THE ORIGINAL ROLE OF THE STATES IN THE ENDANGERED SPECIES ACT

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I. INTRODUCTION

Congress enacted the Endangered Species Act (ESA) in 1973 with overwhelming bipartisan support and remarkably little fanfare.[1] Everyone agreed that the two previous federal efforts to solve

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1. *See* Shannon Petersen, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 464, 483 (1999) (reporting that "most people

the problem were inadequate, even though they had just been enacted in 1966 and 1969.[2] There were only two questions that needed to be answered: what to do about endangered plants, and what to do about states.[3] Plants proved to be not much of a problem,[4] but the role of states remains unsettled and contested today.[5]

Historically, states were responsible for the wildlife within their borders.[6] The enactment of the ESA changed that.[7] Now more than 1,200 animals are protected by federal law,[8] and their protection has displaced state management regimes. The ESA has come to rely on federal authority to an even greater extent than contemporary federal environmental statutes such as the Clean Air Act and the Clean Water Act, which are often heralded as models of cooperative federalism.[9]

And that has provoked a push back. Many states, especially western states, object to the federal control that the ESA exerts over them. That control takes two basic forms: regulation of wildlife and regulation of land use.Wolves are an example of federal regulation of wildlife that is opposed by many states.[10] Idaho

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in and outside of Congress thought the Act was relatively insignificant" and that "the press barely even mentioned the ESA's enactment").

2. *Id.* at 473.

3. *See* CONGRESSIONAL RESEARCH SERVICE, A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980 145 (1982) [hereinafter ESA LEGISLATIVE HISTORY].

4. *See id.* at 147–48 (describing the concerns about endangered plants).

5. *See generally* Jeffrey J. Rachlinski, Protecting Endangered Species without Regulating Private Landowners: The Case of Endangered Plants, CORNELL JOURNAL OF LAW AND PUBLIC POLICY (1998), http://scholarship.law.cornell.edu/cjlpp/vol8/iss1/1.

6. *See generally* Esa Legislative History.

7. *Id.*

8. *Endangered Species Act by the Numbers*, NATIONAL WILDLIFE FEDERATION, https://ecos.fws.gov/ecp0/reports/box-score-report (last visited May 3, 2017).

9. *See infra* note 119.

10. See IDAHO LEGISLATIVE WOLF OVERSIGHT COMM., IDAHO WOLF CONSERVATION AND MGMT. PLAN (Mar. 2002).

doesn't want too many wolves, but the United States does.[11] Most ESA disputes, though, involve state complaints about federal land use regulation. Idaho is happy to share its land with the sage grouse, so long as the sage grouse does not interfere with how the locals want to use the land.[12]

The ESA has long been subject to contrasting perceptions as a remarkable success, a dismal failure, or something between.[13] Many westerners believe that the law needs to be improved. It "is like a 40- year-old ranch pickup: it once served a useful purpose, but it is in bad need of repair."[14] The only question for them is whether the ESA needs to be revised, or instead to be repealed and replaced.[15]

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11. *Id.*

12. *See* Executive Dep't of the State of Idaho, Exec. Order No. 2012-02, Establishing the Governor's Sage-Grouse Task Force (Mar. 9, 2012), https://fishandgame.idaho.gov/public/wildlife/SGtaskForce/execOrder.pdf.

13 *Compare Briefing on Improving the Endangered Species Act: Perspectives from the Fish and Wildlife Service and State Governors: Hearing Before the Subcomm. on Fisheries, Water, and Wildlife of the H. Comm. on Env. and Pub. Works*, 114th Cong. 6–7 (2015) [hereinafter *Briefing on Improving the ESA*] (statement of Dan Ashe, Director, U.S. Fish & Wildlife Service) (characterizing the ESA as "among the Nation's and the world's most aspirational, important, and successful environmental laws") *with id.* at 36 (statement of Wyoming Governor Mead) (insisting that "the ESA is broken"). *See generally* John Copeland Nagle, *The Effectiveness of Biodiversity Law*, 24 J. LAND USE & ENVTL. L. 203 (2009) (analyzing the conflicting claims from the perspective of the ESA's stated purposes).

14 *Briefing on Improving the ESA, supra* note 1313, at 3 (statement of Sen. Steve Daines); *see also Briefing on Improving the ESA*, *supra* note 1313, at 4–6 (statement of Sen. Sullivan) (observing that the ESA "hasn't been modernized or comprehensively updated since 1988," which "is a long time for a statute of this importance").

15. *Compare H.R. 4315, "21st Century Endangered Species Transparency Act"; H.R. 4316, "Endangered Species Recovery Transparency Act"; H.R. 4317, "State, Tribal, and Local Species Transparency and Recovery Act"; and H.R. 4318, "Endangered Species Litigation Reasonableness Act": Hearing Before the H. Comm. on Natural Resources*, 113th Cong. 6 (2014) (statement of Rep. Hastings of Washington) (advising that "it has never been my intent to introduce a sweeping overhaul of the Endangered Species Act. I don't believe that is the best way to go forward. Instead, the focus needs to be on thoughtful, sensible, and targeted proposals") *with* Corbin Hiar, *Endangered Species: Rep. Bishop aims to repeal landmark conservation law*, E&E DAILY NEWS (Dec. 9, 2016), http://www.eenews.net/stories/1060046928 (quoting Representative Bishop's statement that "I'm not sure if there's a way of actually reforming the Endangered Species Act or if you simply have to start over again," and adding that "Repeal

This article argues that we simply need to recover the original vision of the state role in the ESA. The Congress that enacted the ESA in 1973 expected that states would play a lead in conservation efforts because the states already had substantially more wildlife management expertise than the federal government. The federal role, as the Department of the Interior testified at the time, was "an overseeing operation" to ensure that states were fulfilling the purposes of the law.[16] Perhaps more than anything else, the Congress that enacted the ESA sought to avoid jurisdictional infighting[17] – but that is precisely what has happened in too many instances.

A revived state role has numerous advantages. Cooperative federalism is the norm in federal environmental statutes, and it is conspicuous by its absence in the ESA State environmental regulation, which has become quite attractive to many environmentalists at the onset of the Trump Administration. The Western Governors Association (WGA) has prioritized reforming the ESA in order to better achieve the statute's goals while better respecting state authorities and interests. The theoretical justification has been there all along. The doctrine of subsidiarity, which emerged from Catholic social thought and now plays a key role in the governance of the European Union, seeks to empower local and state authorities but is willing to rely on federal power if the states prove to be inadequate.[18] This Article thus proposes to return to the orig-

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it and replace it" is his preferred approach); *see also* Press Release, Center for Biological Diversity, Rep. Bishop's True Intentions Revealed: Invalidate Endangered Species Act (Dec. 8, 2016), https://www.biologicaldiversity.org/news/press_releases/2016/rob-bishop-12-08-2016.html (accusing Representative Bishop of wanting "to get rid of the Act completely").

16. *Endangered Species: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93rd Cong. 211 (1973) [hereinafter *1973 House ESA Hearing*] (statement of Nathaniel Reed, Assistant Secretery for Fish and Wildlief and Parks, Department of the Interior) (expressing the hope that "each of the States will pass a program which will be acceptable to us, and our job will be looking over their shoulder. It will be a very friendly look over the shoulder . . . .").

17. *Endangered Species Act of 1973: Hearings Before the Subcomm. on Environment of the S. Comm. on Commerce*, 93rd Cong. 75 (1973) [hereinafter *1973 Senate ESA Hearings*] (statement of Sen. Ted Stevens) (stating that "I don't want to get into the position where we are getting in to such a cloudy relationship between the State fish and game people and [the federal officials] that we will be in a constant battle").

18. *See infra* note 121.

inal understanding of the state role in the ESA by further empowering state conservation efforts to avoid ESA listings, by resurrecting the cooperative agreements that Congress expected to play a major role in the implementation of the act, and by promoting additional funding and assistance to state wildlife managers who are seeking to achieve the goals of the ESA.

II. THE HISTORY OF THE STATE ROLE IN THE ESA

A. Before 1973

Concerns about extinction are relatively recent. Thomas Jefferson, attuned to the scientific advances of his age, nonetheless believed that it was impossible for any type of animal to go extinct.[19] Indeed, one of Jefferson's reasons for supporting the Lewis and Clark Expedition was to discover where the mastodons and other prehistoric animals still roamed the Earth.[20] The reality of extinction took hold as passenger pigeons, the heath hen, etc., disappeared by the beginning of the twentieth century, and buffalo almost joined them.[21] Several states tried to save those animals, but their efforts were too little and too late.[22]

States retained their traditional authority over wildlife throughout the nineteenth and much of the twentieth century. As the Supreme Court explained in 1896, states have the "undoubted authority to control the taking and use of that which belonged to no one in particular but was common to all."[23] Of course, prior to

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19. See THOMAS JEFFERSON, NOTES ON VIRGINIA (1783), *reprinted in* THE WRITINGS OF THOMAS JEFFERSON: 1781-1784 144 (Paul Leicester Ford ed., 1783) (stating that "[s]uch is the oeconomy of nature, that no instance can be produced of her having permitted any one race of her animals to become extinct; of her having formed any link in her great work so weak as to be broken").

20. *See* MARK V. BARROW, JR., NATURE'S GHOSTS: CONFRONTING EXTINCTION FROM THE AGE OF JEFFERSON TO THE AGE OF ECOLOGY (2009).

