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The Effect of the United States Supreme Court's Eleventh Amendment Jurisprudence on Clean Water Act Citizen Suits: Muddied Waters

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Articles

HOPE BABCOCK*

The Effect of the United States Supreme Court's Eleventh Amendment Jurisprudence on Clean Water Act Citizen Suits: Muddied Waters

The states are permitted to act unjustly only because the highest court in the land has, by its own will, moved the middle ground and narrowed the nation's power.¹

The current Supreme Court has substantially expanded the scope of protection from lawsuits accorded to states by the Eleventh Amendment and narrowed the exceptions to its application.² With rare exception, many people, including Indian

* Professor of Law, Georgetown University Law Center; B.A. Smith College, 1963; LL.B. Yale Law School, 1966. An earlier and much abridged version of this Article was presented at a symposium on citizen suits held by Widener University School of Law. Hope M. Babcock, *The Effect of the Supreme Court's Eleventh Amendment Jurisprudence on Environmental Citizen Suits: Gotcha!*, 10 WIDENER L. REV. 205 (2003). The author thanks Professor Carlos Vazquez for his helpful comments and research assistant Kelly Moser for her hard work on this Article.

¹ JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 156 (2002).

² Judge and former law professor William Fletcher identifies three developments responsible for the recent emergence of the Court's Eleventh Amendment jurisprudence: adoption of the Fourteenth Amendment, which "imposed substantial federal constitutional obligations directly on the states"; the "Warren Court revolution," which "vigorous[ly] expand[ed] . . . equal protection and due process protections for individuals against the states under the Fourteenth Amendment" and "set the stage" for the "routine enforcement of affirmative injunctions against state actors under *Ex parte Young*"; and "the expansion of federal statutory obligations imposed on the states, both in cooperative and not-so-cooperative federalism." William A. Fletcher,

tribes, federal employees, patent holders, the elderly, and the disabled, find themselves unable to vindicate rights granted by federal laws in any court when the defendant is a state or a state agency.³ The most recent example of this is the Court's decision in *Federal Maritime Commission v. South Carolina State Ports Authority*,⁴ in which the Court extended the reach of the Eleventh Amendment to private *administrative* enforcement actions against states, thus forsaking completely any connection to the text of the Amendment.⁵

This trend in the Court's application of the Eleventh Amendment to shield states from injured private citizens has potentially ominous implications for citizens seeking to enforce federal environmental mandates against states.⁶ States, as recipients of dele-

The Eleventh Amendment: Unfinished Business, 75 NOTRE DAME L. REV. 843, 846-47 (2000). He argues that the most important part of the Court's "unfinished business" is arriving at a proper understanding of the states' place in the federal structure.

³ That much of what is happening to undermine the effectiveness of federal mandates is taking place in the branch of government most insulated from public review and accountability is also deeply troubling, as others have noted. *See, e.g.*, NOONAN, *supra* note 1, at 10, 156 (criticizing the Court for devising a standard based on an "illusion" without a rationale "for its existence or a rationale to guide its expanded application" and developing "[a] doctrine that has swelled beyond bounds . . . cannot be consistently applied or reconciled with the federal system" and "is unjust").

⁴ 535 U.S. 743 (2002).

⁵ In *Alden v. Maine*, the Court referred to previous Eleventh Amendment cases, stating, "[t]hese holdings reflect a settled doctrinal understanding . . . that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." 527 U.S. 706, 728 (1999). The phrase "state sovereign immunity" is "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." *Id.* at 713. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-68 (1997) (acknowledging "the broader concept of immunity implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and exemplifying"); *Seminole Tribe v. Florida*, 517 U.S. 44, 60 (1996) ("[W]e 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,'" quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms."). *See also Fletcher, supra* note 2, at 857 (saying "all nine Justices have abandoned any thought, or any pretense, that the text of the Eleventh Amendment matters").

⁶ *See, for example*, Justice Breyer's warning, in his dissent in *College Savings Bank*, that Congress's ability to allow a private remedy against a state as a water polluter was now quite questionable. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 702-03 (1999); *see also* David Milton Whalin, *John C. Calhoun Becomes the Tenth Justice: State Sovereignty, Judicial Review, and Environmental Law After June 23, 1999*, 27 B.C. ENVTL. AFF. L. REV. 193 (2000).

gated federal regulatory authority, are important players in the administration of many environmental laws. States also own, operate, and construct potentially polluting facilities like hazardous waste landfills, hospitals, prisons, airports, roads, and sewage treatment plants on state property that may violate federal laws.⁷ Thus, states are often targets of citizen suits.

Other factors magnify the significance of the Court's state sovereign immunity jurisprudence for environmental litigants. First, as Richard Lazarus has shown, the Supreme Court is generally hostile towards environmental law, finding against environmental plaintiffs with rare exception.⁸ According to Oliver Houck, the Court seems willing to use whatever constitutional provision is at hand to find laws unconstitutional that promote environmental protection.⁹ Thus, there is every reason to think that an

Whalin finds cause for concern in the Court's Eleventh Amendment jurisprudence with respect to the jurisdictional reach of the Clean Water Act, the ability to sue states as owners or operators of hazardous facilities under the Comprehensive Emergency Response and Liability Act, and the legal sanctity of the Clean Air Act's (CAA) National Ambient Air Quality Standards.

⁷ Araiza makes the point that states as regulators that fail to implement or enforce environmental laws adequately by causing spillover externalities on neighboring states and their residents do more damage than the state as an operator of a single polluting facility. William D. Araiza, *Alden v. Maine and the Web of Environmental Law*, 33 LOY. L.A. L. REV. 1513, 1543 (2000).

⁸ See Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 19 PACE ENVTL. L. REV. 619 (2002). "[E]nvironmental protection concerns seem increasingly to be serving a *disfavored* role in influencing the Court's outcome," which Lazarus attributes to the Justices' "increasing skepticism of the efficacy of environmental protection goals and the various laws that seek their promotion." *Id.* at 631 (emphasis added). Lazarus notes in an update of his Pace article that "the current Court, notwithstanding its 'conservative' views, seems especially ready to overturn the decisions of other branches within the federal system," and that its "stability" (due to the fact that the Court's membership has not changed since Breyer joined the Court in 1994) has enabled it to "systematically grant review and decide cases that present the relevant legal issues in settings favorable to the outcome that the majority seeks to promote." Richard J. Lazarus, *The Supreme Court: Three Years Later*, 19 PACE ENVTL. L. REV. 653, 653-54 (2002); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 595 (1992) (Blackmun, J., dissenting) ("I have difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims.").

⁹ See Oliver A. Houck, *Environmental Law and the General Welfare*, 19 PACE ENVTL. L. REV. 675, 675-83 (2002). Houck lists seven instances of the Court's willingness to use the Constitution, including the Court's reconstruction of the Eleventh Amendment, to strike down environmental laws, and compares the resulting montage to "watching a food fight." *Id.* at 683. The Court's relatively recent decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)* illustrates Professor Houck's point about the Court's willingness to use the Constitution to strike at environmental protection initiatives. 531 U.S. 159, 174 (2001). In *SWANCC*, the Court struck down the Corps' "migratory bird

Eleventh Amendment defense to a citizen suit under an environmental law may fare well in this Court. Second, the Court's evolving Eleventh Amendment jurisprudence occurs in a political climate supportive of increased devolution to the states of federal responsibilities for protecting the environment and decreased federal oversight of state performance,¹⁰ while at the same time funds to perform both these tasks are diminishing.¹¹ Third, there have been successful legal challenges to the agency's authority to overfile state enforcement initiatives,¹² and to over-

rule," under which the agency had regulated wetland fills in nonnavigable, isolated wetlands, noting that there are "significant constitutional and federalism questions" concerning Congress's Commerce Clause authority to regulate dredge and fill activities in isolated waters. *Id.* "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* *But see* *Friends of the Earth v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 183-84 (2000) (holding plaintiffs in environmental citizen suits need not allege and prove particularized environmental harm); *Whitmore v. Am. Trucking Ass'n*, 531 U.S. 457, 472-73 (2001) (rejecting the application of the nondelegation doctrine to environmental regulations promulgated under the Clean Air Act); *Palazzolo v. Rhode Island*, 533 U.S. 606, 616-17 (2001) (narrowing the scope of *Lucas per se* test and exemplifying a more environmentally friendly Supreme Court).

¹⁰ More than seventy-five percent of the total number of major environmental programs that can be delegated to, or assumed by, states have been so devolved. Rena I. Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 351, 359 n.32 (2000).

¹¹ *See id.* at 377-78.

¹² *Harmon Indus. v. Browner*, 191 F.3d 894 (8th Cir. 1999). The *Harmon* Court found the EPA's practice of overfiling in states where it has authorized the state to act oversteps the federal agency's authority under the Resources Conservation and Recovery Act (RCRA), saying:

While, generally speaking, two separate sovereigns can institute two separate enforcement actions, those actions can cause vastly different and potentially contradictory results. Such a potential schism runs afoul of the principles of comity and federalism so clearly embedded in the text and history of the RCRA In EPA authorized states, the EPA's action is an alternative method of enforcement that is permitted to operate only when certain conditions are satisfied.

Id. at 902. *But see* *United States v. Power Eng'g*, 303 F.3d 1232, 1238 (9th Cir. 2002) (refusing to follow *Harmon*), *cert. denied*, 123 S. Ct. 1929 (2003); *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 832-33 (N.D. Ohio 2000) (refusing to apply *Harmon* to the CAA, and noting that the statute contained language in its enforcement section which seemed to anticipate overfiling). Interestingly, as Steinzor points out, five states filed *amicus* briefs in *Harmon* in support of the EPA's overfiling authority because depriving the agency of this power would increase pressure on the EPA "to withdraw delegated authority over programs when it disagrees with a state's enforcement decisions." Steinzor, *supra* note 10 at 359 n.31. On the topic of EPA overfiling, see generally Joel A. Mintz, *Enforcement "Overfiling" in the Federal Courts: Some Thought on the Post-Harmon Cases*, 21 VA. ENVTL. L.J. 425 (2003).

turn a state permit issued in violation of federal law,¹³ placing the Environmental Protection Agency's (EPA) state oversight authority under a cloud. This Article is about yet another potential erosion of the network of laws that protect our environment—the liability of states to citizens for violation of federal mandates.

An examination of the effect of the Court's sovereign immunity jurisprudence on the private enforcement of environmental laws against states, therefore, is no mere academic exercise.¹⁴ In an atmosphere in which states are assuming a more central place in the administration of federal environmental laws and federal oversight of state performance is lessening, any initiative that insulates states from legal challenge takes on grave significance for environmental litigants. If environmental plaintiffs cannot enforce federally mandated standards and programmatic requirements against the states that run these programs, history advises that states may under-perform.¹⁵ Thus, a reinvigorated Eleventh

¹³ *Alaska Dep't Envtl. Conservation v. EPA*, 298 F.3d 814, 818 (9th Cir. 2002), *aff'd*, 124 S. Ct. 983 (2004) (holding that the EPA acted within its authority under the Clean Air Act when it overturned the Alaska Department of Environmental Conservation's issuance of a permit to a mine that did not require implementation of best available control technology). The state argued in its *certiorari* petition that the Clean Air Act (CAA) delegates permitting decisions to the states, and that the Ninth Circuit's decision is in conflict with the decisions by the Court and other federal appeals courts that establish the division between federal and state jurisdiction under the CAA and other similar laws. The Supreme Court affirmed the Ninth Circuit's opinion, and while not responding specifically to the state's arguments raised in its *certiorari* petition on the division of the federal-state authority under the CAA, the Court did say "[i]t would be unusual, to say the least, for Congress to remit a federal agency enforcing federal law solely to state court." 124 S. Ct. 983, 1004 (2004).

¹⁴ *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 45-46 (1992). In his dissent, Justice Stevens referred to the Court's holding that section 106(c) of the Bankruptcy Code does not waive immunity from an action seeking monetary recovery in a bankruptcy proceeding, saying "[t]he cost to litigants, to the legislature, and to the public at large, of this sort of judicial lawmaking is substantial and unfortunate. Its impact on individual citizens engaged in litigation against the sovereign is tragic." *See also* Randall S. Abate & Carolyn H. Cogswell, *Sovereign Immunity and Citizen Enforcement of Federal Environmental Laws: A Proposal for a New Synthesis*, 15 VA. ENVTL. L.J. 1 (1995). The authors explain that shielding federal pollution facilities from citizen suits is unnecessary, because Congress has limited both the circumstances under which citizen suits may be brought and the remedies citizens can receive. *Id.* at 7. Further, doing this will cause substantial injustice because it will move controversies from the courts, which are well-suited to resolve them, to ill-equipped administrative forums that lack procedural safeguards. *Id.*

¹⁵ *See* Steinzor, *supra* note 10, at 399-419 (describing how the states are falling behind in their capacity to respond to "first-generation environmental problems"); *see also* John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1208-16 (1995) (describing the EPA's tepid enforcement efforts

Amendment applied to citizen suits brought to enforce federal environmental laws can as effectively undercut the impact of those laws as if Congress had amended them to achieve the same result.¹⁶

This Article focuses on the impact of the Court's Eleventh Amendment jurisprudence on citizen suits authorized under the Clean Water Act (CWA),¹⁷ because that law's cooperative federalism structure is typical of many other environmental laws, and because citizen suits have historically played a critical role in its implementation. The CWA's citizen suit provision (section 505),¹⁸ which specifically incorporates the Eleventh Amendment, has brought on citizen suits the full force and effect of the Court's current state sovereign immunity jurisprudence.¹⁹ The prevailing wisdom is that the Court's state sovereign immunity jurisprudence will not bar CWA citizen suits brought to enforce federal mandates against states in federal court. For the reasons set out in this Article, I am not sure I agree.

The structure of the Article is straightforward. The Article briefly discusses the importance of private enforcement of the CWA, the law's structure, and the specific language of section 505. It then summarizes the arguments favoring centralization of regulatory authority in the federal government and shows how arguments favored by devolutionists—those who argue for decentralization of federal regulatory authority to the states—appear to be prevailing to the detriment of strong environmental enforcement. The Article then turns to the key cases that comprise the Court's current view of the Eleventh Amendment. An examination of this case law reveals the compatibility between the themes the devolutionists propound and those the Court articulates in support of its decisions. The Article applies this

against recalcitrant states regarding inspection and maintenance programs under the CAA).

¹⁶ Until the recent decision in *Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000), the Court's standing jurisprudence was having the same effect. See also Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 84 n.194 (2000) (noting that under Chief Justice Rehnquist, the Court has invalidated twenty-four acts of Congress) (cited in NOONAN, *supra* note 1, at 192).

¹⁷ 33 U.S.C. §§ 1251-1387 (2000).

¹⁸ 33 U.S.C. § 1365(a)(1) (2000).

