventh Amendment immunity, it seems unlikely that an endangered fly or fish will fare much better.
326 Principality of Monaco v. Mississippi, 292 U.S. 313, 331 (1934).
Article III courts, which would otherwise authorize the courts to hear cases and controversies relating to treaties. It has also rejected any construction of the Supremacy Clause that would hold that substantive federal law, such as treaty obligations, "by its own force necessarily overrides the sovereign immunity of the States." Those who protest that international legal obligations should be considered a higher priority than states' sovereign immunity might well be met with the retort that "the contours of sovereign immunity are determined by the Founders' understanding, not by the principles or limitations derived from natural law."

Although the Court's Eleventh Amendment jurisprudence has not specifically rejected the possibility that treaty obligations might constitute a basis for abrogation of Eleventh Amendment sovereign immunity, its current emphasis on the importance of states' rights over the importance of substantive federal law does not appear to be receptive to this argument.

C. Private Party Suits Against States Under the ESA

1. The Ex parte Young Exception.

As previously discussed, the Ex parte Young doctrine provides an exception to states' Eleventh Amendment immunity for suits seeking declaratory and injunctive relief against state officers in their individual

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328 Alden v. Maine, 527 U.S. 706, 732 (1999). The Court reasoned as follows: As is evident from its text, however, the Supremacy Clause enshrines as "the supreme Law of the Land" only those Federal Acts that accord with the constitutional design . . . The Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power . . . We reject any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States. When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States.

Id. at 731-32.
329 Id. at 734.
330 See supra, text accompanying notes 218-235.
This doctrine provides the most obvious path for private parties seeking to enforce the ESA against the states. All current indications support the view that the *Ex parte Young* exception will be the most commonly used method to enforce the ESA and other environmental laws. In *Strahan v. Coxe,* the First Circuit upheld the use of the *Ex parte Young* exception as a means to require Massachusetts to change its regulatory system to comply with the ESA. Other courts have also applied the doctrine to environmental laws with citizens’ suit provisions that closely resemble the ESA’s provision. In *Natural Resources Defense Council v. California Department of Transportation,* a post-Seminole Tribe case, the Ninth Circuit held that *Ex parte Young* allowed plaintiffs’ Clean Water Act suit to proceed against the director of the California Department of Transportation. Federal district courts have reached the same conclusion under the Clean Water Act and, in an unpublished decision, under the Surface Mining Control and Reclamation Act.

Unfortunately, the *Ex parte Young* doctrine is riddled with exceptions and complications. The first, and most obvious, of these problems is that it does not provide plaintiffs with any possibility of money damages. In *Edelman v. Jordan,* the Supreme Court held that relief designated as “equitable restitution” instead of damages still fell afoul of *Ex parte Young* if it involved payments from the state treasury. Even if plaintiffs do not request relief that involves payments from the state treasury, but the Court believes that the relief requested is “as intrusive” as a retroactive levy upon state funds, *Ex parte Young* may not apply. This was the Court’s holding in *Idaho v. Coeur d’Alene Tribe of Idaho,* which upheld Idaho’s Eleventh Amendment defense to the tribe’s lawsuit alleging an ongoing state violation of tribal property rights and requesting prospective injunctive relief. While the Court observed that such an allegation “is ordinarily sufficient to invoke the *Young* doctrine.

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331 *Ex parte Young,* 209 U.S. 123 (1908).
332 127 F.3d 155 (1st Cir. 1997), discussed *supra,* text accompanying notes 88-94.
333 96 F.3d 420 (9th Cir. 1996).
334 *Id.* at 424.
338 *Id.* at 665-66.
fiction," the Court found that "Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." Because the action resembled an action that would not be allowed under Ex parte Young, the Court refused to apply Ex parte Young. As a result of the Court's limitations on the form of relief available, plaintiffs suing under the Ex parte Young exception are barred from any form of monetary relief, including penalties against state officials, from equitable relief involving any form of monetary expenditures that could be interpreted as retroactive, and from relief that is as "intrusive" as retroactive levies on state treasuries.