21. *See generally* CHRISTOPHER COKINOS, HOPE IS THE THING WITH FEATHERS: A PERSONAL CHRONICAL OF VANISHED BIRDS (2009) (telling the story of the disappearance of the Carolina parakeet, the ivory-billed woodpecker, the heath hen, the passenger pigeon, the laborador duck, and the great auk).

22. *See id.* (recounting unsuccessful conservation efforts).

23. Geer v. Connecticut, 161 U.S. 519, 523 (1896).

the New Deal, states were viewed as sovereign over many other areas which we have now become accustomed to view as federal issues. But the state control over wildlife, like the state control over land use, endured far longer and continues to endure today. Those state actions included efforts to prevent species within their borders from going extinct.[24]

Federal wildlife protection was episodic. In 1874, Congress passed a bill that would have banned the killing of buffalo in federal territories, but President Grant pocket-vetoed it.[25] The Lacey Act of 1900 was the first general federal wildlife law, but even it relied on state law to determine which interstate commerce in animals was prohibited.[26] The most significant federal wildlife management occurred on federal lands, including prohibitions on hunting in national parks and the establishment of national wildlife refuges.[27]

An increasing concern about the environment and the increased expansion of federal power combined to produce the Endangered Species Preservation Act of 1966.[28] That statute called for a list of endangered species, it directed federal agencies to protect threatened species "where practicable," it created and authorized funding for the National Wildlife Refuge System, and it prohibited the "taking" of species within a refuge.[29] The 1966 law did not, however, regulate private actions that threatened a species outside national wildlife refuge, and it not apply at all endangered invertebrates, plants, or subspecies.[30] Three years later, Congress

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24. *See 1973 Senate ESA Hearing*, *supra* note 17, at 111 (testimony of Dr. Laurence R. Jahn, President, Wildlife Management Institute) (stating "that the history of American wildlife restoration has been one of rescuing many species from extinction" and that state agencies "have been involved in such work from the very beginning").

25. *See* 43 Cong. Rec. H2106–08 (daily ed. Mar. 10, 1874); Petersen, *supra* note 1, at 468.

26. *See* 16 U.S.C.A. § 3372 (2012).

27. *See* Petersen, *supra* note 1, at 467–71 (describing federal efforts to manage wildlife prior to the ESA).

28. Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed 1973).

29. *Id.*

30. *Id.*

expanded protections by enacting the Endangered Species Conservation Act of 1969.[31] The new law banned the importation of anything made from a species endangered elsewhere in the world, included invertebrates, and called for an international convention to prevent extinctions.[32]

B. 1973

1. The legislative history of the 1973 ESA

President Nixon declared the 1969 law inadequate almost as soon as it was passed.[33] Congress held multiple hearings before it passed the law that became the ESA in 1973.[34] As noted above, the proper role of the states was the dominant concern during those discussions.[35]

Generally, and surprisingly from a twenty-first century perspective, the authors of the ESA agreed that states were far better equipped to manage wildlife than the federal government.[36] Most states had much more developed wildlife programs. Collectively, the states had orders of magnitude more enforcement agents than

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31. Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed 1973).

32. *See* Petersen, *supra* note 1, at 471–72 (summarizing the 1966 and 1969 acts); George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 ND L. REV. 315, 317–18 (1975) (same).

33. *See* Richard Nixon, *Statement on Transmitting a Special Message to the Congress Outlining the 1972 Environmental Program*, THE AMERICAN PRESIDENCY PROJECT (Feb. 8, 1972), http://www.presidency.ucsb.edu/ws/?pid=3731 (asserting that "even the most recent act to protect endangered species, which dates only from 1969, simply does not provide the kind of management tools need to act early enough to save a vanishing species").

34. *See generally* ESA LEGISLATIVE HISTORY, *supra* note 3.

35. *Id.*

36. *See id.* at 146 (concluding that "the states are far better equipped to handle the problems of day-to-day management and enforcement of laws and regulations for the protection of endangered species than is the Federal government"); *id.* at 199–200 (advising that "the greater bulk of the enforcement capability concerning endangered species lies in the hands of the State fish and game agencies, not the Federal Government").

the federal government.[37] As one person put it, the federal government was "dreadfully undermanned."[38] The authors of the ESA thus repeatedly emphasized that they were not displacing state biological expertise.[39] A U.S. Department official promised Congress that "the Federal Government recognizes that it has neither the inclination nor the wherewithal to accomplish endangered species management programs in every one of the 50 states."[40]

Numerous states boasted about their wildlife programs. A Minnesota official described how his state "had a real sincere concern for the timber wolf at that time when the wolf was still considered as a varmint species."[41] Alaska Governor William Egan proclaimed that his state "has done more over a long period of time to adequately protect and management our wildlife resources than any of the other 50 states."[42] New York's Assistant Attorney General asked Congress to ensure that the state could continue to enforce its Mason Act, which provided broader protections than the proposed
ESA.[43]

At the same time, Congress believed that states alone were inadequate. Congress was aware that not all states are equally

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37. *See id.* at 369 (reporting that the State of Michigan had 200 full-time and 200 part-time conservation employees while there were only two federal enforcement officials in Michigan); *1973 Senate ESA Hearings*, *supra* note 17, at 52 (statement of Sen. Stevens) (asserting that Alaska has "more than 20 times the number of State enforcement officers than Federal officers").

38. *1973 Senate ESA Hearings*, *supra* note 17, at 130 (testimony of Cynthia Wilson, Washington Representative, National Audubon Soc'y).

39. *Id.* at 65 (testimony of E.U. Curtis Bohlen, Deputy Ass't Sec'y of the Interior for Fish, Wildlife, and Parks).

40. *Id.* at 53 (testimony of Douglas P. Wheeler, Deputy Assistant Sec'y for Fish, Wildlife, and Parks). *Accord 1973 House ESA Hearing*, *supra* note 16, at 242 (insisting that "[t]he Federal Government cannot successfully carry out wildlife conservation programs extending into every nook and cranny of the United States").

41. *1973 House ESA Hearing*, *supra* note 16, at 321 (testimony of Mike Casey, Director, Minnesota Dep't of Natural Resources).

42. *1973 Senate ESA Hearings*, *supra* note 17, at 150 (letter from Gov. Egan).

43. *See 1973 House ESA hearing*, supra note 16, at 351–62 (testimony of New York Assistant Attorney General James P. Corcoran).

competent with respect to their wildlife management programs.[44] One environmental official asserted that "at least one-third of the State agencies have become commercial bureaucracies solely interested in selling hunting licenses."[45] There were mixed opinions about whether states would embrace, resist, or accept the act.[46] Federal authority was needed to resist local political pressures.[47] A federal role was also necessary because of wildlife that crosses state or international lines.[48] Finally, there was a national interest in preventing extinction, which called for a national policy to protect endangered species.[49] A federal floor for protection was necessary.[50]

Much of the congressional debate sought to strike the right balance between federal and state management. Some wanted

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44. *1973 Senate ESA Hearings*, *supra* note 17, at 132 (testimony of Mr. Kaufmann) (observing that "[s]ome States have been doing a fine job, while some States have been doing a poor one," while there is "a whole spectrum in between").

45. *1973 House ESA Hearing*, *supra* note 16, at 302 (testimony of Tom Garrett, Wildlife Director, Friends of the Earth). Taken aback, Representative Breaux responded, "That is a very strong statement." *Id.* (statement of Rep. Breaux)

46. *Compare id.* at 211 (testimony of Assistant Secretary Reed) (stating "I am very optimistic that the 50 states are going to very swiftly . . . pass laws giving them the authority they need") *with id.* at 327 (testimony of Mike Casey) (surmising that "perhaps each individual State will probably have its problems convincing people or selling people on some of their programs because certainly people look differently on these things, unfortunately").

47. *See* ESA LEGISLATIVE HISTORY, *supra* note 3, at 359 (justifying federal authority as necessary "to insure that local political pressures do not lead to the destruction of a vital national asset").

48. *See 1973 Senate ESA Hearings*, *supra* note 17, at 130 (testimony of Robert Hughes, Sierra Club Nat'l Comm.); *1973 House ESA Hearing*, *supra* note 16, at 205 (testimony of Nathaniel P. Reed, Ass't Sec'y of the Interior for Fish and Wildlife and Parks).

49. See ESA LEGISLATIVE HISTORY, *supra* note 3, at 194; *1973 House ESA Hearing*, *supra* note 24, at 248 (testimony of Cynthia E. Wilson, Washington Representative, National Audubon Soc'y) (describing "the nationwide interest in endangered species. No matter where a particular endangered species resides, its fate is of concern to citizens all around the country").

50. ESA LEGISLATIVE HISTORY, *supra* note 3, at 194.

states to be "treated as equal partners."[51] The supporters of the proposed legislation insisted that they did not intend to usurp state management authority.[52] The recent experience with the Marine Mammal Protection Act, which preempted state law, explained why the ESA "provides for a larger role for the States and why there has been less opposition to it."[53] Numerous supporters agreed that states would be allowed to regulate their wildlife more stringently than the federal government if they chose to do so.[54] Yet state authority was limited. The federal government could regulate endangered species even though wildlife management was "an area heretofore reserved by the States."[55] The idea was "to alert all states to a matter of public concern and to give them an opportunity to respond if they have not already done so."[56]

The solution was to have the federal government oversee the state wildlife management programs to ensure that they satisfied the national standards and goals. The federal role was essential. But states were then expected to play a leading role in implementing the law.[57] The ESA would rely on existing state programs to manage wildlife in a manner that prevented extinction[58] Thus states that already possessed adequate programs would not be affected by the ESA.[59]

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51. *1973 House ESA Hearing*, *supra* note 24, at 380 (letter from Alaska Dep't of Fish & Game Commissioner James W. Brooks to Sen. Gravel, Apr. 17, 1973).