¹⁹ The incorporation of the Eleventh Amendment into the specific text of section 505 also defeats any argument that might be made that the authorization of private rights of action under the law abrogates the state's sovereign immunity. See *infra* Part III.

decentrist jurisprudence, as interpreted by the lower courts, to the CWA to see to what extent it might constrain citizen suits against states, and concludes that it might well limit them. Finally, the Article shows how various suggested ways around the Eleventh Amendment, such as finding an alternative theory for congressional abrogation or grounds for states to waive their immunity, relying on the federal sovereign to prosecute CWA violations against states, or relying on the state courts to vindicate these rights, are wanting in some respect, and thus are poor substitutes for citizen suits. Since the Court has taken upon itself to reinvent the Eleventh Amendment, only the Court can restore the proper balance between the federal government and the states. One can only hope that it will choose to do this before it succeeds in undermining the effectiveness of some very important federal environmental laws.

I

THE FEDERALISM STRUCTURE OF THE CLEAN WATER ACT AND THE ROLE OF CITIZENS IN THE ACT'S IMPLEMENTATION

Congress in the 1970s and 1980s enacted a series of laws that largely, but not exclusively, centralized environmental regulation in the federal government.²⁰ This was done in response to the failure of a completely decentralized regime to abate air and water pollution and to respond to both its spillover effects and the effects of competition between states to attract industry.²¹

²⁰ The previous decentralized regime consisted initially of nuisance law, followed by municipal ordinances in the late nineteenth century and eventually by some state pollution control laws in the 1950s and 1960s. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 72-77 (3d. ed. 2000) (describing the origins of modern environmental law).

²¹ Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 601-02 (1996); see also William L. Andreen, *The Evolution of Water Pollution Control in the United States—States, Local, and Federal Efforts, 1789-1972: Part I*, 22 STAN. ENVTL. L.J. 145, 196-99 (2003) (commenting that state regulatory efforts in the 1950s to mid-1960s were “too little, too late”). Esty also notes that there were other forces that spurred centralization of environmental regulation, such as the preference of some industries “for unified national standards that would preempt varying state requirements” and presidential politics. Esty, *supra* at 602. With regard to the latter, Esty singles out former Senator Ed Muskie, a leading Senate environmentalist, whose 1972 presidential campaign against President Richard Nixon helped ensure that a strong CAA moved through Congress. *Id.* at 602-03; see also Steinzor, *supra* note 10, at 366-75 (listing as justifications for a centralized regulatory regime: mastery of the complex technical and scientific challenges of effective pollu-

The inability of states to withstand local political pressures also contributed to the states' poor performance in regulating environmental pollution. Each of these laws employs a model of federalism that defines, somewhat imprecisely, the contours of the relationship between the federal and state governments in the law's administration. The effect of the Court's Eleventh Amendment jurisprudence on the federalism model employed by the CWA is the focus of this Article.

A. *The Federalism Structure of the CWA*

There are different federalism models, under which states play a role in the administration of the nation's environmental and natural resources laws.²² The CWA, like other pollution control laws, uses what I have called elsewhere the state primacy, or dual regulation cooperative federalism model.²³ Under this model, the EPA administratively delegates its authority to the states to issue standards and administer and enforce the law's permitting

tion control; mitigation of the damage caused by transboundary pollution; achievement of "distributive justice" in the maintenance of public health among the citizens of the United States; and the likelihood that states will engage in a "race-to-the-bottom" that weakens environmental protection); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211-19 (1977) (adding to the congressional rationales in support of centralizing authority in the federal government more academic reasons, such as the need to address the tragedy of the commons and achieve national economies of scale, overcome disparities in effective political representation, correct market failures arising from pollution externalities, and to obtain the advantages of pursuing moral ideals and the politics of sacrifice on a national plane). See Esty, *supra* at 603-05 (discussing Stewart's contribution to centralization debate).

²² See generally Hope M. Babcock, *Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models from Other Laws Save Our Private Lands*, 3 HASTINGS W.-NW. J. ENVTL. L & POL'Y 193 (1996) (describing three models of cooperative federalism and comparing them to the dominant federal model in use on the nation's public lands).

²³ *Id.* at 199. Dwyer describes three features of this model as used in the CAA: Congress (1) "made the major policy decisions or assigned them to the EPA," while leaving the states "considerable room to build upon policy decisions from which they are nominally excluded"; (2) "delegated substantial implementation and enforcement authorities to the states if they want them and are willing to conform their regulatory programs to minimal federal criteria," leaving to the states the important task of "filling in the details"; and (3) "adopted mechanisms to coerce state cooperation without directly taking over state legislative and administrative bodies," including placing a high cost on a state exercising the "exit option"—loss of "state control of [its] air pollution control program and related land use and economic decisions." Dwyer, *supra* note 15, at 1197-99.

requirements through federally approved state programs.²⁴ The states with approved regulatory programs are eligible to receive federal funds to offset the costs of administering these programs.²⁵ If the state regulatory program meets some standard of comparability with its federal analog, state laws, state agencies, and state courts replace their federal counterparts.²⁶ To assure no relaxation in implementation of the federal law's requirements, the EPA oversees state performance of its delegated authority,²⁷ and retains authority to reassert federal jurisdiction,²⁸ restrict or condition federal funding of state programs to achieve specific programmatic results,²⁹ or enforce directly if the agency deems state performance deficient.³⁰ Unless states enact their own independent laws and replace federal funding, the state agencies administering delegated programs must satisfy their federal overseers.³¹

²⁴ The Framers of the Constitution shared the assumption that sovereignty was "unitary and exclusive . . . capable neither of division nor of joint tenancy" and, therefore, either the "state legislatures or national Congress [had] to predominate." Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 654 (1993). During the course of their debates the framers grew to accept the idea that both the central (national) government and the states could exercise sovereignty in their *separate* spheres. Nonetheless, the Framers might have been puzzled by this *sharing* of regulatory power with the states. *Id.* at 654-56.

²⁵ See, e.g., Clean Water Act (CWA) § 106, 33 U.S.C. § 1256 (1994). This section of the CWA grants states and interstate agencies funds "to assist them in administering programs for the prevention, reduction, and elimination of pollution, including enforcement directly or through appropriate State law enforcement officers or agencies."

²⁶ See, e.g., CWA § 510, 33 U.S.C. § 1370 (1994) (stating that states may not adopt or enforce standards which are "less stringent than" federal standards).

²⁷ See, e.g., CWA § 402(d), 33 U.S.C. § 1342(d) (1994) (requiring federal review of state-issued national pollution discharge elimination system permits).

²⁸ See, e.g., CWA § 402(c), 33 U.S.C. § 1342(c) (1994) (setting out the criteria for withdrawal of federal approval of state national pollution discharge elimination system permit programs).

²⁹ CWA § 106, 33 U.S.C. § 1256 (1994) (authorizing the conditioning of, or reduction in, federal program grants); CAA § 179(a), 42 U.S.C. § 7509(a) (1994) (authorizing the cutoff of federal highway funds in nonattainment areas). For a more complete list of the coercive sticks in the CAA, see Dwyer, *supra* note 15, at 1196-97.

³⁰ CWA § 309(a), 33 U.S.C. § 1319(a) (1994) (authorizing federal enforcement of state administered permitting programs).

³¹ For a description of the delegation program under pollution control laws, the EPA's authority for withdrawing delegated authority, and the power of citizens to petition for program withdrawal, see generally Steinzor, *supra* note 10, at 357-59. As Steinzor notes, "[t]he potent dichotomy between the usual prerogatives of state executives and legislators and this dependence on relatively remote federal officials cannot help but breed tension and resistance." *Id.* at 359. Cf. Richard B. Stewart,

Given the fact that Congress enacted laws like the CWA in response to, among other factors, state and local neglect of environmental problems and local entrenchment of privilege, it is puzzling that Congress picked a federalism model that returns to the states substantial regulatory authority over pollution control and abatement. After all, had Congress selected a completely centralized water pollution regulatory program, it would have certainly avoided these errors of the past. A centralized regime would have also corrected market failures and lessened inequities among states as well as possible industry forum-shopping.³²

However, even discounting the obvious political attractiveness to Congress of the federalism model it selected, sharing implementation authority with the states made, and to a large degree still makes, sense.³³ Giving states authority to administer the law's regulatory programs moves decisions to where regulated

Madison's Nightmare, 57 U. CHI. L. REV. 335, 352-53 (1990) (recommending the use of indirect methods, such as transferable pollution credits, to achieve the desired "strategic coupling" of the institution's decisions with national norms and goals).

³² See Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1299-1300 (1995) (noting the particular importance of this feature in the field of pollution control where the concern is that the absence of a strong federal presence will result in "an uneven playing field dotted with 'pollution havens'"). The rationales for centralization, according to Dwyer, are "to take advantage of economies of scale with regard to research and data collection, to regulate interstate pollution, and to replace unduly weak state regulation." Dwyer, *supra* note 15, at 1219 (citing Stewart, *supra* note 21, at 1211-19). Dwyer also cites excerpts from the CAA's legislative history to show Congress's concern about the willingness of states to relax environmental standards to attract, or keep, economic development. *Id.* at 1195 n.60. *But see* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1219 (1992) (disputing the existence of industry forum-shopping and the race-to-the-bottom).

³³ See generally Dwyer, *supra* note 15, at 1190 (saying that "[a]lthough the states are by no means equal partners in regulating the environment, they paradoxically remain indispensable partners" because "the federal government needs state bureaucracies (with their technical and administrative resources) and state politicians (with their political and budgetary support) to achieve its environmental goals"); see also *id.* at 1216-19 (describing the "inevitability of state autonomy in environmental law" because environmental regulation affects "areas—such as land use control and protection of public health and natural resources—that have been in the domain of state and local agencies for decades"; "the diversity of local conditions" requires that implementation and enforcement of federal standards be tailored to local conditions, which, in turn, requires local decision makers who are both knowledgeable and sympathetic toward these conditions, and the controversial nature of environmental law makes local political support important); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1504 (1994) (stating that the "law that most affects most people in their daily lives is still overwhelmingly state law").

activities occur, which allows permits to be tailored to local conditions and to be informed by better, site-specific information. Using a federalism model in which states play a key role in the law's regulatory programs reflects the fact that the country's size and geographic diversity and the number of regulated entities make it extremely difficult, if not impossible, to administer the CWA's permitting program from Washington (or even from the EPA's regional offices).³⁴ The model also respects the close relationship between pollution and land use, long considered a prerogative of local government,³⁵ as well as the fact that the federal government's resources are limited, and that the states have had considerable experience administering laws of this type. Thus, in theory, the model's federalism design should lead to more efficient use of limited resources and ultimately enhance the legitimacy and efficacy of regulatory decisions. Unfortunately, quite the contrary has been true, and the problems with the model set forth below have fueled cries for even greater devolution of regulatory responsibility to the states.³⁶

A fundamental flaw in the CWA's cooperative federalism model is its dependence on a synthesis of two inherently conflicting goals: state regulatory primacy and the implementation of federal standards.³⁷ A governance design in which one jurisdic-

³⁴ See Dwyer, *supra* note 15, at 1197-98. Slightly over a decade ago, the EPA collected information under various federal pollution control laws about more than 30,000 abandoned or uncontrolled hazardous waste sites, and 328 toxic chemicals released to the air, water, and land from more than 17,000 manufacturing facilities. The EPA also has a database for water quality information alone that contains over 170 million data points on surface and groundwater quality, sediments, streamflow, and fish tissue contamination, which provides information on which regulatory programs principally administered by the states are based. ENVIRONMENTAL QUALITY: THE TWENTY-THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 260-61 (1992).

³⁵ See James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 493 (1994) (saying the "dominant model of land use regulation" in this country is local control of land use through Euclidean zoning).

³⁶ Steinzor, *supra* note 10, at 375-77 (describing "tensions in the [federal-state] marriage" and the pressures to dissolve the arrangement).

³⁷ See Babcock, *supra* note 22, at 200-02 (describing the problems with the state primacy, dual regulation model of cooperative federalism); see also Steinzor, *supra* note 10 at 375-77 (describing the downward spiral in federal state relations under this model). For other failings of the state primacy, or dual regulation, model, see Babcock, *supra* note 22, at 202-03; cf. William M. Eichbaum & Hope M. Babcock, *A Question of Delegation: The Surface Mining Control and Reclamation Act of 1977 and State-Federal Relations*, 86 DICK. L. REV. 615 (1982) (describing the tension in the Surface Mining Act between congressionally mandated detailed performance

tion takes the lead in developing the policies that another jurisdiction has primary responsibility for implementing—i.e., a design that “deputizes the states to enforce the law on an equal footing with EPA but gives the Federal government superior leverage within the relationship”³⁸—is bound to cause conflict. Similarly, a model based on inherent federal distrust of state performance, reflected in the model’s concentric, overlapping power-sharing structure, can only lead to strained relationships between the governing partners.³⁹

Complaints about state-run pollution abatement and control programs continue under the new regime.⁴⁰ Although some states have surpassed the federal government in their zeal to protect the environment,⁴¹ this is not true for many others.⁴² For the

standards and a cooperative federal-state relationship). *But see* Dwyer, *supra* note 15, at 1219 (describing “the tension between federal and state priorities” under environmental laws as promoting “the development and growth of states as environmental policy-makers”).

³⁸ Steinzor, *supra* note 10, at 359.

³⁹ *See generally* Dwyer, *supra* note 15, at 1199-1219 (describing the ebb and flow in the federal-state relationship embodied in the CAA as illustrated by the EPA’s efforts to impose mandatory land use and transportation controls and its enforcement against states that refused to implement inspection and maintenance programs); E. Donald Elliott, *Federal Versus State Environmental Protection Standards: Can a National Policy Be Implemented Locally?*, 22 ENVTL. L. REP. 10,010 (1992); Marc Melnick & Elizabeth Willes, *Watching the Candy Store: EPA Overfiling of Local Air Pollution Variances*, 20 ECOLOGY L.Q. 207, 255 (1993); GENERAL ACCOUNTING OFFICE PUB. NO. GAO/RCED-95-64, EPA AND THE STATES: ENVIRONMENTAL CHALLENGES REQUIRE A BETTER WORKING RELATIONSHIP (1995) [hereinafter GENERAL ACCOUNTING OFFICE]. *But see* Houck & Rolland, *supra* note 32, at 1312 (finding positive features of this conflict in the administration of the federal wetlands permitting program).