This raises the second significant limitation of enforcement under Ex parte Young: its ban on retrospective relief. The absence of monetary damages could be viewed as a shortcoming that most significantly affects private parties who contract with state governments; environmentalists and other public interest groups, it may be assumed, should be happy with prospective relief. The absence of any form of retrospective relief could have particularly pernicious environmental effects, however, in the states that are the least likely to comply with the law. Such states could ignore their federal obligations with impunity, secure in the knowledge that they will not be liable for any past violations of the law. Unless and until a court imposes prospective limitations on their behavior, states may even view violating the law as a rational response to laws that their citizens do not favor. As the court noted in Froebel v. Meyer, a federal district court case that addressed allegations of Clean Water Act (CWA) violations against the state, "[p]erversely, a state government that spends money to avoid violating the Constitution ends up financially worse off than one that cynically flouts higher law until ordered into prospective compliance."

340 Id. at 281.
341 Id. at 287.
342 Id. at 282 ("the declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title" [emphasis added]).
343 See Vazquez, supra note 195, at 1792 (If prospective relief is the only recourse, "[t]he state could, without assuming any risk, conduct itself entirely without regard to any possible federal obligations until confronted with a legal challenge.").
344 13 F. Supp. 2d 843 (E.D. Wis. 1998).
345 Id. at 852 n.7. In Froebel, the District Court reluctantly upheld the Wisconsin Department of Natural Resources' Eleventh Amendment immunity to suit under the Clean Water Act, but applied the Ex parte Young doctrine to state officials. Id. Froebel's Eleventh Amendment analysis is thoughtful, succinct, and respectfully critical of the
This license to violate the law until enjoined by a court is further assisted by the definition of "prospective" relief. A court's power to grant prospective relief under Ex parte Young implies that the state's illegal action must be ongoing, in order to be capable of prospective injunction. As the court noted in Froebel, "this requirement dovetails with a prerequisite for citizen suit jurisdiction under the CWA."\(^\text{346}\) The CWA, like the ESA, provides that an action may be brought "to enjoin any person . . . who is alleged to be in violation of any provision of this [Act]. . . ." In Gwaltney v. Chesapeake Bay Foundation, the Supreme Court held that the CWA does not permit citizen suits for "wholly past" violations.\(^\text{348}\) If the state violates the law, but manages to come into compliance before a petition can be filed, its violation may be viewed as "wholly past."\(^\text{349}\) Although this requirement has not been applied directly to the Endangered Species Act, Ex parte Young's requirement of "prospective" relief may have the effect of applying the requirement to ESA actions against the states.\(^\text{350}\)

One final uncertainty in the application of Ex parte Young is its potential inapplicability when a state forum is available to vindicate federal interests under the Act. In Coeur d'Alene, Justice Kennedy contended that "a most important application of Ex parte Young" occurs

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\(^\text{346}\) Id. at 852.


\(^\text{348}\) 484 U.S. 49, 63 (1987).

\(^\text{349}\) In Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998), the Supreme Court held that there was no federal court jurisdiction over defendant Steel Company's failure to submit the information required by the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 100 Stat. 1755, 42 U.S.C. § 11046(a)(1). During the sixty-day notice prior to filing a citizens' suit complaint, the Steel Company managed to file all of its overdue forms. These forms dated from 1988, when the statute passed, to 1995, when the notice was sent. Id. at 287-88. The Supreme Court found that the violation was "wholly past" and that citizens could not seek penalties for the company's failure to meet statutory deadlines. Although the timely reporting of information for public use was one of the primary purposes of the "Right-to-Know" Act, the Court's decision prevents the public from enforcing this right in any meaningful way.