52. *Id.* at 205, 211 (testimony of Ass't Sec'y Reed); *see also id.* at 377 (letter from Seymour H. Levy, President, Tucson Wildlife Unlimited, Inc., to Rep. Dingell, Mar. 7, 1973) (decrying the proposed legislation as "thinly veiled attempts by the Federal Government to continue in its seemingly never ending usurpation of states' authority over resident wildlife species").

53. ESA LEGISLATIVE HISTORY, *supra* note 3, at 369 (statement of Sen. Stevens).

54. *See id.* at 2, 146, 194, 199.

55. *1973 Senate ESA Hearings*, *supra* note 17, at 52 (testimony of Deputy Ass't Sec'y Wheeler).

56. *Id.* at 110 (statement of Dr. Laurence R. Jahn, President, Wildlife Management Institute).

57. ESA LEGISLATIVE HISTORY, *supra* note 3, at 200.

58. *Id.* at 303.

59. *1973 Senate ESA Hearings*, *supra* note 17, at 57.

That general understanding of the federal-state relationship yielded three specific policies. First, the federal government would possess the authority to decide whether or not to list a species under the act.[60] To be sure, some state officials had opposed allowing the federal government to list species "without the concurrence of the affected States," characterizing such an arrangement as "an infringement on State's rights to properly manage and protect resident wildlife species."[61] But the supporters of the law were emphatic that states would not possess a veto over listing decisions.[62]

Then, once a species was listed, the federal government would enter a cooperative agreement with the state for the management of the species.[63] As the House committee report explained, "[t]he subject of cooperative agreements was discussed extensively within the Committee and with other knowledgeable people."[64] The director of the National Wildlife Refuge testified "that cooperative joint Federal-States efforts are needed to insure the most effective effort to manage endangered species."[65] The result would be that the law would begin by giving authority to the federal government, then the federal government could delegate that authority back to any states that wanted to manage the program themselves.[66]

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60. *See 1973 House ESA Hearing*, *supra* note 16, at 325 (testimony of Mike Casey).

61. *Id.* (testimony of Mike Casey).

62. *See* ESA LEGISLATIVE HISTORY, *supra* note 3, at 146, 477; *1973 House ESA Hearing*, *supra* note 16, at 302–03 (testimony of Garrett).

63. ESA LEGISLATIVE HISTORY, *supra* note 3, at 146.

64. *Id.*

65. *1973 House ESA Hearings*, *supra* note 16, at 292 (testimony of Louis S. Clapper, Director of Conservation, National Wildlife Federation).

66. *See id.* at 248 (testimony of Cynthia Wilson) (explaining that it would be preferable to initially have the Government have final authority over taking and on a finding that the State is doing an adequate job, the state should manage it); *id.* at 244 (testimony of Gene Gazlay) (acknowledging that the federal government should retain authority "[i]f a species is truly endangered and the State is unwilling or unable to take the necessary action to counter this threat"); *id.* at 292–93 (testimony of Louis S. Clapper, Director of Conservation, National Wildlife Federation) (recommending "[t]hat the State agencies be given an opportunity to pre-

Next, the federal government would help fund the states. Federal financial assistance was necessary precisely because the role of the states was so significant.[67] Moreover, federal funding was needed because of the historic limitations on state funding for wildlife programs.[68]

The discussions culminating in the ESA in 1973 shared another feature. They understood the importance of habitat protection in saving endangered species, but they expected habitat protection to be accomplished by federal acquisition of sensitive lands. As the committee report put it, protection of habitat was critical, so land acquisition was authorized.[69] But the framers of the ESA also understood that there were practical limits on acquiring all of the habitat that would be needed to preserve endangered species. That could not be done without dismantling our own civilization.[70] The importance of habitat prompted numerous advocates to urge Congress to prohibit habitat destruction as part of the law's regulation of private conduct.[71] But Congress declined. The inevitable – and I would argue, correct – conclusion is that the 1973 Congress did not see the ESA as regulating land use.[72]

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pare and manage recovery plans, and retain jurisdiction over resident species. And such authority shall remain with the States until such time that the State regulatory agency declares its inability or willingness to fulfill the necessary obligations").

67. *See* ESA LEGISLATIVE HISTORY, *supra* note 3, at 147, 194–95; *1973 Senate ESA Hearings*, *supra* note 17, at 131 (testimony of Cynthia Wilson).

68. *See 1973 House ESA Hearings*, *supra* note 16, at 242 (testimony of Gazlay) (explaining that state wildlife agencies had traditionally relied on license fees and excise taxes rather than general tax revenues, and recommending "that this legislation provide Federal assistance to be matched by State general fund moneys in order to carry out recovery programs for endangered species").

69. ESA LEGISLATIVE HISTORY, *supra* note 3, at 148.

70. *Id.* at 144.

71. *1973 House ESA Hearings*, *supra* note 16, at 287; *1973 Senate ESA Hearings*, *supra* note 17, at 86, 104, 108.

72. *See* Petersen, *supra* note 1, at 481–82 (concluding that "no one in Congress contemplated that the prohibition against taking a listed species might lead to the regulation of land use activities on private property"). And yet I agree that *Sweet Home* was correctly decided. In *Sweet Home*, the Court upheld a FWS regulation that included certain habitat destruction within the "take" of a listed species prohibited by section 9 of the ESA. It did so in part because Congress amended the law in 1982 to authorize the "incidental take" of species as a result of habitat destruction, a provision that is nonsensical if actions affecting habitat

It has often been suggested that states and others were blindsided by the application of the ESA to the host of obscure species that now fill the list.[73] The red knot, the black pine snake, and the Florida bristle fern are among the most recently listed species.[74] None of them were mentioned during the debates preceding the enactment of the ESA, and none of which are likely to be familiar to any but the most committed wildlife aficionados today.[75] By contrast, the authors of the ESA were said to be thinking about such "charismatic megafauna" as the bald eagle, whooping crane, and grizzly bear.[76] But Congress was aware that its handiwork would encompass less familiar species. It discussed mollusks,[77] and it considered the plight of the Utah prairie dog.[78] No one could conceive what would be listed in 40 years.[79] And a glance of the original group of species listed in 1966 included the Tule white-fronted goose, the Texas blind salamander, and the Commanche Springs

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were not already covered within the prohibition on "take." Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 714 (1995). In other words, while the regulation may have been an improper of the 1973 version of the ESA, it was authorized by the 1982 amendments. Or, in Justice Scalia's words, it was not until 1982 that Congress agreed that land could be "conscripted to national zoological use." *Id.* (Scalia, J., dissenting).

73. *See* Petersen, *supra* note 1, at 467.

74. *See* U.S. FISH & WILDLIFE SERV., SPECIES LISTED DURING CALENDAR YEAR 2015 (2015), https://ecos.fws.gov/ecp0/reports/species-listings-by-year-report?year=2015.

75. *See id.*

76. Petersen, *supra* note 1, at 479–80.

77. *1973 House ESA Hearings*, *supra* note 16, at 207.

78. *1973 House ESA Hearings*, *supra* note 30, at 303. The Utah prairie dog now features in a challenge of the constitutionality of the application of the ESA to species that live in only one state and that otherwise don't affect interstate commerce. *See* People for the Ethical Treatment of Prop. Owners v. U.S. Fish and Wildife Serv., 57 F.Supp.3d 1337, 1339 (D. Utah 2014), rev'd and remanded sub nom., People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 852 F.3d 990 (10th Cir. 2017); *see generally* John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998).

79. *1973 Senate ESA Hearings*, *supra* note 22, at 142.

pupfish.[80] States and others were thus on notice that the ESA would impose more than a prohibition on shooting grizzly bears.

The statute that emerged from these discussions gained overwhelming approval. The Senate approved it 92-0,[81] the House 355-4. [82] President Nixon signed the law, which he praised as "provid[ing] the Federal Government with the needed authority to protect an irreplaceable part of our national heritage – threatened wildlife."[83]

2. The provisions of the ESA

The statute that emerged from these discussions reflected the important role of states. Like the Clean Air Act and the Clean Water Act before it, the ESA "assumed for the federal government the role of primary standard-setter and overseer of state enforcement[.]"[84] The role of the states appears throughout the text of the act. One of the ESA's purposes is:

> encouraging the [s]tates and other interested parties, through [f]ederal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the [n]ation's international commitments and to better safeguarding, for the benefit of all citizens, the [n]ation's heritage in fish, wildlife, and plants.[85]

The statute also declares the congressional policy "that Federal agencies shall cooperate with [s]tate and local agencies to resolve

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80. U.S. FISH AND WILDLIFE SERV., FIRST SPECIES LISTED AS ENDANGERED, https://www.fws.gov/endangered/species/faq-first-species-listed.html (last visited Apr. 15, 2017).

81. *See* ESA LEGISLATIVE HISTORY, *supra* note 3, at 410. *See also* Petersen, *supra* note 1, at 476 (reporting the vote on the conference committee's handiwork, and noting that none of the four House members who opposed the bill explained their reasons for doing so).

82. *Id.* at 483.

83. *Id.* at 487.