⁴⁰ The 1998 EPA Inspector General’s Report found widespread failures by states to enforce the laws or to report violations to the EPA, and that the EPA had been lax in supervising state enforcement. John H. Cushman, Jr., *EPA and State Found to be Lax on Pollution Laws*, N.Y. TIMES, June 7, 1998, at A1; Eric Pianin, *GAO Issues Warning on EPA Enforcement; Plan to Shift Resources Criticized*, WASH. POST, Aug. 23, 2001, at A23 (reporting that the EPA’s Office of Inspector General found only a handful of states had aggressive environmental enforcement programs and that it criticized the performance of forty-four states in enforcing CWA standards); Melnick & Willes, *supra* note 39, at 253-54 (1993) (noting that state and local air districts were “reluctant to enact stringent environmental regulation” because of local economic concerns). Even the Administration’s Proposed Budget for FY 2004 notes that, in recent years, authorized state NPDES programs have been the object of an increasing number of withdrawal petitions, citizen lawsuits, and independent reviews “indicating noncompliance with Federal CWA requirements,” citing in particular problems with the timely issuance of NPDES permits. TEXT SUPPLEMENT, ADMINISTRATION’S PROPOSED BUDGET FOR FY 2004, 2-6 (Feb. 7, 2003).

⁴¹ *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 25249.5-.13 (West 1986) (requiring businesses to warn persons exposed to listed carcinogens or reproductive toxins); *id.*

most part, states lack the resources and political will to be tough regulators.⁴³ At the same time, allegations of inconsistent federal oversight and micromanagement of state programs, wasteful duplication of effort, delayed and conflicting decisions, and lack of finality have burdened the CWA cooperative federalism model almost to the point of disability.⁴⁴ Further, the political unpopularity of the federal oversight “sticks” (e.g., withdrawal of enforcement or broader programmatic authority) and limited federal resources supporting their use means that federal oversight is uneven and often ineffective. These factors curtail the federal government’s capacity to counter-balance excessive state responsiveness to local political and economic pressure. This puts at risk the model’s ability to achieve national norms and avoid distributional inequities among the several states, thus undermining the theoretical advantages of the model set out previously.

B. *The Clean Water Act’s Citizen Suit Provision*

Congress recognized that deputizing private citizens to enforce the CWA was essential for achieving the Act’s goal of

§§ 39650-39675 (West 1986 & Supp. 1995) (requiring emission standards for toxic air contaminants); *id.* §§ 44300-44394 (requiring facilities to submit an inventory of toxic emissions, to prepare and publicly release a health risk assessment, and to implement measures to reduce air emissions); *New York v. EPA*, Docket No. 02-1387 (D.C. Cir. filed Mar. 6, 2003) (discussing nine northeastern states that have sued the EPA over alleged changes in the CAA’s new source review provisions that weaken the program’s effectiveness); Carolyn Whetzel, *South Coast District Adopts Strictest Rule in United States on Hexavalent Chromium*, 34 ENVTL. REP. May 9, 2003, at 1083.

⁴² Steinzor, *supra* note 10, at 357-58 (noting that nearly half the states have passed laws preventing state agencies from implementing more stringent standards than those promulgated by the EPA “largely in response to the demands of regulated industries”).

⁴³ See Steinzor, *supra* note 10.

⁴⁴ See generally GENERAL ACCOUNTING OFFICE, *supra* note 39. Another area where these problems are seen is in state enforcement of federal pollution control mandates where state inspectors seek more flexibility and accommodation of local interests than do their federal counterparts; see Melnick & Willes, *supra* note 39, at 235 (saying federal agencies must walk a narrow line between federal mandates that specifically disallow local considerations and the states’ desire for flexibility); James R. Elder, *Regulation of Water Quality: Is EPA Meeting Its Obligations or Can the States Better Meet Water Quality Challenges?*, in AMERICAN BAR ASSOCIATION, FEDERAL VERSUS STATE ENVIRONMENTAL PROTECTION STANDARDS: CAN A NATIONAL POLICY BE IMPLEMENTED LEGALLY 20 (1990) (describing the “EPA’s tight-rope walk between the need for national consistency and state flexibility in implementation”).

“[r]estoration and maintenance of [the] chemical, physical and biological integrity [of the] Nation’s waters.”⁴⁵ Courts have consistently recognized this fact of legislative intent,⁴⁶ although recognizing at the same time that citizen enforcement of the Act was only supplemental to the enforcement role of the government.⁴⁷ This is not to say that granting private enforcement authority to citizens is without controversy—it is not.⁴⁸ But few dispute that citizen-initiated litigation has had a profound impact on the shape of environmental law.⁴⁹ The workhorse of citizen suit litigation is section 505 of the CWA. Nearly every environmental law contains a provision like that found in section 505.⁵⁰ Na-

⁴⁵ CWA § 101, 33 U.S.C. § 1251 (1994). See Jefferson D. Reynolds, *Defanging Environmental Law: Extracting Citizen Suit Provisions Under Seminole Tribe v. Florida*, 12 J. NAT. RESOURCES & ENVTL. L. 71, 79-80 (1996-1997) (discussing the legislative history of the citizen suit provisions of the Clean Air Act, and noting with respect to the Endangered Species Act that by the time that law was enacted, “the concept of citizen enforcement was well received with little attention in the congressional record”).

⁴⁶ See, e.g., *Natural Res. Def. Council v. EPA*, 484 F.2d 1331, 1334 (1st Cir. 1973) (saying, “[t]he public suit seems particularly instrumental to the statutory scheme . . . for only the public—certainly not the polluter—has the incentive to complain if the EPA falls short”); see also *Sierra Club v. Morton*, 405 U.S. 727, 737-38 (1972) (referring to a citizen who sues under an environmental citizen lawsuit provision as a “private attorney general”); accord *Bennett v. Spear*, 520 U.S. 154, 165 (1997).

⁴⁷ See, e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987) (saying “[t]he bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action”); see also S. REP. NO. 92-414, at 64 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3730 (“The Committee intends the great volume of enforcement actions be brought by the State,” and citizen suits are proper only “if the Federal, State, and local agencies fail to exercise their enforcement responsibility”) (emphasis added); WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* 271 (2d ed. 1994) (discussing the fact that the sixty-day notice requirement in the citizen suit provision of the CWA was constructed in a way “to encourage and provide for agency enforcement”) (citing S. REP. NO. 92-414, at 79 (1971)).

⁴⁸ Cf. Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982). Sunstein lists some of the reasons that *implied private rights of action* under environmental laws are not a good idea. Among other reasons, they “require courts to undertake determinations for which they lack the specialized factfinding and policymaking competence of the relevant agency.” *Id.* at 416. Decentralized courts increase the likelihood that enforcement process will not be consistent or coordinated, creating “varied results and unpredictability for the regulator and regulated,” and “collective benefits are typically better protected through public enforcement mechanisms than through private remedies.” *Abate & Cogswell*, *supra* note 14, at 31-32.

⁴⁹ See David Sive, *The Litigation Process in the Development of Environmental Law*, 19 PACE ENVTL. L. REV. 727, 736 (2002) (attributing to environmental litigation not only the modern shape of environmental laws, but also their initial passage).

⁵⁰ See, e.g., Toxic Substances Control Act §§ 19(d), 20(c)(2), 15 U.S.C. § 2618(d), 2619(c)(2) (2004); Endangered Species Act of 1973 § 11(g)(4), 16 U.S.C.

tional, regional, and local environmental organizations as well as ad hoc groups and individuals concerned about a particular resource or potential environmental harm have found their way to court to try and enforce federal mandates under those provisions.⁵¹

Section 505 of the CWA authorizes citizens to file suit against either the Administrator of the EPA for failing to perform a non-discretionary duty or against:

any person (including (i) the United States, and (ii) 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 (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.⁵²

The CWA defines “person” as “an individual, corporation, partnership, association, *State*, municipality, commission, or political subdivision of a State, or any interstate body.”⁵³ The refer-

§ 1540(g)(4) (2004); Surface Mining Control & Reclamation Act of 1970 § 520, 30 U.S.C. § 1270(d) (2004); Deep Seabed Hard Mineral Resources Act § 117(c), 30 U.S.C. § 1427(c) (2004); Marine Protection Research & Sanctuaries Act § 105(g)(4), 33 U.S.C. § 1415(g)(4) (2004); Deepwater Port Act of 1974 § 16(d), 33 U.S.C. § 1515(d) (2004); Safe Drinking Water Act § 1449(d), 42 U.S.C. § 300j-8(d) (2004); Noise Control Act of 1972 § 12(d), 42 U.S.C. § 4911(d); Energy Sources Development Act § 210(e)(2), 42 U.S.C. § 5851(e)(2) (2004); Energy Policy & Conservation Act § 335(d), 42 U.S.C. § 6305(d) (2004); Solid Waste Disposal Act § 7002(a), 42 U.S.C. § 6972(e) (2004); Clean Air Act §§ 304, 307, 42 U.S.C. §§ 7604, 7607(f) (2004); Powerplant and Industrial Fuel Act § 725(d), 42 U.S.C. § 8435(d) (2004); Ocean Thermal Energy Conservation Act § 114(d), 42 U.S.C. § 9124(d) (2004); Comprehensive Environmental Response, Compensation and Liability Act § 310, 42 U.S.C. § 9659 (2004); Outer Continental Shelf Lands Act § 23(a)(5), 43 U.S.C. § 1349(a)(5) (1994).

⁵¹ See Sive, *supra* note 49, at 735-36 (calling groups such as Earthjustice, Natural Resource Defense Council, and Environmental Defense Fund “Environmental Public Interest Law Firms”) (*citing* RODGERS, *supra* note 47, at 909-27). Rodgers showed that NRDC has brought fifty-five cases, EDF (now Environmental Defense or ED) forty-eight cases, Sierra Club (most brought by Sierra Club Legal Defense Fund, now EarthJustice) seventy-nine cases, and National Wildlife Federation eighteen cases; Sive said that when all the cases brought by other individuals, organizations and *ad hoc* groups are added to those cases, nearly two-thirds of the cases listed by Rodgers are statutorily authorized citizen suits.

⁵² CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1) (1994) (emphasis added). See also CWA § 309(g)(6), 33 U.S.C. § 1319(g)(6) (setting the parameters for citizen suits seeking administrative penalties).

⁵³ CWA § 505(a)(1), 33 U.S.C. § 1362(5) (1994) (emphasis added). Each of the governmental terms (i.e., “State,” “municipality,” and “interstate agency”) is further defined to make clear Congress’s intent with regard to the reach of section 505. See CWA § 502(2), (3), (4), 33 U.S.C. § 1562(2), (3), (4) (1994), respectively. See also CWA § 502(1), 33 U.S.C. § 1562(1) (1994) (defining “State water pollution control

ence to the Eleventh Amendment in section 505(a) is where citizen suits quite literally enter into the interpretative fray over the intent of that Amendment,⁵⁴ even though there is a specific authorization for citizens to sue states.

Until recently, the major hurdle facing environmental plaintiffs was meeting the Court's Article III standing requirements.⁵⁵ With the advent of the Court's state sovereign immunity jurisprudence, another potentially disabling barrier to these suits has appeared. The problems with the CWA's cooperative federalism model, and the pressures on the EPA to devolve even greater

agency" as meaning the "State agency designated by the Governor having responsibility for enforcing State laws, relating to the abatement of pollution").

⁵⁴ Somewhat surprisingly there has been little litigation over the meaning of that reference, and what case law has developed, for the most part, finds no abrogation of sovereign immunity. *See infra* notes 105-06 and accompanying text; note 188. One court explained "the dearth of cases" interpreting "to the extent permitted by" language in section 505 of the CWA as being due to the fact that state, like federal, enforcement actions are not subject to suit because of their discretionary nature. *Froebel v. Meyer*, 13 F. Supp. 2d 843, 849 (E.D. Wis. 1998).

⁵⁵ *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-10 (1998) (finding a citizen suit seeking declaratory relief and civil penalties did not meet the redressibility prong of Article III standing); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-34 (1998) (finding citizens who challenged the land and natural resources management plan for Ohio's Wayne National Forest had not suffered a "practical harm" and, therefore, the lawsuit was not ripe for judicial review because site-specific environmental assessments were required before any logging could occur); *Bennett v. Spear*, 520 U.S. 154 (1997) (requiring claims not authorized under a citizen suit provision to meet a zone-of-interest test); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (applying a particularized injury rule of Article III standing even to cases where Congress had specifically authorized suit); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891-92 (1990) (holding that citizens challenging agency action must allege highly particularized injuries, and questioning constitutional validity of lawsuits asserting programmatic violations). The Court has also erected other jurisdictional hurdles for potential environmental litigants to clear. *See, e.g.*, *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) (holding the notice requirement in citizen suits provisions is jurisdictional); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 58-61 (1987) (holding citizen suits can be filed only where an ongoing violation continues when the lawsuit is filed, and disallowing suits for wholly past violations). Congress partially overruled *Gwaltney* in the 1990 amendments to the Clean Air Act, allowing citizen lawsuits for past violations if there was evidence that they had been repeated. Pub. L. 101-549, 104 Stat. 2683 (1990) (codified as amended at 42 U.S.C. § 7604 (1990)). A pause in this negative trend for citizen plaintiffs occurred in *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), which granted standing to a citizen group that had alleged a less particularized injury than in *Lujan I* and allowed suit for both declaratory relief and civil penalties. *See also Araiza, supra* note 7, at 1523-24 (saying that "the skepticism the Court has shown about citizen standing percolates into *Alden's* grant of immunity to the states," that both doctrines "converge at the point of imposing structure-based limits on private law enforcement," and "[i]n both situations the Court has reserved enforcement power to a government entity").

regulatory authority on the states despite these problems, make citizen enforcement of pollution control laws against states even more essential today and magnify the impact of this barrier on environmental law.⁵⁶

II

THE RISE OF THE STATES UNDER FEDERAL ENVIRONMENTAL LAWS

Within the CWA's cooperative federalism model, there is considerable discretion as to how the balance between the federal government and states should be struck. During early implementation of laws like the CWA, the tilt was towards the federal government. Since the Reagan Administration and the congressional "Contract With America,"⁵⁷ the tilt has been towards the states.⁵⁸ Whatever support there once was for centrist thinking has long given way to proponents of decentralism.⁵⁹

⁵⁶ See Eric Pianin, *For Environmentalists, Victories in Court: Groups Turn to Judicial System to Fight Efforts By Bush Administration to Relax Protections*, WASH. POST, Jan. 27, 2003, at A3 (describing how, faced with "diminished political influence at the White House and on Capital Hill, environmental groups increasingly and successfully are turning to the courts for help in blocking efforts to relax or scrap environmental protection").