\(^\text{350}\) On the other hand, although the statutory language at issue is the same in the CWA and the ESA, the concept of a "wholly past violation" may take on a different meaning in the area of species protection. One example could be a situation in which the ESA is violated through the destruction of habitat for a listed species. Even if the action itself is "wholly past," the adverse impacts on species could be ongoing. The possibility of mitigation through habitat renewal or contributions to habitat in other areas may constitute "prospective relief" for this ongoing violation.
when no state forum is available to vindicate federal interests.\textsuperscript{351} When a state forum is available, "there is neither warrant nor necessity to adopt the \textit{Young} device to provide an adequate judicial forum for resolving the dispute."\textsuperscript{352}

Although Justice Kennedy was not writing for the plurality at this point in the decision,\textsuperscript{353} the \textit{Froebel} court raised a similar concern based on an earlier Supreme Court case. \textit{Froebel} noted that \textit{Pennhurst State School & Hospital v. Halderman}\textsuperscript{354} held that "prospective relief enjoining violations of state rather than federal law fell outside the scope of the \textit{Young} exception."\textsuperscript{355} The \textit{Froebel} court then raised the possibility that \textit{Ex parte Young} might not apply to a state's alleged violation of water quality standards under the CWA, which allows states to issue permits and which gives EPA and the states concurrent authority over violations of state-issued permits.\textsuperscript{356} This "federalist allocation of authority," the court noted, complicates the question of whether the alleged violation fell under state law or federal law for purposes of \textit{Pennhurst}.\textsuperscript{357} After defining this issue as "a potentially complicated question that touches on federal supremacy, institutional practice and agency discretion"\textsuperscript{358} and noting that the "effect of \textit{Pennhurst} in this context appears unclear,"\textsuperscript{359} the court found a way to avoid having to reason through these complicated issues. Relying on "other federal courts [that] have entertained citizen actions alleging violations of [the CWA] by state officers without addressing this issue," the court held that \textit{Pennhurst} did not bar the application of \textit{Ex parte Young} to the claim against state officials.\textsuperscript{360}

At first glance, the issue of the availability of a state forum may not appear to apply to the ESA, which grants exclusive enforcement jurisdiction to the federal district courts.\textsuperscript{361} The CWA, however, contains the same exclusive grant of federal jurisdiction.\textsuperscript{362} While the ESA does

\begin{footnotesize}
\begin{enumerate}
\item Id. v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270 (1997).
\item \textit{Id.} at 274.
\item Justice Kennedy was joined only by Chief Justice Rehnquist in this section of the opinion.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item 33 U.S.C. § 1365(a) (1999).
\end{enumerate}
\end{footnotesize}
not include as well-defined a scheme of cooperative federalism as is contained in the CWA, it does allow federal agencies to enter into cooperative agreements "with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species." State authority under cooperative agreements and other provisions of the ESA could evoke the same problems under Ex parte Young that concerned the court in Froebel. The Fifth Circuit's decision in Sierra Club v. City of San Antonio, in which the court abstained from hearing an ESA suit because the state had adopted an aquifer regulatory scheme, shows the real possibility that courts could discount federal enforcement in favor of state law.

For all of these reasons, the Ex parte Young doctrine constitutes a "wholly unreliable means of citizen redress against states." Although Strahan indicates that sympathetic federal courts may apply the doctrine in order to hear enforcement actions against states, other courts—such as the Fifth Circuit—may be able to find ways to preclude federal jurisdiction entirely, even when state officials are named in actions for prospective relief.

2. State Consent/Waiver

Private citizens may sue a state if it has waived its sovereign immunity and consented to suit. The Supreme Court's decision in College Savings Bank overruled the theory of constructive waiver that had supported Palila's holding that the state had waived its sovereign

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363 16 U.S.C. § 1535(C)(1) (1999); see also supra Part II.B.3 (discussing cooperative agreements).
364 112 F.3d 789 (5th Cir. 1997).
365 Sierra Club did not even involve the availability of a state forum for the claim at issue; the court admitted that the state law did not appear to allow citizens' suits. Id. at 794. The mere availability of a state regulatory scheme was sufficient for the court to abstain from exercising federal jurisdiction over a citizen's suit. See supra, text accompanying notes 175-177.
367 "[W]e have not questioned the general proposition that a State may waive its sovereign immunity and consent to suit . . . ." Alden v. Maine, 527 U.S. 706, 737 (1999).
immunity to suit under the ESA. Therefore, state waivers of Eleventh Amendment immunity must be explicit.