84. Coggins, *supra* note 32, at 320.

85. Endangered Species Act of 1973 § 2(a)(5), 16 U.S.C.A. §1531 (West 2012). The recognition that state programs are "key" to saving endangered species was a new finding that had not appeared in the 1966 or 1969 versions of the law. *See* Coggins, *supra* note 32, at 321.

water resource issues in concert with conservation of endangered species."[86] The substantive provisions of the ESA seek to operationalize those policies.

Section 4 of the law contains five criteria that the FWS must consider when deciding whether or not a species is endangered or threatened.[87] Four of those criteria focus on the threats to the species.[88] The other criteria examine "the inadequacy of existing regulatory mechanisms."[89] The extensive discussions of state wildlife management programs suggest that Congress expected that often existing state regulatory mechanisms would be adequate. A species would need to be listed only if they weren't. Moreover, section 4 specifies that listing decisions shall be made:

> after taking into account those efforts, if any, being made by any [s]tate or foreign nation, or any political subdivision of a [s]tate or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction.[90]

Again, Congress recognized that states would be acting to protect wildlife habitat, in addition to prohibiting hunting or collecting rare animals.

Section 6 is entitled "cooperation with states."[91] Congress expected it to be the most important provision of the act.[92] Section 6

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86. Endangered Species Act of 1973 § 2(c)(2), 16 U.S.C.A. §1531 (West 2012).

87. Endangered Species Act of 1973 § 4(a)(1)(D), 16 U.S.C.A. §1533 (West 2012).

88. *See id.*

89. *Id.*

90. *Id.* at § 4(b)(1)(A).

91. Endangered Species Act of 1973 § 6, 16 U.S.C.A. §1535 (West 2012).

92. *See* ESA LEGISLATIVE HISTORY, *supra* note 3, at 359 (statement of Sen. Tunney) (describing section 6 as "perhaps the most important section" of the act); *id.* at 362 (statement of Sen. Stevens) (characterizing section as the major backbone of the act). *See generally* KAUSH ARHA & BARTON H. THOMPSON JR., THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT 89–93 (Routledge 2011) (reviewing the legislative history of section 6).

begins with a general requirement that the federal government "shall cooperate to the maximum extent practicable with the States" in implementing the ESA.[93] The section then details what that cooperation should look like. It authorizes "management agreements," which are "agreements with any [s]tate for the administration and management of any area established for the conservation of endangered species or threatened species."[94] More importantly, it authorizes "cooperative agreements," which can be made "with any [s]tate, which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species."[95] The provision deems a state program "adequate and active" if it satisfies five stated criteria, including "acceptable conservation programs" for all listed species, authority for acquiring habitat, and "public participation in designating resident species of fish or wildlife as endangered or threatened."[96] These cooperative agreements were supposed to be central to the recovery of species listed under the act.[97] They are also the trigger for the provision of federal financial assistance to assist states in the development and implementation of their conservation and recovery programs.[98]

According to the conference committee report, section 6 gave states "the fundamental roles with regard to resident species" for a limited period of time during which the state legislature could enact any programs that were necessary to achieve the goals of the law, a device that the committee hoped "will impel the states to develop strong programs to avoid the alternative of federal preemption."[99] After that period, the role of the states would depend on whether they had developed approved cooperative agreements. "Where cooperative agreements are in force, these will of course direct and control the enforcement of endangered and

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93. Endangered Species Act of 1973 § 6(a), 16 U.S.C.A. §1535 (West 2012).

94. *Id.* at § 6(b).

95. *Id.* at § 6(c)(1).

96. *Id.*

97. Coggins, *supra* note 32, at 333-35.

98. *See* ESA § 6(d).

99. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 451 (1982).

threatened species programs. Where none are then in effect, it will be the responsibility of the states to develop workable programs to secure cooperative agreements with the Secretary [of the Interior.]"[100]

Finally, section 6 preempts certain – but not all – state laws.[101] If a state law permits that which the ESA prohibits or prohibits that which the ESA permits, then it is preempted.[102] But the ESA does not preempt "any [s]tate law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife."[103] Moreover, states remained free to enact more restrictive rules governing the taking of a listed species.[104]

The next section of the ESA—section 7 – governs interagency cooperation within the federal government.[105] The Ninth Circuit has described section 7 as "the heart of the ESA," but that is not what appeared to Congress in 1973.[106] Its only references to states include the requirement that the federal government consult with affected states before designating critical habitat,[107] and the provision – added in 1978 – which requires an individual from each affected state to be included on the Endangered Species Committee (also known as the "God Squad") that may be invoked to decide

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100. *Id.*

101. *See* ESA §6(f).

102. *Id.*

103. *Id.*

104. *See id*. But Section 6's provisions "seemed irreconcilable at best and antagonistic at worse" to the extent that they offered conflicting direction. While section 6(g)(2) applied the federal prohibitions in states that had an approved cooperative agreement only to the extent that those prohibitions has also been adopted by the state, section 6(f) preempts states laws to the extent they are less restrictive than the ESA. Lawrence R. Liebesman & Steven A.G. Davison, *Takings of Wildlife Under the Endangered Species Act After Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 5 U.BALT. J. ENVTL. L. 137, 171 (1995).

105. *See* 16 U.S.C. § 1536 (2012).

106. W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 495 (9th Cir. 2010).

107. *See* ESA § 7(a)(2).

whether or not to authorize a federal project even though it would jeopardize the survival of a species.[108]

C. The ESA in 2017

The ESA took on a life of its own within months after its enactment when David Etnier discovered the snail darter swimming in the Little Tennessee River in the path of the Tellico Dam.[109] Senator Howard Baker denounced the tiny fish as "the bold perverter of the ESA."[110] Ever since then, the ESA has revered or reviled, depending on one's perspective. It has succeeded in preventing extinctions; it has failed to help many species recover.[111] While some organizations advocate strengthening the ESA, most defenders of the ESA have concentrated on playing defense. The Center for Biological Diversity (CBD) has documented more than 303 attacks on the ESA since 1996.[112] Of course, what the CBD views as an "attack" is a necessary reform from the perspective of those who are frustrated with the application of the ESA.

The role of the states has been one of the more frequent topics of potential reform. Many of the issues are addressed in "The Endangered Species Act and Federalism: Effective Conservation Through Greater State Commitment," a 2011 book edited by Kaush Arha and Barton Thompson, that emerged from a workshop on biodiversity and federalism held at Stanford University in 2005.[113] Also, the Western Governors Association (WGA) has been the leading advocate for a stronger state role in applying the ESA.

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108. *Id.* at § 7(e)(3)(g); Ben Rubin, *Calling on the "God Squad,"* ENDANGERED SPECIES L. AND POL'Y (Apr. 23, 2014), http://www.endangeredspecieslawandpolicy.com/2014/04/articles/conservation/calling-on-the-god-squad/.

109. *See* Tennessee Valley Authority v. Hill, 437 U.S. 153, 158 (1978); *See generally* ZYGMUNT J.B. PLATER, THE SNAIL DARTER AND THE DAM: HOW PORK-BARREL POLITICS ENDANGERED A LITTLE FISH AND KILLED A RIVER (New Haven: Yale University Press, 2013).

110. 125 CONG. REC. 23867 (1979) (statement of Sen. Baker).

111. *See* John Copeland Nagle, *The Effectiveness of Biodiversity Law*, 24 J. LAND USE & ENVTL. L. 203 (2009) (evaluating the success of the ESA in achieving its various purposes).

112. *Attacks on the Endangered Species Act*, CTR. FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/campaigns/esa_attacks/table.html (last updated Jan. 7, 2017).

113. *See generally* THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT (Kaush Arha & Barton H. Thompson, Jr. eds., Routledge 2011).

Its 2016 policy resolution on "Species Conservation and the Endangered Species Act" begins with a ringing endorsement of both the goals of the ESA and the ability of states to help achieve them:

> 1. Western Governors applaud the principles and intent of the Endangered Species Act (ESA). Since its enactment in 1973, the ESA has helped prevent the extinction and assisted the recovery of some threatened and endangered species, while providing ancillary benefits to other species.
>
> 2. Through broad trustee, statutory and police powers, States have primary management authority over all fish and wildlife within their borders. States also exercise sovereign authority over the administration of water rights within their borders.
>
> 3. Western states are proactively engaged in species conservation, including development of state and/or multi-state conservation plans to manage species at the local level as an alternative to federal ESA regulation.
>
> 4. Through decades of work by staff and contractors, States have developed extensive science, expertise, and knowledge of species within their borders.
>
> 5. Western states are particularly and uniquely affected by the ESA. States are the primary recipients of economic benefits associated with healthy species and ecosystems. Tourism and recreation in wildlife-dependent communities help sustain rural economies and promote healthier communities throughout the West. At the same time, species listings and the associated prohibitions and consultations can impact western states' abilities to promote economic development, accommodate population growth, and maintain and expand infrastructure such as roads, water projects, and transmission lines. In these circumstances, the economic costs of ESA compliance can fall disproportionately on western states and local communities.
>
> 6. Given the impact ESA listing decisions have on vital state interests, states should be provided the opportunity to be full partners in administering and implementing the ESA. Federal agencies should work with states in a meaningful

> and productive manner on all ESA matters potentially impacting the states, as required by Section 6(a) of the ESA: "In carrying out the program authorized by the Act, the Secretary shall cooperate to the maximum extent practicable with the States.[114]

The governors continue, though, with a critique of how the ESA has strayed from its original vision of embracing states as partners in wildlife management.[115] "The ESA is premised on a strong federal-state partnership." But they add, "[t]he role of states also has been limited by rigid internal federal processes, interagency jurisdictional disputes, and interpretations of the provisions of the Federal Advisory Committee Act (FACA)."[116]

The WGA has thus "call[ed] on Congress to amend and reauthorize" the ESA "while maintaining the Act's integrity and original intent to protect and recover listed species to a point where the protections ofthe Act are no longer necessary."[117] The WGA then identified seven goals to pursue in that process: (1) clear recovery goals that lead to delisting; (2) increased flexibility for the FWS to make listing decisions; (3) an enhanced role for state govenments; (4) the use of sound science; (5) improved incentives and funding; (6) a clear definition of "forseeable future" for purposes of listing species affected by long-term threats such as climate change; and (7) treating states as full parterns in all ESA decisions. [118]

III. A RETURN TO THE ORIGINAL UNDERSTANDING OF THE ESA

There are many reasons why states should play a greater role under the ESA. Cooperative federalism is the norm in federal environmental statutes, and it is conspicuous by its absence in the

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114. W. GOVERNORS' ASS'N., POLICY RESOL. 2016-08, SPECIES CONSERVATION AND THE ENDANGERED SPECIES ACT 1–2 (2016), https://westgov.org/images/2016-08_Species_Conservation_and_ESA.pdf.