⁵⁷ Much of this thinking at the political level has had a decidedly anti-Washington and anti-bureaucracy slant. See, e.g., NEWT GINGRICH, *TO RENEW AMERICA* 9 (1995) ("We must replace our centralized, micromanaged, Washington-based bureaucracy with a dramatically decentralized system more appropriate to a continent-wide country . . . 'Closer is better' should be the rule of thumb . . ."), as quoted in Esty, *supra* note 21, at 610 n.148; Dwyer, *supra* note 15, at 1219 (quoting former Governor Pete Wilson explaining his state's resistance to federally mandated motor vehicle inspection and maintenance programs, and Wilson's saying "[w]e're the ones who breathe our air, not the Federal bureaucrats in Washington."). Tarlock comments on the deep passions that the "decentering" of government triggers, with those on the right supporting devolution "in the name of an arid, abstract federalism often divorced from how power is actually exercised, shared and constrained," while environmentalists fiercely oppose it "as a disguised effort to roll back thirty plus years of environmental protection." A. Dan Tarlock, *The Future of Environmental "Rule of Law" Litigation and There Is One*, 19 PACE ENVTL. L. REV. 611, 613 (2002).

⁵⁸ See generally, Esty, *supra* note 21, at 599-613 (describing briefly this history and the rationales used by both the proponents of centralization and of decentralization). For an impressive list of academic scholars who have opined on the preferred location for the administration and enforcement of environmental laws, see Steinzor, *supra* note 10, at 356 n.20, 360-63 (2000) (discussing not only the historical evolution toward centralization of authority to administer and enforce environmental laws, but also the competing subtexts at work in the debate over the contours of the state primacy regulatory model).

⁵⁹ Esty calls this "second-generation thinking," as opposed to the thinking of the

Rena Steinzor demonstrates this trend in her article, *Devolution and the Public Health*, in which she describes some of the initiatives under the EPA's reinvention program that devolve greater responsibility to the states and restrain even further the EPA's oversight role.⁶⁰ Both of these initiatives are occurring within the CWA's existing federalism framework.

It is not necessary to go into detail with respect to any of the specific reinvention proposals to realize that the devolution trend they reflect is troubling because of the fundamental problems with the CWA's cooperative federalism model set out previously. Steinzor reaffirms this concern with her four "cautionary tales," which illustrate the perils of greater devolution to the states.⁶¹ Each of these tales, not surprisingly, stems directly from experience with the CWA. They are: (1) the growing problem in the implementation of the CWA's industrial permitting program where states are seriously behind in repermitting existing dischargers; (2) the difficulties states have had in issuing water quality standards (a power given to the states to tailor national effluent limitations to local conditions);⁶² (3) a dramatically different view of enforcement as an incentive to good regulatory performance tending towards cooperative solutions to violations, as opposed to viewing enforcement primarily as a means to pun-

first generation that authored the original laws. Esty, *supra* note 21, at 605. Esty also lists among commonly used arguments supporting decentralization the fact that it brings the "benefits of diversity" (i.e., states functioning as laboratories) and corrects the diseconomies of regulatory scale (i.e., the benefit of "tailoring" regulations to the localized circumstances of environmental background conditions, risk preferences, policy preferences, income levels, and improving social welfare). *Id.* at 606-13. In addition, decentralization increases regulatory competition without resulting in a race-to-the-bottom, offers more representative decision making, and counters the likelihood of regulatory powers being captured by "rent-seeking interests or other narrowly focused groups" who impose costs on society. *Id.* at 611. *See also* John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 365-66 (2002) (commenting on the largely "unnoticed trend" among local governments to adopt environmentally protective laws, arguing that local governments should be "full partners of the state and federal governments in the critical matter of environmental protection," and advocating that federal and state policy should be changed "to reinforce and utilize this powerful new grass-roots force").

⁶⁰ Steinzor, *supra* note 10, at 420-46 (describing and critiquing the EPA's reinvention initiatives, including state mini-block grants and a system of differential EPA oversight of state performance, because they devolve greater, unsupervised regulatory authority on states).

⁶¹ *Id.* at 382-99.

⁶² CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (2004) (authorizing states to develop water-quality-based effluent limits).

ish violators with stiff penalties;⁶³ and (4) the difficulties states have had combating transboundary pollution.⁶⁴ Steinzor concludes that the states are falling behind in their capacity to respond to even first generation environmental problems under the CWA, and are in no position to tackle second generation problems by any means, innovative or otherwise—referring to some of the EPA’s reinvention devolution initiatives.⁶⁵ For those concerned about environmental protection, devolution of regulatory authority under the CWA has not had an auspicious track record. The thought that more authority may move to the states is even more troubling, as Steinzor’s data demonstrate.⁶⁶

This record alone might be sufficient cause for concern, but the fact that the EPA has rarely withdrawn state delegated authority on its own initiative, or at the request of environmental groups, makes matters worse.⁶⁷ Quite simply, the EPA lacks the resources and political will to compel the states to perform at a level necessary to protect the environment.

It is easy to understand the EPA’s reluctance to let the congressional hammer fall. There would be an enormous political firestorm should such an action occur.⁶⁸ Requiring the agency to take over administration of the National Pollution Discharge Elimination System (NPDES) permit program would also present a huge drain on already limited federal resources.⁶⁹ And, in

⁶³ See Steinzor, *supra* note 10, at 382, 388-96.

⁶⁴ *Id.* at 382-99.

⁶⁵ *Id.* at 399-419. Steinzor’s conclusions are based on an analysis of data from seventeen states that looks at population size and distribution, land area, overall economic capacity, and resources devoted to environmental and natural resources programs, and that characterizes the environmental challenge each state faces.

⁶⁶ Dwyer, however, argues that while the states had a poor record before enactment of basic environmental laws, that record has improved considerably. Dwyer, *supra* note 15, at 1223. He ascribes that improvement to the centralization of environmental policy beginning in 1970, which gave states both a “model” for their own legislation and “a springboard for innovative regulation that goes beyond the federal minimum.” *Id.*

⁶⁷ See, e.g., Steve Cook, *EPA Returns Control of Air Permit Program to Maryland After Legislature Amends Law*, 34 ENVTL. REP., Jan. 24, 2003, at 180; see also Dwyer, *supra* note 15, at 1199-1216 (describing the EPA’s unsuccessful struggle to get the states to implement land use and transportation controls and its tepid enforcement efforts against recalcitrant states regarding state inspection and maintenance programs).

⁶⁸ Partial Withdrawal of Approval of 34 Clean Air Act Part 70 Operating Permits Programs in California; Announcement of a Part 71 Federal Operating Permits Program, 67 Fed. Reg. 63,551 (Oct. 15, 2002) (to be codified at 40 C.F.R. § 70).

⁶⁹ See Melnick & Willes, *supra* note 39, at 246 (noting that “revocation of state

the last analysis, the EPA remains dependent on local expertise and acceptability for these programs to work.⁷⁰ The states all know of the EPA's reluctance to withdraw programmatic authority, so there is no real federal pressure on states to meet federal requirements, leaving citizens as the only antidote.

Assuming, therefore, that the need for citizen enforcement of environmental laws like the CWA is escalating in importance, the prospect that the Court's expansionist view of the Eleventh Amendment might extend to environmental citizen suits is of grave concern.⁷¹ This is because states, which are playing an even more central role in the administration of these laws, are still either unwilling, or severely hampered in their ability, to administer them vigorously and have no need to fear federal oversight. It is to the Court's Eleventh Amendment jurisprudence that this Article now turns.

III

THE SUPREME COURT'S ELEVENTH AMENDMENT JURISPRUDENCE (IN BRIEF)

The text of the Eleventh Amendment is surprisingly clear and brief given how far afield from the text the Court has wandered, and how much controversy its application has engendered. It provides 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."⁷² In

enforcement authority [under the CAA] would not be wise because states do perhaps seventy to ninety percent of all enforcement of the CAA").

⁷⁰ See generally Dwyer, *supra* note 15.

⁷¹ See Araiza, *supra* note 7, at 1553-54 ("Especially in an age marked by at least a rhetorical commitment to devolution, decentralization, and more equal intergovernmental cooperation, such a hierarchical, nonconsensual approach to state compliance with federal law cannot be expected as the most likely federal response to *Alden*.").

⁷² U.S. CONST. amend. XI. The Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1783), which held that Article III had abrogated any preexisting immunity the States might have had, allowing the Court to exercise jurisdiction over a private lawsuit against the State of Georgia to collect a debt, led to the swift adoption of the Eleventh Amendment reversing that holding. See John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity*, 104 DICK. L. REV. 1, 20, 22 (1999) (saying *Chisholm* is important because it "remind[s] us of what the Constitution meant to the Founding generation before the Eleventh Amendment was enacted" and that is, "that a broader concept of immunity was not implicit in the Constitution at all").

a relatively short time, the Court has untethered the Eleventh Amendment from this text. As Justice Kennedy said in *Alden v. Maine*, “[t]he Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle; it follows that the scope of the States’ immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.”⁷³

Over the years, the Court has found license in this language to apply the Amendment to suits brought to enforce federal mandates⁷⁴ in federal court against states by citizens of the *same* state,⁷⁵ to suits in *state*, not just federal courts,⁷⁶ and in federal *administrative* adjudicatory proceedings.⁷⁷ At the same time as

⁷³ *Alden v. Maine*, 527 U.S. 706, 728-29 (1999). See Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1616 (2000) (commenting on the Court’s opinion in *Alden*, and stating that “nothing in the Amendment itself really bears on the case. Nor does the Court’s opinion seriously suggest any other textual ground for the decision. In other words, the Court saw no need to ground its decision in any constitutional text.”); see also Ellen D. Katz, *State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz*, 1998 WIS. L. REV. 1465, 1478 (1998) (suggesting that “[t]he Court’s repeated departures from the [Eleventh] Amendment’s language when construing its scope suggest that the [J]ustices, including the Court’s most ardent textualists, may deem the Amendment’s text unpersuasive evidence of the framers’ intent”).

⁷⁴ The Eleventh Amendment bars suits against state officials for violations of state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (holding *Ex parte Young* doctrine inapplicable to a suit brought against a state official to compel his compliance with state law, and saying “it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law”).

⁷⁵ In *Hans v. Louisiana*, the Court held that the Eleventh Amendment confirms principles of state sovereign immunity that are embedded in the constitutional structure and thus bars citizens from bringing suits in federal court against their own state. 134 U.S. 1, 10 (1890). The Eleventh Amendment now also bars suits brought by Indian tribes, *Blatchford v. Native Village*, 501 U.S. 775 (1991), and by foreign countries, *Monaco v. Mississippi*, 292 U.S. 313 (1934). The Court has additionally extended the immunity for states beyond suits “in law or equity” to cover suits in admiralty. See, e.g., *In re New York*, 256 U.S. 490, 497 (1921) (casting aside the tradition of viewing admiralty suits as distinct from those brought “in law and equity”); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 544 (1828).

⁷⁶ *Alden*, 527 U.S. at 712 (holding that the Eleventh Amendment immunizes a state from private lawsuits brought in its own courts under federal law).

⁷⁷ *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); see also *R.I. Dep’t of Env’tl. Mgmt. v. United States*, 286 F.3d 27, 39 (2002) (holding, among other things, that the Eleventh Amendment provided no barrier to applying sovereign immunity principles to administrative adjudications, and saying that “[t]he federal government cannot effectively negate sovereign immunity simply by shifting the adjudication of private claims against non-consenting states to administrative fora”); Kathryn J. Gainey, Note, *Does Sovereign Immunity Bar Administrative Proceedings Pursuant to Federal Environmental Statutes*, 27 HARV. ENVTL. L. REV. 227 (2003)

the Court has broadened the reach of the Eleventh Amendment, it has curtailed Congress's ability to abrogate that immunity.⁷⁸ It has also limited the circumstances when a state will be found to have waived its immunity,⁷⁹ or a litigant to raise successfully an *Ex parte Young*⁸⁰ exception to state immunity.⁸¹ The Court's

(examining the effect of *South Carolina State Ports Authority* on environmental whistleblower proceedings brought by public employees against state agencies). *But see* Conn. Dep't of Envtl. Prot. v. OSHA, 356 F.3d 226 (2d Cir. 2004) (holding the Eleventh Amendment does not prevent OSHA from investigating an administrative complaint filed by a state employee whistle-blower).

⁷⁸ *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding Congress cannot abrogate a state's immunity pursuant to its Commerce Clause powers). Although Congress can abrogate a state's immunity under section 5 of the Fourteenth Amendment, there must be congruence and proportionality between the injury to be prevented or remedied by legislation and the legislative means adopted to that end. *Id.* at 59. Further, the law must be based on a sufficient legislative record to demonstrate to the court that there is a large wrong or evil that Congress can lawfully act to correct—i.e., there must be a history of “widespread and persisting deprivation of constitutional rights.” *See* *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (requiring congruence and proportionality between the injury and the legislative means); *see also* *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding Congress did not validly abrogate the Eleventh Amendment in the Americans with Disabilities Act because the legislative record did not contain clear evidence of a pattern of past constitutional violations by the states); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (noting that although the Age Discrimination in Employment Act contains a clear statement of congressional intent to abrogate Eleventh Amendment immunity, Congress exceeded its authority under the enforcement clause of the Fourteenth Amendment because it failed to identify a pattern of irrational state discrimination or design a congruent or proportional remedy); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 633 (1999) (holding that the Patent Remedy Act was not a section 5 enactment). *But see* *Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1977, 1984 (2003) (finding that the Family and Medical Leave Act satisfied the “congruence and proportionality” test and, therefore, was appropriate prophylactic legislation).

⁷⁹ *See* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (saying the “test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one”). Statutory, even constitutional provisions, merely allowing a state to sue, or be sued, in its own courts are insufficient to waive the state's immunity from suit in a federal forum. *Coll. Sav. Bank*, 527 U.S. at 676; *Atascadero*, 473 U.S. at 241; *Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (*per curiam*). *But see* *Coll. Sav. Bank*, 527 U.S. at 675-76 (stating that a federal court will find a waiver of immunity, if the state “voluntarily” invokes jurisdiction).

⁸⁰ *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (finding the Eleventh Amendment no bar to suits brought against state officials, in their official capacity, for prospective injunctive or declaratory relief designed to remedy ongoing violations of federal law); *see also* *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 648 (2002) (authorizing suit seeking injunctive relief against Maryland public service commissioners in their official capacity). *But see* *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945) (barring suits brought only against state officials when “the state is the real, substantial party in interest”).

vague and overly broad rationales for protecting states from private lawsuits—to prevent affronts to the *dignity* of the states⁸² and to preserve *essential* state functions⁸³—could easily be construed to cover a wide range of putative threats to states implicit in just about any lawsuit.

The Court has also made clear that Eleventh Amendment immunity extends beyond the states to “arms or instrumentalities”

⁸¹ See, e.g., *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 281, 287-89 (1997) (declining to apply the *Ex parte Young* doctrine to a claim by Tribe that federal law gave the tribe beneficial ownership of the submerged lands and banks of Lake Coeur d’Alene, and holding that although a request for prospective relief from an allegedly ongoing federal law violation is ordinarily sufficient to invoke “the *Young* fiction,” the case was unusual because the lawsuit was the “functional equivalent of a quiet title implicating special sovereignty interests”); *Seminole Tribe*, 517 U.S. at 74-75 (stating that the *Ex parte Young* doctrine does not apply when there is a preclusive congressional remedial scheme); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (holding that federal courts cannot order state officials to remedy past violations of federal law by paying funds out of the state treasury given that such relief “is in practical effect indistinguishable . . . from an award of damages against the State”).