Several factors could, conceivably, convince states to waive their sovereign immunity to ESA enforcement. First, pressure from the ESA implementing agencies, FWS and NMFS, could convince states to waive their immunity. States with large-scale listings also might find that environmental and private property interests are not willing to participate in state schemes if they know enforcement will not be available under the ESA. States might waive their sovereign immunity under both of these scenarios in order to avoid a reversion to federal control.

Congress also could include a requirement to waive state sovereign immunity when it disburses funds that support state ESA programs. The Supreme Court has upheld similar uses of Congress’ spending power when four conditions have been met. First, “the exercise of the spending power must be in pursuit of the ‘general welfare.’” Second, conditions on state receipts of federal funds must be unambiguous. Third, “conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’” These conditions should not raise significant barriers, particularly in light of the ESA’s firm grounding in the value of species preservation “to the Nation and its people.”

The fourth condition is that the conditional grant of federal funds must not be barred by other constitutional provisions. If this phrase were interpreted to mean that Congress may not use the spending power to regulate that which it is prohibited from regulating directly, Congress could not condition ESA funding on states’ waiver of sovereign immunity. Under this interpretation, the fact that Congress could not directly abrogate state sovereign immunity would also prevent Congress from using the spending power to require states to waive their sovereign immunity. The Supreme Court directly rejected this interpretation, however, in South Dakota v. Dole, a case that upheld the withholding of federal transportation funds from states that sell alcohol to those younger than twenty-one years of age. The Court held instead that this limitation

371 Id.
372 Id. (citing Massachusetts v. United States, 435 U.S. 444, 461 (1978)).
374 See Dole, 483 U.S. at 208.
on the spending power simply means that the power may not be used to "induce the States to engage in activities that would themselves be unconstitutional."\(^{376}\)

It is not unconstitutional for states to waive their sovereign immunity; in fact, *College Savings Board* reaffirmed that a state's sovereign immunity is "'a personal privilege (that) it may waive at pleasure.'"\(^{377}\) Furthermore, the inducement of federal funds will not be viewed as coercive unless "'pressure turns into compulsion.'"\(^{378}\) Although the Court has not established a clear cutoff between pressure and compulsion, states' acceptance of funding to implement cooperative agreements and other ESA programs would not be likely to qualify as "compulsion." Therefore, it appears that Congress could attach at least part, if not all, of federal ESA funding to a requirement that states waive sovereign immunity.

D. Private Party Suits Involving Non-ESA Claims

1. State Court Actions under State Law

One obvious solution to Eleventh Amendment immunity problems is to bypass federal jurisdiction completely. If a relevant state cause of action exists, private parties may sue in state court, under state law—assuming that the state has waived sovereign immunity in its own courts.\(^{379}\)

Although this may be one solution to the problem of enforcement against states, it is not necessarily an optimal solution. States' respect for species preservation varies; some state resource management agencies, and state legislators, have the reputation of putting economic interests in tourism and resource extraction before species protection.\(^{380}\) These

\(^{376}\) *Id.* at 210.


\(^{378}\) *Dole*, 483 U.S. at 211 (citation omitted).

\(^{379}\) Not all states have waived sovereign immunity to suit. In the area of contract law, for example, where most states view sovereign immunity as an out-of-date barrier to efficient operations, the courts of four states—Texas, Vermont, Arkansas, and Kentucky—"always" uphold sovereign immunity in contract disputes. *See* Gary Taylor, *The Nation's Bastion of Contract Immunity*, NAT'L L.J. May 29, 1995, at A1, A21.

\(^{380}\) See, e.g., John M. Gaffin, *Can We Conserve California's Threatened Fisheries Through Natural Community Conservation Planning?* 27 ENVTL. L. 791, 794 (1997) ("Unfortunately, many natural resource advocates in northern California hold the Resources Agency of California (Resources Agency) in low esteem. Advocates feel that
differences may be reflected in state courts. At a broader level, many litigants prefer to avoid state courts because of the courts’ perceived bias or prejudice in favor of states. As one commentator has noted, “[s]tate judges may have the comfort born of long familiarity with the state’s attorney, they may be unduly deferential to the testimony in favor of state officials, or they may be inclined to be protective of the state treasury.”