115. *Id.* at 2.

116. *Id.*

117. *Id.* at 5.

118. *Id.* at 5–8.

ESA.[119] A revived state role has numerous advantages. State environmental regulation has become quite attractive to many environmentalists at the onset of the Trump Administration.[120] The Western Governors Association (WGA) has prioritized reforming the ESA in order to better achieve the statute's goals while better respecting state authorities and interests. The theoretical justification has been there all along. The doctrine of subsidiarity, which emerged from Catholic social thought and now plays a key role in the governance of the European Union, seeks to empower local and state authorities but is willing to rely on federal power if the states prove to be inadequate.[121] This Article thus proposes to return to the original understanding of the state role in the ESA by: (1) further empowering state conservation efforts to avoid ESA listings, (2) resurrecting the cooperative agreements that Congress expected to play a major role in the implementation of the act, and (3) promoting additional funding and assistance to state wildlife managers who are seeking to achieve the goals of the ESA.

Several features of the ESA reveal its promise in empowering states to assert control over their wildlife and habitats—if they can show that they are sufficient to achieve the goal of preserving endangered species. First, states can engage in conservation efforts to prevent the need for listing a species under the ESA. Second, the role of cooperative ageements authorized by section 6 of the ESA can be revitalized. Third, states can pursue recovery efforts that

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119. *See* J.B. Ruhl, *Cooperative Federalism and the Endangered Species Act: A Comparative Assessment and Call for Change*, *in* THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT 35, 36 (Kaush Arha & Barton H. Thompson, Jr. eds., Routledge 2011) (describing the ESA as "an oddball among federal environmental statutes" because the ESA does not reflect cooperative federalism); Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson For Conservation From Pollution Control Law: Cooperative Federalism For Recovery Under The Endangered Species Act*, 27 Colum. J. Envtl. L. 45 (2002) (calling for the ESA to embrace cooperative federalism).

120. *See, e.g.*, Dan Farber, *How States Can Defend Themselves Against Trump*, LEGALPLANET, Feb. 2, 2017, http://legal-planet.org/2017/02/02/how-states-can-defend-their-own-environments/.

121. See Jenna Bednar, Subsidiarity and Robustness: Building the Adaptive Efficiency of Federal Systems, 55 NOMOS 231 (2014); Paolo G. Carozza, Subsidiarity As a Structural Principle of International Human Rights Law, 97 AM. J. INT'L L. 38 (2003); James L. Huffman, Making Environmental Regulation More Adaptive through Decentralization: The Case for Subsidiarity, 52 U. Kan. L. Rev. 1377, 1381 (2004); Hon. James L. Buckley, Reflections on Law and Public Life, 1 GREEN BAG 2d 391, 396 (1998).

result in both the conservation of the species and the lifting of the ESA's regulations.

1. Listing decisions

States are eager to avoid ESA listings because the ESA imposes significant federal land use regulations to protect listed species. According to the WGA,

> ESA listings dramatically alter the ability of states and federal agencies to seek incentive-based, collaborative solutions to difficult conservation questions by causing citizens to avoid cooperative agreements. ESA listing decisions have real economic impacts for state and local governments through restriction on rangeland grazing, hunting, tourism and development of resources on public and private lands. The negative economic impacts of federal ESA decisions fall solely on states, local communities, businesses, jobs, and private property owners.[122]

The dilemma, of course, is that the activities that are negatively impacted by ESA regulations are the same activities that themselves negatively impact rare species.

The ESA allows states to avoid the federal regulation that the law imposes.[123] Of the five statutory factors to be considered in deciding whether a species is endangered, four require consideration of the actual threats to the species.[124] The fifth factor—"the inadequacy of existing regulatory mechanisms"—examines the protection that the species already enjoys under federal, state, local, or foreign law.[125] The premise of that factor is that a species is not endangered if other laws already protect it.

State authorities have seized on this provision to develop protections for a species in order to avoid its listed under the ESA.

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122. W. Governors' Ass'n, Comment Letter on Proposed Rule for Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (Oct. 9, 2014), http://www.eenews.net/assets/2015/08/05/document_pm_04.pdf.

123. *See* 16 U.S.C. § 1533(a)(1) (2012).

124. 16 U.S.C. § 1533(a)(1)(A)-(C), (E) (2012).

125. 16 U.S.C. § 1533(a)(1)(D) (2012).

Erin Ryan cites two examples: "Maine negotiated a five-year opportunity to experiment with state-based conservation efforts before its Atlantic salmon run was ultimately listed, and eleven midwestern states used a negotiated reprieve from a black-tailed prairie dog listing to successfully increase breeding populations while staving off the negative consequences of an ESA listing."[126] States have prepared similar conservation plans to avoid the listing of the Yellowstone grizzly bear population, a plant in Utah, the Colorado River cutthroat trout, etc.[127] Most recently, the FWS has cited state conservation efforts to decline to list:

- The Washington ground squirrel, which suffered as the result of agricultural development in eastern Washington and north-central Oregon.[128] Those states responded to protect the squirrel by prohibiting activities detrimental to the squirrel on state-owned land in Oregon, by including measures to conserve the squirrel when siting wind energy projects, and by developing a Multiple Species General Conservation Plan (MSGCP) in Douglas County, Washington;[129]
- The relict leopard frog, endemic to three rivers and associated springs in Nevada, Arizona, and Utah.[130] The laws of all three states protect the frog by ensuring that state water rights determinations account for the frog's needs, prohibiting alteration of a wetland or stream to the detriment

126. ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 294 (2011).

127. Greater Yellowstone Coal., Inc. v. Servheen, 665 F.3d 1015, 1030–32 (9th Cir. 2011); Colo. River Cutthroat Trout v. Salazar, 898 F. Supp. 2d 191, 200 (D.D.C. 2012); Ctr. for Native Ecosystems v. U.S. Fish & Wildlife Serv., 795 F. Supp. 2d 1199, 1200 (D. Colo. 2011).

128. Endangered and Threatened Wildlife and Plants; 12-Month Findings on Petitions To List Nine Species as Endangered or Threatened Species, 81 Fed. Reg. 64,843, 64,855 (Sept. 21, 2016).

129. *Id.*

130. *See* Relict Leopard Frog Conservation Team, Conservation Agreement and Rangewide Conseervation Assessment and Strategy for the Relict Leopard Frog (Rana Onca) (2005).

of wildlife without a permit, and prohibiting the collection, importation, and possession of the frog;[131] and

- The Coral Pink Sands Dunes tiger beetle, which lives only in the Coral Pink Sand Dunes of southern Utah, which was protected by extensive state conservation planning efforts and by the management of the Coral Pink Sand Dunes State Park.[132]

The challenge is to determine when such state efforts are adequate to prevent the endangerment of the species, as section 4 of the ESA requires. The controversy surrounding the dunes sagebrush lizard is illustrative.[133] The FWS declined to list the lizard because of the conservation measures adopted by New Mexico and Texas.[134] The lizard lives "within the Permian Basin, which is one of the most productive oil and gas producing areas in the western United States."[135] The potential conflict between preserving the lizard and oil and gas development caused local members of Congress to introduce legislation that would have exempted the lizard from the ESA.[136] While Congress was debating, state officials in New Mexico and Texas worked to develop a variety of conservation initiatives.[137] The FWS found that "83 percent of the dunes sage-

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131. *Id.*; *See* Endangered and Threatened Wildlifeand Plants; 12-Month Findings on Petitions To List 10 Species as Endangered or Threatened Species, 81 Fed. Reg. 69,425 (Oct. 6, 2016).

132. *See* Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule To List Coral Pink Sand Dunes Tiger Beetle and Designate Critical Habitat, 78 Fed. Reg. 61,082 (Oct. 2, 2013).

133. *See* Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872 (June 19, 2012).

134. *Id.* at 36,899.

135. *Id.* at 36,887.

136. *See* 158 CONG. REC. S2,174 (daily ed. Mar. 28, 2012) (statement of Sen. Corwyn) (amendment introduced by Sen. Corwyn to amend the ESA to "not apply to the sand dune lizard"); *See also* 157 CONG. REC. H5,557–58 (daily ed. July 26, 2011) (statement of Rep. Pearce) (reporting that his constituents asked, "They couldn't kill our jobs with a lizard, could they?").

137. Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. at 36,884–85.

brush lizard's habitat was enrolled in the New Mexico Conservation Agreements,"[138] while "[t]he Texas Conservation Plan focuses on the avoidance of activities within lizard habitat that would further degrade habitat, reclamation of lizard habitat to reduce fragmentation, and, due to the presence of mesquite in Texas habitat, removal of mesquite that is encroaching into shinnery oak dunes."[139] The FWS determined that the conservation efforts "have a high certainty of being implemented" because:

> the level of enrollment is high . . . , the mechanism and authorities for collecting funds are in place, the process for allocating funds to support reclamation work and research in lizard habitat is in place, the monitoring and documentation of compliance with the conservation measures are in place, and monthly and annual reports are complete, and all parties have the legal authorities to carry out their responsibilities under the New Mexico Conservation Agreements.[140]

By contrast, the FWS listed the little prairie chicken notwithstanding an extensive effort by multiple states to develop conservation programs to save the chicken without federal intervention.[141] The FWS acknowledged that states had adopted a variety of important conservation efforts have been undertaken across the range of the lesser prairie-chicken[142] that have "slowed, but not halted, alteration of lesser prairie-chicken habitat."[143] But the FWS found that those efforts were insufficient to save the chicken because they "are limited in size or duration" or they "are voluntary,

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138. *Id.* at 36,884.

139. *Id.* at 36,885.

140. *Id.* at 36,886; *See also id*. (finding that "the [Texas] conservation effort will be effective at eliminating or reducing threats to the species, because it first avoids habitat and if necessary, limits development within suitable and occupied habitat as a priority, and it also improves and strives to restore habitat and reduces fragmentation").

141. Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species, 77 Fed. Reg. 73,828, 73,836 (Dec. 11, 2012).

142. *Id*. at 73,836.

143. *Id.* at 73,828, 73,836.

with little certainty that the measures, once implemented, will be maintained over the long term."[144] The lesser prairie-chicken listing provoked multiple lawsuits contending that the FWS failed to afford sufficient credit to the state conservation efforts.[145] A federal district court agreed with the states and the FWS responded by vacating the listing.[146]

Perhaps the most significant feature of the legal framework is who gets to decide the adequacy of state regulation. The existing law entrusts that task to the FWS, subject to arbitrary and capriciousness review in the courts.[147] There are good reasons for that, but there is cause for concern as well. It is easy—too easy, perhaps—for federal regulators to decide that only federal regulation is adequate.

Thus, the WGA resolved that "States should be included as partners in ESA listing determinations, particularly in the case of listings that could have significant impact on state economies."[148] The governors proposed "that state and multi-state conservation plans, upon review, consultation and endorsement by the U.S. Fish and Wildlife Service or National Marine Fisheries Service (NMFS), should give rise to a regulatory presumption by federal agencies that an ESA listing is not warranted."[149] Such a presumption would be within the FWS's discretion to interpret the ESA, for it would still entrust the FWS with the decision whether or not to "endorse" a state conservation plan.[150] But the hostility with which some conservation groups view state management is reflected in the claim that the Western governors' "would replace science-based

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144. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Lesser Prairie-Chicken, 79 Fed. Reg. 19,974, 19,998 (Apr. 10, 2014).

145. *See generally* Permian Basin Petroleum Ass'n Chaves County v. Dep't of the Interior, 2016 WL 4411550 (D. Tex. Feb. 29, 2016).

146. *See generally* Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken Removed From the List of Endangered and Threatened Wildlife, 81 Fed. Reg. 47047 (July 20, 2016).

147. *See* Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2012).

148. W. GOVERNORS' ASS'N., POLICY RESOL. 2014-11 2 (2014), http://westgov.org/images/stories/policies/Species_of_Concern_and_Candidate_Species_2014-.pdf.

149. *Id.* at 2.

150. *See id.*

decision making with back-room politics in determining which species are protected and which are marked for extinction" and that the "resolution is a power grab [by] the Western governors to take over the management of endangered species, when it is the failure of state wildlife policies that led these species to the brink of extinction in the first place."[151]

The WGA's proposal is contrary to the original understanding of the ESA, which specifically rejected calls to entrust states with veto power.[152] But the original understanding did not say anything about embracing the extensive deference to the FWS that the courts offer today.[153] One solution, therefore, would be to ask the courts to rule on the adequacy of state conservation measures without affording deference to either the FWS or to the states. That approach would run counter to the dominant, and justifiable, perspective that agencies are better equipped to resolve complex scientific questions than generalist federal judges. But the dilemma raised by the ESA in this context is that a court is being asked to decide which of two competing sovereigns best understands the same scientific evidence. Eliminating judicial deference would frustrate both the FWS (who benefits from such deference now) and the WGA (who prefers a state veto over ESA listings). But that might be a better way to satisfy the competing claims regarding the statute's query regarding the adequacy of existing conservation measures.

Regardless of who gets to evaluate the scientific data, the WGA also complains that the FWS often errs in gathering the relevant information. The WGA seeks to "[i]ncrease the regulatory flexibility of the Services to review and make decisions on petitions to list or change the listing status of a species under the ESA,"[154] to

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151. Phil Taylor, *Western Govs Seek Deference, Funding From Feds To Avert Listings*, E&E NEWS (June 11, 2014), http://www.eenews.net/eenewspm/stories/1060001149/print (quoting Erik Molvar of WildEarth Guardians).

152. *See id.*

153. *See, e.g.*, Alaska Oil & Gas Ass'n v. Pritzker, 840 F.3d 671 (9th Cir. 2016) (applying the arbitrary and capricious standard of review to uphold a FWS listing decision).

154. W. GOVERNORS' ASS'N, POLICY RESOL. 2016-08 6 (June 14, 2016), https://westgov.org/images/2016-08_Species_Conservation_and_ESA.pdf. The WGA elaborates:

"[e]nsure the use of sound science in ESA decisions,[155] and to define the term "foreseeable future," especially as it relates to species affected by climate change.[156] And the WGA advances a more specific complaint about the FWS's listing decisions. The governors believe that the FWS discounts the scientific expertise of the states. As discussed above, Congress believed that the states possessed greater scientific expertise at the time when the ESA was

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> The current statutory time frames provided for making listing determinations are not sufficient to allow for adequate data collection and analysis. Consequently, instead of prioritizing listing decisions based upon resource availability and for the species needing the most immediate attention, the agencies are often forced to prioritize listing determinations through legal action. This can result in making determinations based on insufficient data for a species. Further, it can jeopardize opportunities to partner with states, landowners and other stakeholders for preemptive species conservation efforts that could eliminate any need to list the species.

Id.

155. *Id.* at 6. As the WGA explains,

> Given the broad implications that may arise when ESA actions are taken, significant decisions must be made using objective, peer-reviewed scientific literature and scientific observations. A review of the scientific and management provisions contained within listing, recovery and de-listing decisions by acknowledged independent experts is important to ensure the public that decisions are well-reasoned and scientifically based. State agencies often have the best available science, expertise and other scientific and institutional resources such as mapping capabilities, biological inventories, biological management goals, state wildlife action plans and other important data. This wealth of resources is highly valuable; the federal government should recognize, consult, and employ these vast resources in developing endangered species listing, recovery and delisting decisions. Scientific and management review committees, as well as the scope and extent of the appropriate scientific and management review, should be agreed upon by the Services and the affected states. Federal agencies may delegate their responsibility to name these review committees, and determine the scope of review to states in order to enhance state ownership of the committee's decision.

Id.

156. *Id.* Here the WGA asserts that "[t]he meaning of "foreseeable future" with the use of climate modeling needs to be defined for listing decisions where climate change is critical to the decision." *Id.*

crafted.[157] Indeed, FWS continues to acknowledge that.[158] As longtime ESA expert and Obama Administration official Michael Bean told Congress,

> we strongly agree that States, the data from States, is often the best available data for us. Because of the extensive experience and responsibilities of the States, the ESA already directs the Service to carefully consider the information that States provide. The Service must take into account the work of the States in its listing decisions. And the Service must provide the States with a written explanation whenever it makes a listing decision at odds with the recommendations of a State.[159]

But Bean added that state expertise does not always encompass the full scope of the ESA.[160] Given that "not all States have responsibilities or programs for all the types of species eligible for ESA listing: in particular, plants and invertebrates," the best available data for such species "may come from universities, museums, conservation organizations, and industry."[161] Moreover, as Bean explained, "For counties and tribes, the situation is more varied. In most States, the jurisdiction and responsibility for wildlife rests with the State, not with the counties, which generally have no research programs related to ESA listing decisions."[162] Bean thus concluded

> the question of what constitutes the best available data should turn on an evaluation of the data itself, and not who

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157. *See* W. GOVERNORS' ASS'N, POLICY RESOL. 2016-08 (June 14, 2016), https://westgov.org/images/2016-08_Species_Conservation_and_ESA.pdf.

158. *See Legislative Hearing on the Endangered Species Act: Hearing on H.R. 4315, H.R. 4316, H.R. 4317, and H.R. 4318 Before the H. Nat. Res. Comm.*, 113th Cong. (2014) (statement of Michael Bean, Counselor to the Assistant Secretary, Fish and Wildlife and Parks, U.S. Department of the Interior).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 21.