⁸² See *Seminole Tribe*, 517 U.S. at 58 (“Eleventh Amendment does not exist solely in order to ‘preven[t] federal-court judgments that must be paid out of a State’s treasury,’ it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”) (internal citations and quotations omitted); see also *Alden v. Maine*, 527 U.S. 706, 715, 751 (1999) (noting that states “retain the dignity, though not the full authority, of sovereignty” and saying the Eleventh Amendment protects the states’ ability “to govern in accordance with the will of their citizens”); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (holding that limit on federal judicial power is an essential element of constitutional design, as immunity “accords the States the respect owed them as members of the federation”); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (making it clear that its decision was driven by the indignity to which a state is subject when a federal court orders state officials to conform their conduct with state laws). For a much earlier iteration of the state dignity rationale, see *Ex parte Ayers*, 123 U.S. 443, 505 (1887) (“The very object and purpose of the eleventh amendment [sic] were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”). But see *Verizon*, 535 U.S. at 653 (Souter, J., concurring) (finding it “neither prudent nor natural” to see a federal court’s review of a state’s determination of a question of federal law “as impugning the dignity of the State or implicating the States’ sovereign immunity in the federal system”); see also NOONAN, *supra* note 1, at 52-54.

⁸³ *Coeur d’Alene*, 521 U.S. at 287-88 (holding that an Indian tribe is barred by the Eleventh Amendment from seeking injunctive relief in federal court in a suit to establish title to land); see also *Alden*:

A power to press a State’s own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals.

527 U.S. at 749.

of the state (i.e., state departments and agencies), where the state is the real party in interest.⁸⁴ The lower courts have interpreted this extension broadly,⁸⁵ sweeping in most state agencies that might run afoul of a federal environmental mandate.⁸⁶ The key question—whether any liability imposed against the state, through its agency, will require public funds to be paid from the state treasury—has direct bearing on any civil penalties that a successful environmental litigant might collect from a misbe-

⁸⁴ *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429-30 (1997); *see also P.R. Aqueduct*, 506 U.S. at 142-47 (applying the *Cohen* collateral order doctrine to a territorial agency as an “arm” of the State); *Welch v. Tex. Dep’t of Highways & Pub. Trans.*, 483 U.S. 468, 480 (1987) (stating that absent a waiver, neither a State nor agencies acting under its control may “be subject to suit in federal court”).

⁸⁵ To determine if a state agency qualifies as an instrumentality of a state, courts look at various criteria, such as: (1) “whether any money judgment would be satisfied out of state funds”; (2) “whether the [agency] performs central governmental functions,” “may sue or be sued,” or has “power to take property in its own name or only the name of the state”; and (3) whether the agency has a corporate structure. *See, e.g.*, *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 250-51 (9th Cir. 1992) (utilizing this “multi-factored balancing test” to determine that California school districts are “state agencies” entitled to assert Eleventh Amendment immunity from suit in federal court); *Hadley v. N. Ark. Cmty. Technical Coll.*, 76 F.3d 1437, 1439 (8th Cir. 1996) (holding that courts, in determining whether an agency is the alter ego of the state, will typically look at the degree of local autonomy and control the agency has and whether funds to pay any award will come from the state treasury); *see also Whalin, supra* note 6, at 215-19 (describing the various criteria different circuit courts use to determine whether an agency is an arm of the state).

⁸⁶ At least for now, the Court has sustained the tradition, established in *Lincoln County v. Luning*, 133 U.S. 529, 530-31 (1890), that Eleventh Amendment immunity does not extend to cities or counties. *Accord* *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 609 n.10 (2001) (holding that counties and municipalities do not enjoy Eleventh Amendment immunity); *Lake County Estates, Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 400-01 (1979) (same). *See* Cheri Gochberg, Note, *Environmental Enforcement After Seminole Tribe v. Florida*, 17 J. LAND RESOURCES & ENVTL. L. 343, 365 (1997) (advocating that federal agencies exercise their discretion to sue cities, counties, and municipalities because they are “in charge of operating and maintaining many potential sources of pollution, such as waste disposal and sewage treatment plants”). *But see* *Fletcher, supra* note 2, at 850-51 (identifying as “unfinished business” for the Court “whether the states and local governments should be treated equally for purposes of the Eleventh Amendment”). The Court has also left open the question whether Eleventh Amendment immunity stretches to interstate compact commissions or officials. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 50 n.20, 51 (1994) (holding Eleventh Amendment immunity does not apply to a regional authority, even though there is “no ‘per se rule [precluding the application of the Eleventh Amendment] when States act in concert’”) (citations omitted) (emphasis in original). *But see* *Souders v. Wash. Metro. Area Transit Auth.*, 48 F.3d 546, 550-51 (D.C. Cir. 1995) (holding the Washington Metropolitan Area Transit Authority (WMATA) Compact did not waive WMATA’s Eleventh Amendment immunity to a nuisance suit challenging noise levels).

having state.⁸⁷

The Eleventh Amendment generally bars federal court jurisdiction over an action against a state official acting in his or her official capacity.⁸⁸ Usually, but not always, suits for injunctive and/or declaratory relief are not barred by the Eleventh Amendment under the application of the *Ex parte Young* doctrine.⁸⁹ Regardless if one subscribes to the “diversity explanation” (the Amendment does no more than require a narrow construction of the state-citizen diversity clause in Article III) or to the “prohibition theory” (the Amendment bars federal court jurisdiction) of the Amendment’s intent,⁹⁰ the Court considers that the Amendment “sufficiently partakes” of subject matter jurisdiction to enable a state to assert it as a defense for the first time on appeal.⁹¹

⁸⁷ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 29 (1981) (“In no case, however, have we required a State to provide money to plaintiffs much less required a State to take on such open-ended and potentially burdensome obligations,” as the structural relief sought by the plaintiffs in this case.); *Thomson v. Harmony*, 65 F.3d 1314, 1319 (6th Cir. 1995) (finding that the University of Cincinnati is a state instrumentality and, therefore, amenable to suit in the Ohio Court of Claims, and that the hospital is an agency of the university that is entitled to immunity from suit in federal court); *MSA Realty Corp. v. Illinois*, 990 F.2d 288 (7th Cir. 1993) (holding, among other things, that the Eleventh Amendment bars a claim for injunctive relief that would require direct payments by a state from its treasury for the indirect benefit of a specific entity).

⁸⁸ *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984); accord *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974); *Burnette v. Carothers*, 192 F.3d 52, 57 (2d Cir. 1999).

⁸⁹ See, e.g., *Natural Res. Def. Council v. Cal. Dep’t of Transp.*, 96 F.3d 420, 423 (9th Cir. 1996) (allowing suit for prospective relief under the CWA); *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1483 (10th Cir. 1995) (finding Eleventh Amendment did not bar suit alleging the attorney fee provision in Wyoming’s surface mining statute violated the Surface Mining Control & Reclamation Act because suit sought prospective, rather than retrospective, relief); *MSA Realty Corp.*, 990 F.2d at 295 (holding, among other things, “that the eleventh amendment [sic] bars a claim for injunctive relief . . . that would require direct payments by the state from its treasury for the indirect benefit of a specific entity”). But see, e.g., *Manning v. S.C. Dep’t of Highways & Pub. Transp.*, 914 F.2d 44, 48-49 (4th Cir. 1990) (barring suit under the Declaratory Judgment Act by a landowner seeking a declaration that his rights were violated under South Carolina condemnation statutes because issuance of declaratory judgment would have the same effect as a full-fledged award of damages).

⁹⁰ See *Fletcher*, *supra* note 2, at 848 (discussing both theories and determining that under either, the text of the Eleventh Amendment “does not bar a suit by any plaintiff except an out-of-state or foreign citizen, does not bar a suit not brought in law or equity, and does not bar any suit brought in state court”).

⁹¹ *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974) (holding that the Eleventh Amendment defense sufficiently partook of the nature of a jurisdictional bar so that it could be considered even though it was not raised in the district court by Illinois state officials).

To a large extent the Court's federalism jurisprudence,⁹² of which its Eleventh Amendment decisions are a part, reflects the thinking of those in Congress and the Administration who support devolution of federal regulatory authority to the states. This is particularly troubling since the commonality of thinking on this issue decreases the already slim likelihood that Congress would undertake any corrective action should the Court decide to shield the states from citizen suits brought to enforce federal mandates.⁹³ Yet, other than generally critical scholarly comments⁹⁴ and dissenting Justices,⁹⁵ this construction of a glass wall

⁹² The other prongs of this jurisprudence can be found in the Court's decisions restricting the reach of the Commerce Clause, *see* *United States v. Lopez*, 514 U.S. 549, 565-68 (1995) (holding that Congress does not have the authority under the Commerce Clause to prohibit the possession of firearms in the vicinity of schools), and expansion of the Tenth Amendment. *See* *Printz v. United States*, 521 U.S. 898, 934-35 (1997) (holding that the Tenth Amendment prohibits the United States from compelling a state to enact legislation to implement a specific regulatory scheme); *accord* *New York v. United States*, 505 U.S. 144, 161 (1992).

⁹³ Tarlock says that the three foundational premises for environmental law in this country are now partially unraveling. These principles are: (1) courts should be open to suits by nongovernmental organizations challenging the "failure of federal and state agencies to consider adequately the environmental consequences of their actions"; (2) the need "to federalize environmental protection to the maximum extent possible"; and (3) the application of "state-of-the-art-plus technology" can solve most environmental problems. While all of these "objectives succeeded beyond the wildest expectations of the pioneering architects of environmental protection" and "remain the foundation of modern environmental law," he argues they are "insufficient to sustain environmental law in the twenty-first century." Tarlock, *supra* note 57, at 611.

⁹⁴ *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1429 (1987) (criticizing the Court's current Eleventh Amendment jurisprudence for "clumsily attempting to hammer legal devices for abused citizens into doctrinal defenses for abusive governments"); Fletcher, *supra* note 2, at 858 (criticizing the Court's Eleventh Amendment jurisprudence for having "cleared away the text of the Eleventh Amendment"); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1033-34 (1983) (saying that the Court's treatment of the Eleventh Amendment "as prohibiting federal courts from taking jurisdiction over suits brought in federal court against a state by private citizens" is "mistaken"); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 953 (2000) (declaring that the "Court's Eleventh Amendment and sovereign immunity case law deserves the condemnation and resistance of scholars"); Vicki C. Jackson, *Seductions of Coherence: State Sovereign Immunity and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 691 (2000) (criticizing the Court's decisions in *Alden*, *College Savings Bank*, and *Florida Prepaid Postsecondary Education Expense Board*, as "blows for government nonaccountability and the preeminence of the fiscal interests of the states over the supremacy of federal law" and "curtailing the substantive reach of Congress' powers under the Fourteenth Amendment"); Vicki C. Jackson, *Seminole Tribe, the Eleventh*

around the states from citizens seeking to vindicate federal mandates has proceeded largely unnoticed, and its potential impact on environmental citizen suits was, until recently, largely unexamined.⁹⁶

Amendment, and the Potential Evisceration of Ex parte Young, 72 N.Y.U. L. REV. 495 (1997) [hereinafter Jackson, *Potential Evisceration*] (generally criticizing the effect of *Seminole Tribe* on the *Ex parte Young* doctrine); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 3-13, 3-4 (1988) (criticizing the Court's interpretation of sovereign immunity in *Hans* as textually unwarranted and fundamentally at odds with two bedrock constitutional principles: that "The law will generally provide a remedy for rights violated by the government . . . and that the judicial power of the United States over claims arising under federal law is as broad within its sphere, as is the legislative power of the United States"); David L. Shapiro, *The 1999 Trilogy: What Good Is Federalism?*, 31 RUTGERS L.J. 753, 757, 759 (2000) (calling the Court's *Seminole Tribe* decision "Rosemary's Baby," and criticizing the Court's 1999 trilogy for being "neither good federalism nor a sign of moderation"); Carlos Manuel Vasquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 861 (2000) (stating that "the increasing prominence of the state sovereignty strain in the Court's opinions may suggest that the Court is poised to reject or narrow some of the alternative mechanisms for enforcing the federal obligations of the states"); Young, *supra* note 73, at 1604 (criticizing the majority's use of what the author calls "big ideas" structuralism).

⁹⁵ See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 100 (1996). In his dissent, Justice Souter declared:

In holding the State of Florida immune to suit under the Indian Gaming Regulatory Act, the Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right.

Id.

⁹⁶ This is not to say that the topic has been completely unexamined. See, e.g., Araiza, *supra* note 7, at 1516 (assessing the effect of *Seminole Tribe* and *Alden* on federal environmental law and concluding that "private environmental lawsuits against states in state court can go forward at least to the extent that they are cast as Young suits," but noting that *Alden* continues to pose some problems); Gochberg, *supra* note 86 (examining restrictions placed on enforcement of environmental laws by *Seminole Tribe*); Margo Hasselman, Note, *Bragg v. W. Va. Coal Ass'n and the Unfortunate Limitation of Citizen Suits Against the State in Cooperative Federalism Regimes*, 29 ECOLOGY L.Q. 205 (2002) (analyzing *Bragg* and briefly examining its effect on private environmental lawsuits under the CAA and CWA); Markus G. Puder & John A. Veil, *The Discrete Charm of Cooperative Federalism: Environmental Citizen Suits in the Balance*, 27 VT. L. REV. 81, 112 (2002) (analyzing *Bragg* and concluding that "the train of thought offered in the decision has the potential to undermine the entire system of citizen litigation involving federally approved state programs"); Reynolds, *supra* note 45, (examining the Court's decision in *Seminole Tribe* and the extent to which it has placed in doubt statutory language waiving the state sovereign immunity in favor of citizen enforcement); Whalin, *supra* note 6 (examining the implications of the Court's Eleventh Amendment jurisprudence on discrete issues under the Clean Water Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation and Liability Act; and takings; as well as citizen suits against states under delegated authority); cf. Abate & Cogswell, *supra*

IV

A CLOSER LOOK AT THE COURT'S ELEVENTH
AMENDMENT JURISPRUDENCE AND
ITS POTENTIAL IMPACT ON
CWA CITIZEN SUITS

State immunity under the Eleventh Amendment is not absolute. There are three exceptions to that immunity: (1) congressional abrogation; (2) state waiver; and (3) the *Ex parte Young* doctrine.⁹⁷ The prevailing wisdom is that the Court's state sovereign immunity jurisprudence does not apply to the CWA, or to other pollution control statutes that employ a cooperative federalism model. This thinking is largely based on footnote 17 in *Seminole Tribe v. Florida*,⁹⁸ which suggests that section 505 implicitly authorizes suits against states under the third exception—the *Ex parte Young* doctrine.⁹⁹ Unfortunately, citizen suits under the CWA and its kindred statutes may be vulnerable to an Elev-

note 14 (arguing for a cabined sovereign immunity doctrine against the federal sovereign in the context of citizen enforcement of federal environmental law); Gainey, *supra* note 77 (discussing the impact of *Federal Maritime Commission v. South Carolina State Ports Authority* on the federal administrative proceedings involving a state's compliance with environmental laws).