Finally, archaic state rules and other peculiarities may afflict state court systems. Commentators have noted, for example, that “[c]oncerned citizens seeking to challenge Oregon state agency decisions must brave the state judicial scheme, which former Chief Justice Patterson of the Oregon Supreme Court has described as ‘inefficient, unpredictable, ineffective, expensive, and unresponsive.’”

The impact of the Eleventh Amendment cases has been described as “revolutioniz[ing] not only the relationship between states and the federal government, but also between states and their citizens.” Part of this revolution may well take place in state courts, which may begin to hear disputes between the states and their citizens that otherwise would have taken place in federal district court. The outcome may be a wide variation in the standard for species protection across the states.

2. Federal Takings Lawsuits Under the Fifth Amendment

Private landowners that claim state agencies have violated contractual obligations under the ESA may evaluate the option of pursuing a “takings” claim against the state pursuant to the Fifth and Fourteenth

for many years, the Resources Agency has persistently failed to meet its responsibility to protect the natural resources of the state.” (citation omitted); Sherry Marie Cote, Note, *The Manatee: Facing Imminent Extinction*, 9 FLA. J. INT’L L. 189, 201 (1994) (“The main problem with the [Florida] State protections afforded to the Florida Manatee . . . is that the legislature is too concerned with the rights of fishermen and recreational boaters to provide comprehensive protection for the Florida Manatee.”). *See generally* Tarlock, *supra* note 19, at 562 (“Our traditional suburban Social Darwinism and the limited geographical scale of local governments create few incentives for them to consider any but the most immediate and short-term external costs of land development. Biodiversity protection, in contrast, requires local governments to restrain land development in specific landscapes . . . .” (citation omitted)).

381 *See* Brant, *supra* note 201, at 771.


383 *See* Brant, *supra* note 381, at 772.
Amendments to the U.S. Constitution. Claims attempting to prove a taking of contractual rights face a familiar hurdle: that of sovereign immunity. The sovereign must unmistakably be shown to have surrendered its immunity before a vested contractual right will be found. As has been noted in another context, “[p]rivate parties may be able to enforce [ESA] implementing agreements by means of a takings claim. This route is fraught with uncertainty, however,” and does not provide an entirely reliable basis on which to ensure that ESA agreements with states can be implemented.

E. Non-Private Party Enforcement: Reliance on Federal Enforcement Against States

There is no question that the federal government may enforce federal legislation against states. In Alden v. Maine, the Supreme Court explained that a suit brought against a state

[B]y those who are entrusted with the constitutional duty to ‘take Care that the Laws be faithfully executed,’ differs in kind from the suit of an individual . . . . Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.

This, then, is the goal of the Supreme Court’s Eleventh Amendment jurisprudence: to reduce the scope of citizens’ suits in favor of federal enforcement, if, when, and to the extent that political factors allow such suits to be brought.

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384 See Lynch v. United States, 292 U.S. 571, 579 (1934) (finding the Fifth Amendment’s protection against taking property without just compensation extends to contracts with the United States).
386 Melious & Thornton, supra note 100, at 540.
387 “We have hitherto found a surrender of immunity against particular litigants in only two contexts: suits by sister States and suits by the United States.” Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991) (citations omitted).
389 See id. at 755-56 (citation omitted) (emphasis added).
In the case of the ESA, federal oversight is the most important means of federal enforcement. The federal government has the authority not to approve state plans and to shape state policies through federal/state partnerships. If states do not live up to their ESA obligations, environmentalists as well as the Supreme Court would probably appreciate it if the federal government acted as the enforcer. The current regulatory system, in which environmentalists frequently are the parties who sue to enforce the ESA, "sets up environmentalists to look like spoilers." Neither reported cases of federal enforcement against the states—none exists—nor the ESA budget provides much support, however, for the notion that citizen enforcement will be replaced by vigorous federal action.