> provided it. To presume at the outset that the data from a particular source will always constitute the best available data would negate the very purpose of requiring the use of the best available data. Moreover, it is clear that data from States, counties, and tribes cannot all constitute the best available data when the data from these sources are in conflict, as they sometimes are.[163]

Finally, the ESA directs the FWS to notify relevant state agencies of any proposed listing of species or designation of critical habitat, and it further directs the FWS to provide the state with "a written justification for [the] failure to adopt regulations consistent with the agency's comments."[164] The State of Alaska relied on his provision in challenging the designation of critical habitat for the polar bear.[165] The Ninth Circuit recently held that the FWS complied with that requirement in the polar bear case, but the court's holding that such claims are judicially reviewable suggests that more states may act to ensure that the FWS supplies the requisite response to the state's concerns. [166]

2. Section 6 cooperative agreements

"When Congress enacted the modern ESA in 1973," Rob Fischman explains, "it envisioned that state programs would play a key role in the Act's recovery program."[167] That is why it is surprising that section 6 of the ESA "has languished at the periphery of ESA

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163. Bean identified a further problem. "Frequently the publications, studies, and reports on which the Service relies are based upon underlying data collected and maintained by the States, who control access to it. State law sometimes stringently restricts the release of certain wildlife data, as does the State of Texas, for example." *Id.*

164. Endangered Species Act of 1973 § 2(i), 16 U.S.C. §1531 (2012).

165. Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544, 549 (9th Cir. 2016).

166. *See id.* at 565.

167. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L. J. 179, 211 (2005).

implementation."[168] Fischman describes section 6 as "the centerpiece of the ESA's longstanding but minor program of cooperative federalism."[169]

The original understanding of the ESA anticipated something much different. Robert Davison has written the most thorough description of what Congress intended section 6 to accomplish and what section 6 has actually done instead.[170] Section 6 was designed to reconcile the need for a coherent national policy and the recognition "that the states are far better equipped to handle the problems of day-to-day enforcement than the federal government."[171] But two subsections of section 6—(f) and (g)—"seemed irreconcilable at best and antagonistic at worst."[172] Subsection (f), entitled "conflicts between federal and state laws," voids any state law which permits what is prohibited by ESA or prohibits what is authorized by the ESA.[173] Moreover, subsection (f) says that state law may be more restrictive than the ESA itself or FWS regulations, but state law may not be less restrictive.[174] Subsection (g), entitled "transition," states, "[t]he prohibitions set forth in or authorized pursuant to sections 1533(d) and 1538(a)(1)(B) of this title shall not apply with respect to the taking of any resident endangered species or threatened species . . . within any State . . . which is then a party

168. *Id.*

169. *Id.*

170. *See generally* Robert P. Davison,*The Evolution of Federalism under Section 6 of the Endangered Species Act*, *in* THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT 89 (Kaush Arha & Barton H. Thompson, Jr. eds., Routledge 2011) [hereinafter Davison].

171. *Id.* at 93.

172. *Id.*

173. *See* 16 U.S.C. § 1535(f) (2012).

174. *Id.*

to a cooperative agreement with the Secretary pursuant to subsection (c) of this section (except to the extent that the taking of any such species is contrary to the law of such State)."[175]

Here is the issue: Subsection (g) suggests that the ESA's take prohibition does not apply to a state that is party to a cooperative agreement with the FWS, but subsection (f) seems to preempt state laws that are less restrictive than the ESA or FWS regulations.[176] The rationale for subsection (g)'s approach is that the ESA "appeared to contemplate cooperative agreements as a mechanism to assist in the development and implementation of state programs to conserve species."[177] States would be allowed to employ their own techniques for conserving listed species, even if those techniques were different from those adopted by the federal government.[178] Specifically, actions that are deemed a prohibited "take" by the FWS implementing the ESA could nonetheless be permitted if a state had demonstrated another way of protecting the species as part of reaching a cooperative agreement approved by the FWS.[179]

That understanding of the law vanished quickly. The regulation that the FWS promulgated in 1976 afforded subsection 1535(g)(2) "a very narrow interpretation" even though that provision "had been the subject of much debate and interest in Congress two [sic] years earlier."[180] Then, in 1992, the only federal district court to address the issue brushed aside the claim that the FWS take regluations did not apply in a state that was party to a cooperative agreement.[181] In *Swan View v. Turner*, the forestry industry argued habitat destruction did not constitute a prohibited "take" because Montana law did not prohibit habitat destruction,

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175. *Id.* § 1535(g)(2). Section 1538 contains the ESA's prohibition on the "take" of endangered species; section 1533(d) allows the FWS to extend the take prohibition to threatened species. *See id.* §§ 1538, 1533(d).

176. *See* 16 U.S.C. § 1535 (2012).

177. Davison, *supra* note 170, at 94.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See* Swan View Coal., Inc. v. Turner, 824 F. Supp. 923 (D. Mont. 1992).

and Montana was party to a cooperative agreement with FWS.[182] The court was almost persuaded, but not quite.[183] It acknowledged that the forestry industry "raises compelling arguments on this issue," but it instead ruled that

> based on the clear language of § 6(f) of the ESA combined with the overwhelming priority Congress has given to the preservation of threatened and endangered species, the court must conclude that the less restrictive takings provisions under Montana law are preempted by the ESA and that the definition of "take" under the ESA which includes "harm" and "significant habitat modification" is controlling in this case.[184]

The *Swan View* court's holding means "that section 6(f) of the ESA nullifies any exemption from the Act's takings prohibitions provided under section 6(g)(2)(A) or section 4(d)."[185] Perhaps most surprisingly, no other court has grappled with the priority seeming afforded to cooperative agreements by subsection 6(g).

Section 6 also authorizes federal funding for state conservation programs.[186] The FWS provided $32 million in such funding in 2013, including, money "to acquire and restore 184 acres of habitat for the reintroduction of the endangered Salt Creek tiger beetle," a "highly-imperiled species" that lives in eastern saline wetlands, which are the "most limited and endangered wetland type and vegetation community in all of Nebraska."[187]

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182. *Id.*

183. *Id.*

184. *Id.* at 938.

185. Davison, *supra* note170, at 103.

186. *See* Endangered Species Act, *supra* note 164, § 6.

187. U.S. Fish & Wildlife Service, *U.S. Fish and Wildlife Service Boosts State Endangered Species Conservation Efforts with $32 Million in Grants*, FWS.ORG (July 9, 2013), https://www.fws.gov/mountain-prairie/pressrel/2013/07092013grantAnnouncement.php.

That's not enough for the WGA. It asserts that "[i]ncentives and funding for conservation are essential."[188] More specifically, the WGA has thus called for

- Increasing grants authorized under ESA Section 6 – and other federal funding for the recovery of listed species – for: 1) state and local implementation of the Act; and 2) federal efforts to prevent additional listings in active partnership with the states;
- Improving the functionality of ESA Section 6 to increase partnerships and cooperation between states and the federal government in addressing ESA issues; and
- Alleviating the pressure on states to expend scarce funds to address, mitigate and recover endangered and threatened species, at the expense of non-listed species within the state's jurisdiction;[189]

The FWS and conservation organizations would concur with these recommendations, but the more general limitiations on the federal budget make it unlikely that they will be satisfied soon.

In sum, section 6 has come to be understood as a funding provision. It is likely that Congress intended for it to be more than that. It is strange to think that Congress spent so much time emphasizing the role of the states, but then neglected to codify that role in the act.[190] Perhaps the most important task in recovering the original understanding of the ESA is to restore cooperative agreements to the role that they were intended to occupy.

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188. W. GOVERNORS' ASS'N, POLICY RESOL. 2016-08 7 (June 14, 2016), https://westgov.org/images/2016-08_Species_Conservation_and_ESA.pdf.

189. *Id.* at 3.

190. *See* Davison, *supra* note 170, at 95 (asserting that "[w]hatever role was envisioned for the states by the Congress in the 1973 ESA, it appears to have been of a greater magnitude than the one that resulted").

3. Recovery & delisting

States can employ conservation programs to delist a species that has recovered.[191] The same factors that determine whether a species should be listed are also used to determine whether the species should be delisted because it is no longer endangered or threatened.[192] Thus, even if a state fails to prevent a listing in the first instance, its conservation efforts can result in an early removal of the species from the list of federally protected species.[193]

The WGA, along with numerous writers and advocates, has criticized the failure of the ESA to adequately involve the states in recovery efforts.[194] "The Endangered Species Act can effectively be implemented only through a full partnership between the states, federal government, local governments and private landowners," according to the WGA.[195]

> One way to accomplish this partnership is to authorize the delegation of authority for the development of conservation plans on a voluntary basis to states that choose to accept such delegation, and agree with the appropriate Secretary to perform them in accordance with specified standards. Authority should also be given to the appropriate Secretary to provide grants for the additional administrative costs to the state. States will benefit by a right of refusal to be partners in recovery planning and species management. Additionally, states should also be offered tools such as incidental take authority, as authorized by the ESA.[196]

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191. *See, e.g.*, Endangered and Threatened Wildlife and Plants; Removal of the Magazine Mountain Shagreen From the List of Endangered and Threatened Wildlife, 78 Fed. Reg. 28513 (May 15, 2013) (to be codified at 50 C.F.R. pt. 17).

192. *See* 16 U.S.C. § 1533(a)(1) (2012).

193. *See id*.

194. W. GOVERNORS' ASS'N, POLICY RESOL. 2016-08 6 (June 14, 2016), https://westgov.org/images/2016-08_Species_Conservation_and_ESA.pdf.