⁹⁷ A fourth argument some environmental plaintiffs have tried in their efforts to circumvent the Eleventh Amendment is that the United States is the "true" plaintiff in any citizen suit enforcement proceeding and that citizens are merely standing in the shoes of the government—i.e., that the complaint is in the nature of a *qui tam* action. At least one circuit court has given this argument short shrift. See *Burnette v. Carothers*, which held that "there is no common law right to maintain a *qui tam* action." 192 F.3d 52, 58 (2d Cir. 1999) (citing *Conn. Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 84 (2d Cir. 1972)). The CWA, the Resources Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) neither give citizens the right "to sue on behalf of the United States nor establish a formula for recovering civil penalties. To the contrary, the citizen suit provisions authorize 'any citizen to commence a civil action on his own behalf.'" *Id.* (citing 33 U.S.C. § 1365(a)). *Cf.* R.I. Dep't of Env'tl. Mgmt. v. United States, 286 F.3d 27, 43 (2002) (applying the same principle to administrative proceedings).

⁹⁸ 517 U.S. at 97 (1996) (holding that Congress cannot abrogate a state's immunity pursuant to its Commerce Clause powers).

⁹⁹ See *id.* at 75 n.17 (distinguishing the Clean Water Act from the Indian Gaming Regulatory Act because the former does not contain a remedial scheme that would be less expansive than that which is imposed under the *Ex parte Young* doctrine). See also *Bragg v. W. Va. Coal Ass'n*, which held that the Eleventh Amendment barred a citizen suit that sought to enjoin the Director of the West Virginia Division of Environmental Protection for violating his nondiscretionary duties under the Surface Mining Control and Reclamation Act (SMCRA). 248 F.3d 275, 294 (4th Cir. 2001). Unlike the CWA, state, not federal law was implicated in the lawsuit and, therefore, the *Ex parte Young* doctrine did not apply. *Id.*

enth Amendment defense,¹⁰⁰ despite footnote 17, because of how the lower courts have narrowed the reach of that doctrine.¹⁰¹

Before discussing the *Ex parte Young* exception, it is worth briefly looking at how the Court has constrained the other two exceptions to state sovereign immunity (abrogation and waiver) to put the *Ex parte Young* doctrine into the broader context of the Court's overall Eleventh Amendment jurisprudence. Such a review shows that the Court has substantially narrowed each of these exceptions, virtually shutting whatever window of opportunity for CWA citizen suits against states they might otherwise have offered. These decisions increase the likelihood that the

¹⁰⁰ For example, the Court's Eleventh Amendment decisions have all but foreclosed CERCLA private cost recovery and contribution actions brought against states. See *Prisco v. New York*, No. 91 Civ. C3990, 1992 WL 88165, at *7 (S.D.N.Y. Apr. 22, 1992) (disallowing plaintiff's claims under CERCLA against individual state officials under the *Ex parte Young* exception precisely because the plaintiff's remedies under CERCLA are limited to damages claims); see also *Araiza*, *supra* note 7, at 1529 (commenting that a lawsuit seeking changes in how a state administers its CAA state implementation plan (SIP) could be interpreted as implicating the "autonomy and integrity of the state's regulatory authority as to in effect enjoin the state itself" and be barred under the Eleventh Amendment). Although *Araiza* concludes that, after *Alden*, such a suit could probably go forward, the possibility after *Bragg* that a SIP could be considered state law throws that conclusion into question. *Id.* at 1530. See also *Hasselman*, *supra* note 96, at 227-28 (noting the facial similarity between the federalism structure in the SMCRA and the CAA). But see *Clean Air Council v. Mallory*, 226 F. Supp. 2d 705 (E.D. Pa. 2002) (holding that the Eleventh Amendment did not bar suit under the CAA, alleging state officials failed to implement fully motor vehicle inspection and maintenance (I/M) program mandated by state implementation plan, saying among other things that the state did not have a "special sovereignty interest" in the design of its I/M program).

¹⁰¹ A related area of concern that is beyond the scope of this Article is the lower federal courts' use of the *Burford* abstention doctrine, which allows federal court dismissal where adjudication would involve complicated questions of state law, or would interfere with a state's attempt to develop a regulatory scheme. Although federal appellate courts have only addressed suits challenging permitting or siting decisions under the RCRA, district courts have applied the reasoning more broadly to RCRA citizen suits generally. For a critical review of this trend, see generally Charlotte Gibson, Note, *Citizen Suits Under the Resources Conservation and Recovery Act: Plotting Abstention on a Map of Federalism*, 98 MICH. L. REV. 269 (1999). The Fourth Circuit's decision in *Bragg* that state, not federal law is at issue in a citizen suit under a delegated regulatory program may have the additional result of increasing what might otherwise have been considered at least questionable uses of the *Burford* abstention since a federal statutory scheme will no longer be at issue in such suits. See *id.* at 284-85 (explaining that courts that have dismissed RCRA suits based on the theory that they involve only local law have done so under two theories, one of which is based on the claim that "once the EPA has authorized a state program to operate 'in lieu' of RCRA's federal regulations, the issues at stake . . . become local matters suitable for abstention").

Court might consent to a similar narrowing of the *Ex parte Young* exception by the lower courts. Because neither abrogation nor waiver holds out much promise for CWA litigants, they are discussed in summary fashion below, followed by a more comprehensive discussion of the *Ex parte Young* doctrine.

A. *Congressional Abrogation of the Eleventh Amendment and State Waiver of Eleventh Amendment Immunity*

1. *Abrogation*

Congress can abrogate a state's sovereign immunity provided that it expresses its unequivocal intention to do so in the statute,¹⁰² and acts pursuant to a valid grant of constitutional authority.¹⁰³ A review of the case law on both of these prongs reveals that abrogation is unavailing as a theory under which a CWA citizen suit against a state could proceed, despite section 505's specific authorization of such suits.

As to the first prong of congressional abrogation, the clarity of congressional intent required, the Court has said that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically."¹⁰⁴ There seems to be near-unanimity at the circuit level that the language found in section 505 of the CWA (and in so many environmental laws) is not sufficiently unequivocal as to abrogate the Eleventh Amendment,¹⁰⁵ and, in fact, reveals that "the Eleventh Amendment re-

¹⁰² *Seminole Tribe*, 517 U.S. at 55 (requiring a "clear legislative statement" of an intent to dispel sovereign immunity); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (holding that Congress must make its intent to abrogate the states' Eleventh Amendment immunity "unmistakably clear in the language of the statute"); accord *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (calling this "a 'simple but stringent test'").

¹⁰³ *Alden v. Maine*, 527 U.S. 706, 756 (1999); see also *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Seminole Tribe*, 517 U.S. at 55.

¹⁰⁴ *Atascadero*, 473 U.S. at 246.

¹⁰⁵ See, e.g., *Burnette v. Carothers*, 192 F.3d 52, 57 (2d. Cir. 1999) (finding the citizen suit language in the CWA, RCRA, and CERCLA does not "unequivocally express Congress's intent to abrogate sovereign immunity and subject states to suit"); see also *Natural Res. Def. Council v. Cal. Dep't of Transp.*, 96 F.3d 420, 423 (9th Cir. 1996) (holding that the district court properly dismissed all claims under the CWA against the state agency on Eleventh Amendment grounds). Compare *Rowlands v. Pointe Mouille Shooting Club*, 959 F. Supp. 422, 426 (E.D. Mich. 1997) *aff'd*, 182 F.3d 918 (6th Cir. 1999) (RCRA citizen suit provision operates within the Eleventh Amendment) and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 8 (1989)

tains some presumptive force.”¹⁰⁶

With regard to the second prong, the validity of Congress’s exercise of its abrogation power, the CWA is again in trouble. It is generally assumed that Congress exercised its Commerce Clause power when it enacted the statute.¹⁰⁷ In *Seminole Tribe*, the Court declared that the Commerce Clause is no longer a valid constitutional basis for congressional abrogation of a state’s Eleventh Amendment immunity.¹⁰⁸ At the moment, only the enforcement provision of the Fourteenth Amendment (section 5) remains as a constitutional basis for congressional abrogation.¹⁰⁹ Therefore, it appears unlikely that Congress abrogated the Elev-

(finding the provisions of CERCLA unmistakably express Congress’s intent to divest the states of their Eleventh Amendment immunity).

¹⁰⁶ *Froebel v. Meyer*, 13 F. Supp. 2d 843, 850 (E.D. Wis. 1998); *see also* R.I. Dep’t. of Env’tl. Mgmt. v. United States, 286 F.3d 27, 42 (2002) (finding no provision in the Safe Drinking Water Act that “remotely purports to abrogate the states’ immunity,” and construing the law’s citizen suit provision as indicating “that Congress had no intention to disturb the states’ traditional immunity from suit”).

¹⁰⁷ *But see* *Houck*, *supra* note 9, at 683-86 (arguing that the General Welfare Clause provides a more compelling basis for environmental laws than the Commerce Clause); *see also* *Steinzor*, *supra* note 10, at 364-65 (noting that “environmental federalism might well have developed on a more stable, less confusing foundation” if Congress had invoked the principle of protecting public health under a general federal police power, rather than the Commerce Clause).

¹⁰⁸ 517 U.S. at 59; *accord* *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999) (“*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers”); *Alden*, 527 U.S. at 754 (“In light of history, practice, precedent, and the structure of the Constitution . . . the States retain immunity from private suits in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.”); *see also* *Jackson*, *Potential Evisceration*, *supra* note 94 (generally criticizing the effect of the Court’s ruling on the *Ex parte Young* doctrine, and arguing the task ahead for the Court is overruling the case); *Fletcher*, *supra* note 2, at 854-57 (arguing states should not be immune for their actions when they are engaging in commercial behavior, and thus *Union Gas* should be reinstated).

¹⁰⁹ *Seminole Tribe*, 517 U.S. at 65-66; *see also* *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999) (noting that the Court has recognized individual suits against nonconsenting states only when authorized by Congress’s valid exercise of its Fourteenth Amendment enforcement power); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (acknowledging the Fourteenth Amendment as a basis for abrogation of state sovereign immunity); *Burnette*, 192 F.3d at 59. The *Burnette* court rejected an argument that CERCLA’s authorization of claims for recovery of response costs created a protectable property right under section 5 of the Fourteenth Amendment, saying “Congress’s creation of a private claim for damages does not, without more, give rise to a legitimate claim of entitlement. To hold otherwise would eviscerate *Seminole*.” *Id.* The court also noted the need to determine “whether the prophylactic measure taken under purported authority of § 5 . . . was genuinely necessary to prevent violation of the Fourteenth Amendment.” *Id.* at 60 (quoting *Coll. Sav. Bank*, 527 U.S. at 675).

enth Amendment in the CWA.¹¹⁰

2. Waiver

State waiver as a basis for exposing a state to liability can similarly be disposed of quickly. As noted previously, a state can waive its immunity to suit by consenting to be sued. In determining whether a state has waived its Eleventh Amendment immunity, a court will look to see if the waiver is unequivocal either by virtue of the express language of the statute or by such overwhelming implication from the text as to leave no room for any other reasonable construction.¹¹¹ A state cannot constructively waive its sovereign immunity.¹¹² Therefore, merely participating in a regulatory program by accepting delegated authority will not qualify as consent.¹¹³ Nor will the acceptance of federal funds

¹¹⁰ See *Froebel*, 13 F. Supp. 2d at 849 (saying, after *Seminole*, “the abrogation claim for an environmental statute such as the CWA appears difficult, if not impossible, to maintain” and concluding that section 505 fails both *Seminole* tests, “though not without troubling implications for environmental citizen suits in general”). See also *Mich. Peat v. EPA*, 175 F.3d 422, 428 (6th Cir. 1999) (holding the CWA did not abrogate the Eleventh Amendment in a suit brought under section 404, and that the action could not be maintained under the *Ex parte Young* exception); cf. *Rowlands*, 182 F.3d at 918 (reaching the same result under RCRA); *Burnette*, 192 F.3d at 57; *Froebel*, 13 F. Supp. 2d at 850-51 (listing some of the affected environmental laws).

¹¹¹ See *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 292 (4th Cir. 2001) (“If Congress is not unmistakably clear and unequivocal in its intent to condition a gift or gratuity on a State’s waiver of its sovereign immunity, we cannot presume that a State, by accepting Congress’s proffer, knowingly and voluntarily assented to such a condition.”); see also *Frew v. Hawkins*, 124 S. Ct. 899 (2004) (holding that the Eleventh Amendment does not bar enforcement of a consent decree against a state even though the violations of the decree were not violations of federal law, because the decree springs from a federal dispute, furthers the objectives of a federal law, and was accepted by the state when it asked the district court to approve its decree; and declining to address the argument that the State had waived its immunity in the course of litigation).

¹¹² *Coll. Sav. Bank*, 527 U.S. at 680 (expressly overruling *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), and saying that since any waiver of a constitutional right must be examined stringently, constructive waiver has “no place” in sovereign immunity jurisprudence); accord *Burnette*, 192 F.3d at 60 (saying the state did not constructively waive its sovereign immunity by engaging in an activity regulated by Congress because “the law is now clear that a state cannot “constructively waive[] its sovereign immunity”). But see *Coll. Sav. Bank*, 527 U.S. at 701 (Breyer, J., dissenting) (saying if Congress has the power to create “substantive rights,” it must also have the “subsidiary power” to create private remedies to enforce them).

¹¹³ *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 298 (4th Cir. 2001) (holding the language in the citizen suit provision of the SMCRA, 30 U.S.C. § 1270(a)(2), requiring states to submit to federal jurisdiction was not an “‘unequivocal’ warning” that the states participating in the law’s regulatory scheme waived their immunity).

constitute a waiver of a state's immunity.¹¹⁴ Thus, courts will not infer from a state's participation in a delegated federal regulatory program or acceptance of federal funds for the administration of that program a waiver of the state's immunity.

The lower courts that have addressed the issue of waiver in section 505 find the language authorizing suits by citizens to enforce the law's substantive provisions unpersuasive on the issue of waiver. In fact, two federal circuit courts have interpreted those provisions not only as not expressing Congress's intent to waive Eleventh Amendment immunity, but, similar to abrogation, as actually preserving a state's sovereign immunity.¹¹⁵ Thus, waiver offers a poor avenue for citizens seeking to enforce federal mandates under the CWA against states in the face of an Eleventh Amendment defense.