Monetary constraints are not the only important factor that will limit federal enforcement actions against states. Federal agencies are also subject to political constraints, including electoral pressures on Congress and the President, arising from landowners as well as from environmental groups. They are also involved in ongoing relationships with states, and must weigh the possible benefits of any given enforcement action against the possible harm to their long-term role within the state.

Furthermore, even when the federal government decides to bring an action against a state, it is quite likely that the federal interest will not coincide precisely with the interests of private parties. The aftermath to *Idaho v. Coeur d'Alene Tribe* demonstrates this problem clearly. In *Coeur d'Alene*, the Supreme Court barred the tribe's claim to submerged lands in the Lake Coeur d'Alene water system, finding that the state's Eleventh Amendment immunity shielded it from the tribe's claims.

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391 This is typical of enforcement under the ESA in general. See Ruhl, supra note 17, at 598 n.124 ("FWS has seldom prosecuted administrative, civil, or criminal actions solely on the ground of habitat modification; rather, citizen group litigation has been the principal source of case law regarding the scope of the harm definition in that regard.").
392 See supra, note 151. The paucity of funding for ESA programs helps to ensure that federal agencies and states work together, rather than meeting as adversaries. See, e.g., Oregon Exec. Order No. EO 99-01, *The Oregon Plan for Salmon and Watersheds* (Jan. 8, 1999), available at http://www.oregon-plan.org/Eo99-01.htm (noting that ensuring state and local planning are necessary under the ESA because “[t]o date, the FWS and NMFS generally have not had the resources to develop and implement effective recovery plans for fisheries.").
395 Id. at 287-88.
The ruling did not, however, affect a suit brought by the United States Justice Department on behalf of the Department of the Interior, which became involved at the tribe’s request. In pursuing the action, the Justice Department only addressed the tribe’s ownership of the southern third of Lake Coeur d’Alene; the tribe had claimed ownership of the entire lake. The federal government did not pursue the entire claim because it contended that the tribe sold the northern part of its reservation, including the lake, to the federal government.

Federal enforcement of private party complaints under the ESA, like the federal enforcement of the Tribe’s claim, thus may be partial and subservient to the federal interest. If private parties can interest the federal government in an action against a state in the first place, they may find that the ultimate scope of the actions does not address all of their concerns.

F. Avoiding State Immunity: Enforcement Against Local Governments

Local governments may be liable under the ESA both for regulatory actions that constitute an illegal “take” of endangered species and for failing to take action that would prevent an illegal “take” of endangered species. Eleventh Amendment sovereign immunity does not extend to suits brought against a municipal corporation or other governmental entity that is not an “arm of the


398 It is difficult to imagine that the federal government would bring an action on behalf of private property owners under the HCP provisions of the ESA, for example, if no strong federal interest were involved. Even if such an action were pursued, it seems equally unlikely that the federal interest would extend to purely private claims of loss. This could leave landowners without recourse for the very state actions concerning them most: those affecting private property values.

399 Loggerhead Turtle v. County Council of Volusia County, Florida, 148 F.3d 1231 (11th Cir. 1998).

400 United States v. Town of Plymouth, Mass., 6 F. Supp. 2d 81 (D. Mass. 1998). The court granted FWS’ request for a preliminary injunction, finding that the town’s failure to prevent off-road vehicles from driving through the nests and habitat of piping plovers (listed as “threatened” under the ESA) violated the ESA. See id. at 82.
It is likely, therefore, that local governments will bear the brunt of states' Eleventh Amendment sovereign immunity. It will generally be easier to sue local governments under the ESA than to attempt to navigate the shoals of states' Eleventh Amendment immunity. The possibility of actions against local governments will help to fill the gap left by the states' sovereign immunity. If one local government is found liable under the ESA, this determination will undoubtedly have a deterrent effect on other local governments. This option obviously will not address state-specific obligations, however, including contractual obligations taken on by the states through the HCP process. The inability to enforce HCP obligations against states may effectively require that state participation in federal-state conservation

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401 Alden v. Maine, 527 U.S. 706, 756 (1999); see also, e.g., State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194, 199 (1929) (Eleventh Amendment immunizes state agency that was "but the arm or alter ego of the State"). The rationale is that a plaintiff who successfully sued an arm of the state would have a judgment with "the same effect as if it were rendered against the State for the amount specified in the complaint." Smith v. Reeves, 178 U.S. 436, 439 (1900). In contrast, the Court has "consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a slice of state power." Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979).