195. *Id.*

196. *Id.*

Moreover, the WGA calls for "[p]roviding greater distinction between the management of threatened versus endangered species in ESA to allow for greater management flexibility, including increased state authority for species listed as threatened," and "[p]roviding more extensive state engagement in development and implementation of Section 4(d) special rules or other mechanisms under the ESA that promote species conservation while addressing situations that merit flexibility or creative approaches."[197] Each of these steps will serve to "[e]nhance the role of state governments in recovering species."[198]

The WGA would like the ESA to "[r]equire clear recovery goals for listed species, and actively pursue delisting of recovered species."[199] As they explain,

> recovery, and ultimately de-listing of species covered by the ESA, should be the highest priority of the Act. Every effort should be made to complete a recovery plan within one year of a species being listed, when doing so will not compromise the integrity of the plan. For climate change listings a two to three year process may be reasonable. Federal funding for ESA activities should be prioritized to achieve species recovery.[200]

They further contend

> that the best way to accomplish this goal is to require the Services to publish clear and quantifiable recovery goals, in consultation with the individual affected state(s), for threatened or endangered species at the time of the listing decision. This will provide objective recovery criteria that both state and federal agencies may work toward in the recovery process. Recovery plans should also provide guidance, in the case of species listed as endangered, regarding the criteria for a down-listing from endangered to

197. *Id.* at 3.

198. *Id.* at 6.

199. *Id.* at 5.

200. W. GOVERNORS' ASS'N, POLICY RESOL. 2016-08 5 (June 14, 2016), https://westgov.org/images/2016-08_Species_Conservation_and_ESA.pdf.

> threatened. In cases where quantification of recovery goals is not initially feasible, the services should be required to publish a plan, including a timeline, describing the steps the federal agencies will take in identifying measurable goals. Recovery goals should be reviewed and changed using an adaptive framework. Further, the Western Governors believe the required objective recovery criteria should include a clear articulation of the required population, population trends, or other relevant criteria, including amelioration of threats identified in the listing process.[201]

A review of the species that have recently recovered to the point that they were delisted shows that states are often more involved than usually believed. States were involved in conserving each of the species that were delisted in 2015 and 2016.[202] The FWS delisted the Louisiana black bear in part because they "are currently, and will continue to be, protected from taking, possession, and trade by State laws throughout their historical range."[203] The FWS delisted the Delmarva fox squirrel in 2015 thanks in part to

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201. *Id.* at 5–6.

202. *See, e.g.*, Endangered and Threatened Wildlife and Plants; Removing the San Miguel Island Fox, Santa Rosa Island Fox, and Santa Cruz Island Fox From the Federal List of Endangered and Threatened Wildlife, and Reclassifying the Santa Catalina Island Fox From Endangered to Threatened, 81 Fed. Reg. 53315-01 (Aug. 12, 2016) (to be codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants; Removing the Island Night Lizard From the Federal List of Endangered and Threatened Wildlife, 79 Fed. Reg. 18190-01 (Apr. 1, 2014) (to be codified at 50 C.F.R. pt. 17). The only exceptions were those species that are found only on federal lands. *See id.* (delisting the island night lizard, which "is endemic to three federally owned Channel Islands (San Clemente, San Nicolas, and Santa Barbara) located off the southern California coast and a small islet (Sutil Island) located just southwest of Santa Barbara Island."); Endangered and Threatened Wildlife and Plants; Removing the San Miguel Island Fox, Santa Rosa Island Fox, and Santa Cruz Island Fox From the Federal List of Endangered and Threatened Wildlife, and Reclassifying the Santa Catalina Island Fox From Endangered to Threatened, 81 Fed. Reg. 53315-01 (delisting the island fox, which "inhabit[s] the six largest of the eight Channel Islands . . . [,]" all of which are part of Channel Islands National Park).

203. Endangered and Threatened Wildlife and Plants; Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity-of-Appearance Protections for the American Black Bear, 81 Fed. Reg. 13124-01 (Mar. 11, 2016) (to be codified at 50 C.F.R. pt. 17).

the efforts of the State of Maryland.[204] Likewise, the efforts of California and Oregon helped the delisting of the Modoc sucker.[205] In California, "the California Fish and Game Code affords some protection to stream habitats for all perennial, intermittent, and ephemeral rivers and streams" by minimizing impacts.[206]

Yet even with federal assistance, states often miss the opportunity to take a more proactive role in achieving the recovery of listed species.[207] The 1989 listing of a snail stymied Arkansas's plans to develop a state park and lodge, yet the state did not even bother to comment when the FWS proposed to delist the snail in 2013.[208] Additional state authority would be consistent with the original understanding of the ESA and could help species recover, but there is no guarantee that all states will act.

III. CONCLUSION

Senator Baker was wrong. The snail darter was not "the bold perverter" of the ESA.[209] Rather, the ESA worked exactly as it was supposed to do when it blocked the Tellico Dam that would have jeopardized the survival of the snail darter.[210]

Moreover, the ESA has been a success. It has prevented the extinction of the species that it protects.[211] Indeed, it does not ap-

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204. *See* Endangered and Threatened Wildlife and Plants; Removal of the Delmarva Peninsula Fox Squirrel From the List of Endangered and Threatened Wildlife**,** 80 Fed. Reg. 70700-01 (Nov. 16, 2015) (to be codified at 50 C.F.R. pt. 17).

205. *See* Endangered and Threatened Wildlife and Plants; Removal of the Modoc Sucker From the Federal List of Endangered and Threatened Wildlife, 80 Fed. Reg. 76235-01 (Dec. 8, 2015) (to be codified at 50 C.F.R. pt. 17).

206. *Id.*

207. *See, e.g.*, Endangered and Threatened Wildlife and Plants; Removal of the Magazine Mountain Shagreen From the List of Endangered and Threatened Wildlife, 78 Fed. Reg. 28513-01 (May 15, 2013) (to be codified at 50 C.F.R. pt. 17).

208. *Id.*

209. 125 Cong. Rec. 23867 (1979) (statement of Sen. Baker).

210. *See* Tennessee Valley Authority v. Hill, 437 U.S. 153, 154 (1978).

211. *See* John Copeland Nagle, *The Effectiveness of Biodiversity Law*, 24 J. LAND USE & ENVTL. L. 203 (2009) (evaluating the success of the ESA in achieving its various purposes).

pear that any species has gone extinct once it gained the protections of the law.[212] That is a remarkable record of statutory achievement.[213]

But the ESA is not perfect, and its imperfections are best seen in two circumstances. The ESA has done a poor job of enabling species to recover so that that are no longer in danger of extinction. And the implementation of the ESA has failed to produce the federal-state partnership anticipated by the framers of the law. Those two phenomena are related. Without the central role of the states, federal actions to achieve recovery have been woefully inadequate.

The solution I propose here is to empower states by recovering the original purpose of the ESA. States are already becoming more involved in fashioning conservation plans to avoid the need for listing a species. They are also moving, albeit more slowly, toward participation in recovery efforts aimed at delisting species. The remaining challenge is to restore cooperative agreements to the more prominent role that Congress intended them to serve.

All of this is designed to achieve the ESA's overriding goals of preventing extinction and achieving recovery. The Congress that

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212. The only species that have been delisted as extinct were probably already extinct when the ESA was passed in 1973. *See, e.g.*, Endangered and Threatened Species; Final Rule to Remove the Caribbean Monk Seal From the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 63901-02 (Oct. 28, 2008) (delisting the Caribean monk seal, which was last seen in 1952); Endangered and Threatened Wildlife and Plants; Removal of EpioMasma (= Dysnomia) sampsoni, Sampson's Pearly Mussel, from the List of Endangered and Threatened Wildlife. 49 Fed. Reg. 1057-01 (Jan. 9, 1984) (delisting a mussel what had not "been collected in over 50 years despite repeated sampling within its range"). The only exceptions are the dusky seaside sparrow, which perished in 1987, *see* Endangered and Threatened Wildlife and Plants; Final Rule to Deltat the Dusky Seaside Sparrow and Remove Its Crttlcal Habitat Designation, 55 Fed. Reg. 51112-01 (Dec. 12, 1990); Also the Mariana mallard and the Guam broadbill, whose last confirmed sightings were in 1979 and 1984, respectively. *See* Endangered and Threatened Wildlife and Plants; Removing the Mariana Mallard and the Guam Broadbill From the Federal List of Endangered and Threatened Wildlife, 69 Fed. Reg. 8116-01 (Feb. 23, 2004). But populations of each of those three birds were already so depleted by the time the ESA became law that there probably wasn't anything that the law could have done to protect them.

213. For my defense of the ESA along these lines, see John Copeland Nagle, The Inimitable Endangered Species Act, at the New York Botanical Garden's Conference: Threshold: Biodiversity, Climate, and Humanity at a Crossroads (Mar. 27, 2017) (video available at https://m.youtube.com/watch?v=AGiuZmbPjMc at 1:09).

enacted the ESA expected the states to play a central role in that task.[214] The restoration of that understanding of the law is what many states request. But if states are unwilling to engage in the difficult work that species conservation requires, the federal government will remain the backstop. The ESA represents a national commitment to preserve species "whatever the cost."[215] It is up to the states to decide whether they want to bear that cost.

214. *See 1973 Senate ESA Hearings, supra* note 17 at 53 (testimony of Douglas P. Wheeler, Deputy Assistant Sec'y for Fish, Wildlife, and Parks).

215. Tennesee Valley Auth. v. Hill, 437 U.S. 153, 154 (1978).