B. *The Ex parte Young Doctrine*

The Court in *Ex parte Young* held that the Eleventh Amendment does not bar suit against a state official acting in violation of federal law.¹¹⁶ Although often termed a legal fiction,¹¹⁷ the doctrine is based on the unassailable premise that a state cannot authorize its officials to violate the Constitution and the laws of

¹¹⁴ Compare *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985) (“[T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court.”) with *Doe v. Nebraska*, 345 F.3d 593, 599, 604 (8th Cir. 2003) (holding that Nebraska agreed to waive its sovereign immunity to suit under the 1973 Rehabilitation Act by accepting federal funds for its foster care and adoption programs).

¹¹⁵ See, e.g., *Bragg*, 248 F.3d at 298 (“Far from expressing Congress’ clear intent that participating States waive Eleventh Amendment immunity, this language [SM-CRA § 1270(a)(2)] actually preserves a State’s sovereign immunity.”); accord *Burnette*, 192 F.3d at 57 (finding that citizen suits under section 505 of the CWA were “expressly limited by the Eleventh Amendment”).

¹¹⁶ *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (The state official is “stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States.”).

¹¹⁷ *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 293 (1997) (calling the *Ex parte Young* doctrine a fiction to the extent it distinguishes between a state and an officer acting on the state’s behalf, but one that is necessary to maintain the balance of power between state and federal governments) (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)). See Eric B. Wolff, Comment, *Coeur d’Alene and Existential Categories for Sovereign Immunity Cases*, 86 CAL. L. REV. 879, 912-14 (1998) (criticizing the Court for addressing all sovereign immunity claims with an oversimplified analytical rule instead of looking to legal traditions and “existential categories” as suggested by Professor Jaffe and Justice Scalia).

the United States.¹¹⁸ Thus, such an action is not considered an action of the state and cannot be shielded from suit by a state's immunity.¹¹⁹ Therefore, when this doctrine applies, a state officer can be sued in his individual capacity for violating a mandatory federal duty.¹²⁰

Footnote 17 in *Seminole Tribe* suggests that section 505 implicitly authorizes suit under *Ex parte Young*.¹²¹ However, a combi-

¹¹⁸ See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (saying the *Ex parte Young* doctrine is necessary "to permit federal courts to vindicate federal rights and hold state officials responsible 'to the supreme authority of the United States'"); see also *Hafer v. Melo*, 502 U.S. 21, 30 (1991) (saying "'since *Ex parte Young* . . . it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law.'" (citation omitted). If such a suit is successful, the state officer may be held personally liable for damages under 42 U.S.C. § 1983 based upon actions taken in his official capacity. *Id.* at 30-31.

¹¹⁹ *Pennhurst*, 465 U.S. at 102. A state official subject to *Ex parte Young* can raise as a defense the lack of direct authority, or practical ability, to enforce the challenged statute. See, e.g., *Okpalobi v. Foster*, 244 F.3d 405, 417 (5th Cir. 2001) (en banc) (holding "any probe into the existence of a *Young* exception should gauge (1) the ability of an official to enforce the statute at issue under his statutory or constitutional powers, and (2) the *demonstrated willingness of the official to enforce the statute*") (emphasis added); accord *Snoeck v. Brussa*, 153 F.3d 984 (9th Cir. 1998); *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996) (holding "*Young* does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute"); see also *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 847 (2002) (declining to read additional "ripeness" or "imminence" requirements into *Ex parte Young* beyond those imposed by Article III and a prudential ripeness analysis, and holding suit barred against the Governor and State Secretary of Resources because there was no showing of the requisite enforcement connection, but allowing suit against the Director of the California Department of Fish & Game because he had direct authority over, and principal responsibility for, enforcing the law at issue).

¹²⁰ While a court lacks authority to prevent a state official from performing a discretionary function, an injunction prohibiting a state official from doing something she has no legal right to do is not an interference with that official's discretion. *Ex parte Young*, 209 U.S. at 150; see also *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (applying *Ex parte Young* to allow suit against state regulatory commissioners); *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996) (noting the opinion leaves open alternative means to ensure states comply with federal laws, e.g., "an individual can bring suit against a state officer to ensure that the officer's conduct is in compliance with federal law"); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (noting *Ex parte Young* "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law").

¹²¹ 517 U.S. at 75 n.17 (comparing the Indian Gaming Regulatory Act § 7410(d)(7) with other statutes where lower courts have found that Congress implicitly authorized suit under *Ex parte Young*, including 33 U.S.C. § 1365(a)); see also *Natural Res. Def. Council v. Cal. Dep't of Transp.*, 96 F.3d 420, 424 (9th Cir. 1996) (saying, since "Congress intended to encourage and assist the public to participate in enforcing the standards promulgated to reduce water pollution," it would be

nation of Supreme Court and lower court decisions interpreting the reach of *Ex parte Young* has narrowed the doctrine in ways that may deprive environmental litigants of its benefits.¹²² Four of the ways in which federal courts have narrowed the effectiveness of *Ex parte Young* as a shield against an Eleventh Amendment motion to dismiss are discussed below. These include the scope of the doctrine, the nature of relief a court may award both as to its scope and type, and the character of the law under which suit has been brought. Again, while each of these restrictions has significance for prospective environmental plaintiffs, it is the fourth that has the greatest import and is, accordingly, discussed in the most detail below.

1. *The Scope of the Doctrine—the Special Sovereignty Interests of the State*

The Court's decision in *Idaho v. Coeur d'Alene Tribe* limits the reach of the *Ex parte Young* exception in a narrow class of circumstances—namely, where the relief requested would implicate *special sovereignty interests* of the state.¹²³ In that case, the plaintiff sought to shift all beneficial ownership and control over submerged lands from the State to the Tribe. The Court termed the suit “unusual” in that it was the functional equivalent of a quiet title action, yet one that went well beyond the typical stakes in

reasonable to conclude that it “implicitly intended to authorize citizens to bring *Ex parte Young* suits against state officials with the responsibility to comply with clean water standards and permits”); *cf.* *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (holding the *Ex parte Young* exception allows suits to enjoin continuing violations of the ESA take prohibition); *accord* *Pacific Rivers Council v. Brown*, 2002 WL 32356431 (D. Or. Dec. 23, 2002) (allowing a citizen suit against a state forester for violating the ESA by approving clearcut logging operations in watersheds that contain coho salmon, where the requested relief was prospective, the alleged violations of the ESA were “fairly traceable” to the state forests, the state would not be divested of jurisdiction over state lands, and where plaintiff's action is not barred by *Seminole Tribe*).

¹²² See *Coeur d'Alene*, 521 U.S. at 270 (commenting that the exceptions to the *Ex parte Young* doctrine demonstrate that application of the doctrine must entail more than “a reflexive reliance on an obvious fiction” . . . such “empty formalism” would improperly sacrifice the “real interests served by the Eleventh Amendment”); *Bell Atl. Md. v. MCI Worldcom, Inc.*, 240 F.3d 279, 294 (4th Cir. 2001) (“[J]ust because a private citizen's federal suit seeks declaratory injunctive relief against State officials does not mean that it must automatically be allowed to proceed under an exception to the Eleventh Amendment protection.”).

¹²³ See *Coeur d'Alene*, 521 U.S. at 261, 296 (holding that the *Ex parte Young* doctrine does not apply “[w]here a plaintiff seeks to divest the state of all regulatory power over submerged lands [I]t simply cannot be said that the suit is not a suit against the State.”).

such an action.¹²⁴

It is probably safe to assume, as the district court did in *Swartz v. Beach*,¹²⁵ that suits to enjoin state-authorized illegal discharges are not changing the nature of the state's ownership of the submerged lands, and, therefore, do not fall within an interpretation of *Coeur d'Alene* that limits the effect of the decision to those circumstances.¹²⁶ What is not so clear is whether a suit claiming that a state was not properly *implementing* a federal environmental statute implicates the integrity and autonomy of a state's regulatory authority as to, in effect, enjoin the state itself from acting in a certain way, and thus runs afoul of the holding in *Coeur d'Alene*.¹²⁷

¹²⁴ *Id.* at 282-83; *see also* *Ysleta Del Sur Pueblo v. Raney*, 199 F.3d 281, 290 (5th Cir. 2000) (finding that a tribe had "not sufficiently distinguished" its own case from a quiet title action); *MacDonald v. Village of Northport*, 164 F.3d 964, 972 (6th Cir. 1999) (finding that a challenge to public use of a right of way that provided public access to a navigable waterway implicated special sovereignty interests); *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1193 (10th Cir. 1998) (holding Kansas's special sovereignty interests were implicated under the Tax Injunction Act because granting plaintiff prospective relief would, in effect, divest Kansas of its power to assess and levy personal property taxes, and saying "a state's interests in the integrity of its property tax system lies at the core of the state's sovereignty"). The *ANR Pipeline* court also found that the relief requested by the plaintiff was the *functional equivalent* of a money judgment against the state, and for this additional reason intruded on the state's special sovereignty interests and was barred by the Eleventh Amendment. *Id.* at 1189. For a narrower reading of the *Coeur d'Alene* holding, *see* Carlos Manuel Vasquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 49 (1998) (reading "the Court's disquisition on the special nature of submerged lands" as suggesting that the *Coeur d'Alene* exception to the *Ex parte Young* doctrine "extends only to disputes over sovereignty over such lands").

¹²⁵ 229 F. Supp. 2d 1239, 1256 (D. Wyo. 2002) (finding the regulation of coalbed methane discharge water under the CWA does not implicate special sovereignty interests). In *Swartz*, the plaintiff alleged, among other things, that the individual state defendants had taken his private property in violation of the Constitution by issuing a discharge permit that increased the salinity of vegetation on his ranch, and sought to enjoin the state from allowing this to happen.

¹²⁶ *See* Vasquez, *supra* note 124; *see also* *Swartz*, 229 F. Supp. 2d at 1256 (finding that the regulation of coalbed methane discharge water under the CWA "does not implicate special sovereignty interests because Plaintiff's requested relief would not change the nature of the State's ownership and regulation of the ephemeral stream"); *Froebel v. Meyer*, 13 F. Supp. 2d 843, 854 (E.D. Wis. 1998) (concluding that while an action under the CWA implicates a state's sovereignty interest in its navigable waters, the average CWA claim will "not amount to the expansive and permanent incursion on [state] sovereign interests" implicated in the "relief sought in *Coeur d'Alene*").

¹²⁷ *See* Araiza, *supra* note 7, at 1529-30 (raising this question with respect to suits challenging a state's implementation of its SIP, but noting that both *Edelman* and

2. *The Nature of the Relief Requested*

The Court has constricted in two ways the type of relief a private litigant can get when she sues a state under *Ex parte Young*. The first concerns the extent to which Congress has constrained the remedy that a court may grant for a violation of a statutorily created right.¹²⁸ The effect of this line of cases on the application of the *Ex parte Young* doctrine to CWA citizen suits seems minimal. The second restriction limits a litigant's relief to that which is prospective and does not require any expenditure from the state's public funds.¹²⁹ While somewhat constricting, this limitation does not create a fatal barrier to the doctrine's use by CWA litigants.

a. *The Scope of Remedial Relief*

In *Seminole Tribe*, the Court found that Congress had specified in the Indian Gaming Regulatory Act (IGRA) the means to enforce the duty imposed on Florida that was the basis of the tribe's suit.¹³⁰ The Court concluded that the "quite modest set of sanctions" (the power of a court to issue an order directing the state to negotiate or submit to mediation and to order that the Secretary of the Interior be notified) in the law displayed an intent by Congress not to provide the "more complete and more

College Savings Bank rejected the argument that a state's immunity hinged on the character of its action).

¹²⁸ See *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996) ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."); see also *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 525 U.S. 635, 647 (2002) (finding the 1996 Telecommunications Act places no restrictions on the relief a court can award, and therefore *Seminole Tribe* is inapposite).

¹²⁹ See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 665 (1974); *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 465 (1945). However, an ancillary effect on a state treasury, as a result of compliance with a court decree which by its terms is prospective in nature, may be "permissible and [is] often an inevitable consequence of the principle announced in *Ex parte Young*." *Edelman*, 415 U.S. at 668 (citation omitted) (discussing *Graham v. Richardson*, 403 U.S. 365 (1971), in which Arizona and Pennsylvania welfare officials were estopped from denying welfare benefits to otherwise qualified recipients who were aliens, and *Goldberg v. Kelly*, 397 U.S. 254 (1970), in which New York welfare officials were enjoined from authorizing the termination of benefits paid to welfare recipients without a prior hearing).

¹³⁰ See 25 U.S.C. § 2710(d)(3) (defining the state's duties under the IGRA), and § 2710(d)(7) (describing the means by which those duties were to be enforced). The Court described § 2710(d)(7) as intending "not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3)." *Seminole Tribe*, 517 U.S. at 74.

immediate relief” that would otherwise be available under *Ex parte Young*.¹³¹ Therefore, a court allowing suit under *Ex parte Young*, in the case of the IGRA, would be inconsistent with the detailed and limited remedial scheme that Congress had prescribed to enforce the state’s statutory duty to negotiate.¹³² Accordingly, the doctrine should not apply in that circumstance. The question raised by *Seminole Tribe* is whether the CWA constitutes a sufficiently detailed remedial scheme so as to preclude the application of *Ex parte Young* to a citizen suit brought to enforce its provisions against a state.

The answer to this question is assisted to some extent by the Court’s own dicta in *Seminole Tribe* finding the CWA distinguishable from the IGRA on exactly this point, and stating that it “[did] not hold that Congress *cannot* authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme,” only that Congress did not intend that result in the IGRA.¹³³ The word coming out from the circuit courts on this question is similarly encouraging. For example, in *Pennsylvania Federation of Sportsmen’s Clubs*, the Third Circuit found that, with respect to the Surface Mining Control and Reclamation Act’s (SMCRA) remedial scheme, there was no clear expression by Congress of what the remedies should be other than a takeover of the state program by the federal regulatory agency or suit in federal court, and, therefore, the law was neither detailed nor limited.¹³⁴ When coupled with the language

¹³¹ *Seminole Tribe*, 517 U.S. at 75.

¹³² *Id.* at 74. *But see* Jackson, *Potential Evisceration*, *supra* note 94, at 510-30 (arguing the reasoning of *Seminole Tribe* rests on the mistaken assumption that *Ex parte Young* affords a free-standing remedy that is somehow broader than a statutory enforcement scheme).