In determining whether or not an entity is a state entity, the primary factor, reflecting "the Eleventh Amendment's core concern," is "whether any judgment [against the entity] must be satisfied out of the state treasury." Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 51 (1994). The Supreme Court has held that a bi- or multi-state agency, created under the Compact Clause, does not qualify for Eleventh Amendment immunity, "[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose." Lake Country Estates, 440 U.S. at 401; see also Hess, 513 U.S. at 32-33 (Port Authority Trans-Hudson Corporation does not have Eleventh Amendment immunity).

As an example of a circuit court test used to determine whether or not an entity is a state agency, the Ninth Circuit applies the following factors:

- whether a money judgment would be satisfied out of state funds,
- whether the entity performs central governmental functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity.

Mitchell v. Los Angeles Community Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1988), cert. denied, 490 U.S. 1081 (1989). Applying this analysis, the Ninth Circuit has found that the Wyoming Community Development Authority, an entity created by state law to promote affordable housing and economic development, was not an arm of the state for purposes of Eleventh Amendment sovereign immunity. See Durning v. Citibank, N.A., 950 F.2d 1419, 1421 (9th Cir. 1991).
programs be implemented through local and regional authorities rather than through the state itself.

As a result, it may be more difficult to develop comprehensive state conservation schemes for wide-ranging species, such as West Coast salmon species, because the enforceability of the states’ commitments to implement conservation measures may be suspect. Private landowners and local governments may be reluctant to agree to make commitments to habitat conservation if they conclude state agencies are effectively immune from enforcement of the obligations to which they commit; the environmental community may be less likely to endorse innovative state conservation commitments as an alternative to federal regulatory approaches if there are significant questions about the enforceability of the states’ commitments.

In order to avoid these potential problems, the federal ESA implementing agencies can help to provide non-federal parties with assurances that state obligations will be met. In particular, the regulatory reach of the ESA allows the federal ESA implementing agencies effectively to impose a statewide conservation scheme as a condition to receiving relief from the Section 9 prohibition against “take.” For example, while the state of California played a critical role in the initiation and implementation of the state Natural Community Conservation Plan, FWS ensured a consistent range-wide conservation program for the threatened California gnatcatcher through its 4(d) rule. Such continuing federal oversight can provide important assurances to non-federal parties of the enforceability of state activities.

G. Potential Standing Issues

If states are not included in ESA litigation, some plaintiffs may face standing challenges. To satisfy standing requirements, plaintiffs must show that their injury is “fairly traceable” to the actions of the defendant and that the injury will likely be redressed by a favorable decision. In Loggerhead Turtle v. County Council of Volusia County, Florida, the county challenged the plaintiffs’ standing on both “fairly traceable” and redressability grounds. The “fairly traceable” element

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404 148 F.3d 1231 (11th Cir. 1998).
focuses on the line of causation between the illegal conduct and injury, and "[t]he causal link may become ‘too attenuated’ if the injury is ‘the result of the independent action of some third party not before the court." The county claimed that, in incorporated areas, municipalities within the county had regulatory authority over the beachfront lighting that was alleged to "take" endangered turtles. Therefore, the county contended, the line of causation went to the municipalities, not to the county. Furthermore, if these municipalities were not included in the action, plaintiffs' injury could not be redressed.

The Eleventh Circuit rejected this argument. It cited the terms of the county charter, which provided that the county "shall" establish minimum standards for the protection of the environment, applicable within both incorporated and unincorporated areas of the county. Municipalities could establish more restrictive, but not less restrictive, ordinances. The court also noted that the county had, in fact, adopted a county-wide ordinance governing beach lighting. The court concluded that the county's overall regulatory authority established a sufficient causal link. The fact that the municipalities had the authority to enact more onerous lighting standards did not "sever the ‘fairly traceable’ connection between Volusia County’s regulatory actions and the Turtles’ alleged ‘harm.’"

This argument could play out in reverse if a private party sued local governments, but not the state, for harm to a species subject to state programs under the ESA. Local governments might contend that they were merely complying with state law, and that any harm under the ESA was "fairly traceable" to the state. This would not be a particularly strong argument in states that allowed local governments to adopt more stringent regulation; unlike the situation in Loggerhead Turtle, local governments' ability to regulate more stringently would be relevant to their direct liability under the ESA. In areas of the country that are less sympathetic to the ESA, however, courts could seize this opportunity to avoid compelling local governments to take unpopular actions to implement an unpopular law.

405 Id. at 1247 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).
406 Id. at 1247-48.
407 Id. at 1248.
408 Id. at 1249.
VI. CONCLUSION

Much of the innovation that has occurred under the ESA in the last decade has resulted from state programs, including the California Natural Community Conservation Program, the Oregon Salmon Initiative, and other state-initiated habitat conservation programs. It will certainly be ironic if the Supreme Court's expansive view of state sovereign immunity under the Eleventh Amendment has a chilling effect on these experiments in providing an alternative to federal regulation.

Although intended to protect states from the "indignity" of private enforcement, Eleventh Amendment sovereign immunity could instead lead non-federal parties to view state species protection measures with suspicion.\(^409\) With *Palila*'s reasoning and holding on state sovereign immunity effectively overruled, the states' obligations under the ESA will only be fully enforceable if the federal government decides to enforce, a decision that will be strongly affected by politics and budgetary constraints. For non-federal parties, only prospective equitable relief is likely to be available in federal court. State court relief may be available—if state law provides for citizens' suits, if the state has waived its sovereign immunity, if the suit is not removed to federal court, and if the state scheme provides for appropriate relief.

As a result of Eleventh Amendment constraints, non-federal ESA enforcement actions are likely to focus on the activities of local governments, rather than states. In areas where local and regional interests are bitterly opposed to the ESA, this could lead to significant conflicts—conflicts that the states may be in a position to defuse. The spectre of enforcement against local agencies may encourage states to act as brokers between the federal government and local governments, establishing innovative programs and approaches to help local governments comply with the ESA under the regulatory control and supervision of the federal agencies. This would allow the states to

\(^409\) Justice Breyer has noted this problem, in more general terms:

[The Court's state sovereign immunity] rules will inhibit the creation of innovative legal regimes, say, incentive-based or decentralized regulatory systems, that deliberately take account of local differences by assigning roles, powers, or responsibility, not just to federal administrators, but to citizens, at least if such a regime must incorporate a private remedy against a State (e.g., a State as water polluter) to work effectively.

continue to act as laboratories for ESA experimentation and to infuse the experience and expertise of state regulatory agencies into ESA compliance.

The effect of the Eleventh Amendment on the ESA thus need not be entirely negative. It does not exclude the possibility of an important state role in ESA implementation. This approach would not, however, resolve the problem of the enforceability of strictly state actions that fall within the purview of the ESA. Even if local governments are likely surrogates for some ESA enforcement actions, non-federal parties simply may not be able to enforce ESA requirements relating to state actions such as state timber harvests, state land disposal and development, and hunting regulation.

This leads to the central paradox of the Court’s recent Eleventh Amendment cases: that these “states’ rights decision[s] that purport[] to decentralize power would shift enforcement from private individuals to more centralized Federal bureaucracies.”410 State sovereign immunity increases the significance of enforcement by the federal ESA agencies, not the role of local citizens. Private attorneys general may (or may not) be replaced by public attorneys general; local goals of the nongovernmental sector may be supplanted by the exigencies of the federal bureaucracy. As Justice Breyer observed in his dissent to College Savings Bank, “Federalism matters to ordinary citizens seeking to maintain a degree of control, a sense of community, in an increasingly interrelated and complex world.”411 The Supreme Court’s misplaced sense of charity to states is likely to diminish, rather than increase, communities’ control over the interrelated and complex issues of species preservation.

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