¹³³ *Seminole Tribe*, 517 U.S. at 75 n.17; *see also* Froebel v. Meyer, 13 F. Supp. 2d 843, 853-54 (E.D. Wis. 1998) (commenting that the Court’s dicta in *Seminole Tribe* saved it from having to consider “the relative complexity of the CWA’s remedial scheme as directed at the states”). *But see* Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n, 453 U.S. 1, 11 (1981) (finding no implied remedy under the CWA based upon its extensive remedial scheme).

¹³⁴ Pa. Fed’n of Sportsmen’s Clubs v. Hess, 297 F.3d 310, 331 (3d Cir. 2002) (saying “the question is whether the scope of the statutory remedy Congress established displaces the ‘default option’ of an *Ex parte Young* suit,” and finding that the SMCRA does not prescribe such a scheme). In *Cox v. City of Dallas, Texas*, 256 F.3d 281, 309 (5th Cir. 2001), the court held that the

RCRA, with its explicit reference to the Eleventh Amendment and its similarity to the CWA, [is] precisely the sort of statute envisioned by the *Seminole Tribe* Court to authorize an *Ex parte Young* action. Far from demonstrating Congress’s intention to bar access to *Ex parte Young*, the

in that law's citizen suit provision that such suits are explicitly allowed to the extent provided by the Eleventh Amendment, the argument for allowing such suits to go forward became even clearer to that court.¹³⁵ The only court to date faced with this question under the CWA agreed with the Third Circuit's reasoning and found the Act did not contain a limited remedial scheme as understood in *Seminole Tribe*.¹³⁶ Since, in most cases, citizens seeking relief under laws like the CWA are not seeking a wider range of remedies than those prescribed by the laws under which they are suing,¹³⁷ this restriction of *Ex parte Young* should not pose a problem.

RCRA embraces the *Ex parte Young* doctrine as a feature of its remedial scheme.

Cf. Westside Mothers v. Haveman, 289 F.3d 852, 862 (6th Cir. 2002) (noting the single remedy provided under the Medicaid Act of cutting off funds if a state program does not meet federal requirements is not a detailed remedial scheme sufficient to show Congress's intent to preempt an action under *Ex parte Young*, and contrasting this single remedy with the "timetables, incentives, and 'intricate procedures'" in the IGRA); *Joseph A. v. Ingram*, 275 F.3d 1253, 1264 (10th Cir. 2002) (holding the Adoption and Safe Families Act and the Adoption Assistance and Child Welfare Act did not provide remedial schemes sufficient to foreclose *Ex parte Young* jurisdiction because the statutes did not provide for remedies more limited or materially different than available under *Ex parte Young*); *MCI Telecomm. Corp. v. Pub. Serv. Comm'n of Utah*, 216 F.3d 929, 939-40 (10th Cir. 2000) (holding section 252 of the 1996 Telecommunications Act, which provides aggrieved parties with a private cause of action, was not precluded by *Seminole Tribe's* limitation on the *Ex parte Young* doctrine); *Md. Psychiatric Soc'y, Inc. v. Wasserman*, 102 F.3d 717, 719 n.1 (4th Cir. 1999) (rejecting an assertion that the Medicaid Act's remedial scheme is sufficient to invoke the rule of *Seminole Tribe*); *Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1196 (10th Cir. 1998) (finding 42 U.S.C. § 1988 did not contain a detailed remedial scheme designed to limit or prevent potential remedies that a court might order).

¹³⁵ *Pa. Fed'n of Sportsmen's Clubs*, 297 F.3d at 331.

¹³⁶ *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1255 (D. Wyo. 2002) (relying on the Court's acknowledgment in *Seminole Tribe* footnote 17 that the language in section 505 of the CWA allowing citizen suits "to the extent permitted by the Eleventh Amendment" evidences congressional intent to provide litigants with remedies traditionally available under the *Ex parte Young* doctrine).

¹³⁷ *See Prisco v. New York*, No. 91 Civ. 3990, 1996 WL 596546, at *16 (finding *Seminole Tribe* did not block a RCRA lawsuit where the plaintiff simply sought "to obtain injunctive relief in accordance with RCRA's own provisions"); *see also Araiza, supra* note 7, at 1535-36 (suggesting that the more general citizen suit authorizations found, for example, in the CWA, should survive in either federal or state court, as the type of relief authorized is not limited, "but instead implicitly provides the court with the full panoply of equitable [*Ex parte Young*] powers necessary to 'enforce' the law"). *But see Whalin, supra* note 6, at 239 (arguing that "since all of the federal environmental statutes allow the United States the discretion to bring an action against a state entity for enforcement," even the theoretical existence of this remedy precludes the use of *Ex parte Young*).

b. Prospective, Not Retroactive Relief

The second way the Court has restricted the *Ex parte Young* doctrine is to limit the relief a litigant can get to that which is prospective and does not require payment of funds from the state treasury.¹³⁸ While imposing some limitations on the effectiveness of a CWA citizen suit, as discussed below, the Court's interpretation of the doctrine does not prevent that suit from being brought because the jurisdictional requirements of section 505 (and of most citizen suit provisions) allow suits only for ongoing violations.¹³⁹ Thus, litigants seeking *injunctive relief* under the CWA have successfully deployed *Ex parte Young* in suits against states.¹⁴⁰

¹³⁸ Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102-03 (1984); see also Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 37-38 (1994) (finding that because the Authority was the product of a bi-state compact, payment of liabilities for torts it committed would not come from the states' treasuries, and, therefore, the Eleventh Amendment was not implicated); Edelman v. Jordan, 415 U.S. 651, 668 (1974) (upholding the lower court's determination that the Eleventh Amendment does not bar suit to compel future state compliance with federal standards for processing welfare applications, but that the Eleventh Amendment does bar an injunction ordering retroactive payment of previously owed benefits); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 296 (1997) (In determining whether *Ex parte Young* applies, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."). But see Hess, 513 U.S. at 58-61 (O'Connor, J., dissenting) (suggesting that exposure of the state treasury to liabilities, while a "sufficient condition," was not a "necessary" one; rather the proper inquiry was whether the "State possesses sufficient control over an entity performing government functions that the entity may be properly called an extension of the State itself").

¹³⁹ Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 57 (1987) (holding that section 505's language requires citizen-plaintiffs to "allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future"); see also Araiza, *supra* note 7, at 1538 n.124 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108-09 (1998), as putting into question granting of injunctive relief in a "'one-shot violation' situation"); Araiza, *supra* note 7, at 1538 (suggesting that *Steel Co.*'s limitation on the availability of injunctive relief when combined with the significant role retrospective relief could play in redressing environmental violations means "*Alden's* final closing of the door to retrospective relief looms even larger"). But see *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000). *Friends of the Earth* cast a cloud over *Steel Co.*'s holding, with the Court saying that *Steel Co.* merely held that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations, but our decision in that case did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred.

Id. at 188.

¹⁴⁰ See, e.g., *Natural Res. Def. Council v. Cal. Dep't of Transp.*, 96 F.3d 420, 423

However, “the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night.”¹⁴¹ This ambiguity may have significance for CWA suits where the remedy may as easily be to correct a past, albeit ongoing, violation (such as removing an illegal wetland fill) as it is to prohibit future illegal conduct.¹⁴² Further, the law is also not clear as to whether the doctrine allows *declaratory relief*, a form of relief frequently sought by CWA litigants.¹⁴³

Additionally, not only can citizens not recover civil penalties

(9th Cir. 1996) (allowing claims to proceed seeking prospective injunctive relief against the Director of the California Department of Transportation for violations of a CWA permit); *Comm. to Save the Mokelumne River v. East Bay Util. Dist.*, 13 F.3d 305, 309-10 (9th Cir. 1993) (holding the Eleventh Amendment does not bar suit against members of the California Regional Water Control Board for prospective injunctive relief under the CWA). *But see Araiza, supra* note 7, at 1531 (saying, after *Coeur d’Alene*, it is clear that “even some types of prospective relief against states will be unavailable and the unavailable relief might well include injunctions requiring a state to take a particular regulatory or enforcement course”).

¹⁴¹ *Edelman*, 415 U.S. at 667.

¹⁴² *But see Araiza, supra* note 7, at 1539-40 (finding *Ex parte Young* posed a problem not only for CERCLA’s cost recovery or contribution remedy, but also for the only type of injunctive relief available under the law, which would be “mooted” either by the cleanup having been completed or by the fact that the EPA had ordered the plaintiffs to do the work—exactly the situation which led to the Court’s late-departed decision in *Pennsylvania v. Union Gas Co.*).

¹⁴³ *See Green v. Mansour*, 474 U.S. 64, 73 (1985) (holding “the issuance of a declaratory judgment . . . would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being . . . prohibited by the Eleventh Amendment”); *Natural Res. Def. Council*, 96 F.3d at 423 (disallowing claims for declaratory relief against the Director of the state Department of Transportation for past violations of the CWA). *But see Verizon Md. Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635 (2002). The Court recognized that Verizon’s prayer for declaratory relief “seeks a declaration of the *past*, as well as the *future*, ineffectiveness of the Commission’s action,” but found no past liability of the state, or of any of its commissioners, at issue, nor a risk of “a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.” *Id.* at 646 (quoting *Edelman*, 415 U.S. at 668 (1974)). Therefore, “insofar as the exposure of the State is concerned, the prayer for declaratory relief adds nothing to the prayer for injunction.” *Id.* The Court also listed cases in which injunctive relief against state regulatory commissioners had been approved at the circuit court level: *Nat’l Audubon Soc’y v. Davis*, 307 F.3d 835, 848 (2002) (holding plaintiffs’ request for declaration that a state law is preempted by federal law and cannot be enforced by state officials against federal trapping efforts in the future is purely prospective and is not barred by the Eleventh Amendment); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045-49 (9th Cir. 2000) (applying *Ex parte Young* exception to declaratory relief against state board of equalization); and *Balgowan v. New Jersey*, 115 F.3d 214, 217-18 (3d Cir. 1997) (finding jurisdiction to hear Fair Labor Standards Act (FLSA) claim for declaratory relief against state commissioner under *Ex parte Young* exception).

against a state under *Ex parte Young*, a basic remedy in most CWA citizen suits,¹⁴⁴ but there may also be a problem if the execution of an injunction requires a state to expend funds or dispose of state property.¹⁴⁵ However, all of these problems with using the *Ex parte Young* doctrine pale in severity when compared with the question of whether a citizen suit brought under a delegated federal regulatory program is seeking to enforce federal or state law.

3. *The Characterization of the Law Under Which Suit Has Been Brought*

Potentially, the most debilitating interpretation of the *Ex parte Young* doctrine comes not directly from the Supreme Court, but

¹⁴⁴ See *Friends of the Earth*, 528 U.S. at 185-88 (recognizing the deterrent value of public fines); see also Michael D. Axline et al., *Stones for David's Sling: Civil Penalties in Citizen Suits Against Polluting Federal Facilities*, 2 J. ENV'T. L. & LIT. 1 (1987) (discussing among the values of civil penalties their obvious deterrent effect). There is also an obvious stigma effect associated with civil penalties, which can provide an additional incentive for a recalcitrant government agency.

¹⁴⁵ See *Edelman*, 415 U.S. at 663 (reciting the rule that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"); see also *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949) (holding *Ex parte Young* exception does not apply if injunctive relief cannot be granted by merely ordering cessation of the conduct complained of, but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property); *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945) (stating that "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants"); *Fletcher*, *supra* note 2, at 847 (commenting on the "intrusiveness of affirmative injunctions" and wondering if "there may be some danger to the continuation of an unqualified *Ex parte Young* principle under the current Supreme Court's jurisprudence"). But see *Edelman*, 415 U.S. at 667-68 ("[T]he fiscal consequences to state treasuries in these [injunctive relief] cases were the necessary result of compliance with decrees which by their terms were prospective in nature Such an ancillary effect on the state treasury is a permissible and often inevitable consequence of the principle announced in *Ex parte Young*."); *Mokelumne River*, 13 F.3d at 309-10 (finding action against members of state water quality board not barred by Eleventh Amendment even though it requested costly remedial action to remove and dispose of contaminated sediments); *Schlafly v. Volpe*, 495 F.2d 273, 280 (7th Cir. 1974) (considering *Larson* footnote as only barring suit in exceptional cases, where to do otherwise would impose "'an intolerable burden on government functions, outweighing any consideration of private harm'"); *Froebel v. Meyer*, 13 F. Supp. 2d 843, 852 (E.D. Wis. 1998) (saying "*Schlafly* is still good law" and that it is "echoed by the prevailing rationale in [*Coeur d'Alene*]," and pointing out the "irony . . . that compliance with injunctive orders properly issued under *Ex parte Young* will often have dramatic fiscal consequences for states") (citing *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970)).

from circuit courts applying Supreme Court precedent—in particular, from their application of the Court’s decision in *Pennhurst State School & Hospital v. Halderman* (*Pennhurst II*).¹⁴⁶ *Pennhurst II* holds that citizens cannot sue state officials in federal court for violations of state law, regardless of the nature of relief sought.¹⁴⁷ The question *Pennhurst II* raises for potential environmental litigants is whether a claim made under a delegated federal regulatory program is asking a federal court to enforce federal or state law against a state. The Fourth Circuit, in *Bragg v. West Virginia Coal Association*, answered that question by saying under the SMCRA it is unquestionably state law.¹⁴⁸ The *Bragg* court’s answer has serious implications not only for citizen suits under the SMCRA, but, because of the similarities between the federalism structures of the SMCRA and other pollution control laws, potentially for suits brought under those

¹⁴⁶ 465 U.S. 89 (1984). *Pennhurst II* involved a class action brought by mentally retarded adults against Pennhurst Hospital claiming that the hospital did not provide adequate rehabilitation services required under the Pennsylvania Mental Health and Mental Retardation Act, PA. STAT. ANN. tit. 50 § 4201 (Purdon 1969 and Supp. 1982), and that conditions at the Hospital violated the Eighth and Fourteenth Amendments to the Constitution. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 92. The Third Circuit, ruling only on state grounds, found a violation of the state statute and ordered state officials to accommodate the needs of the class. *Id.* at 93-94. The Supreme Court then overturned the Third Circuit’s decision, saying that a federal court could not order state officials to change their hospitals pursuant to a state law that gave those same officials broad discretion, even if the officials had erred in the exercise of that discretion. *Id.* at 107-10. The Court held that the Eleventh Amendment bars a suit challenging a mistake made by a state official in the course of exercising his discretionary authority under a state law, declaring that the purpose of the *Ex parte Young* doctrine was to “permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’” *Id.* at 105.

¹⁴⁷ *Id.* at 106.

¹⁴⁸ *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 297 (4th Cir. 2001); accord *Pa. Fed’n of Sportsmen’s Clubs v. Hess*, 297 F.3d 310 (3d Cir. 2002) (holding the Eleventh Amendment barred a citizen suit alleging that the Secretary of Pennsylvania’s Department of Environmental Protection (PDEP) failed to maintain an adequate reclamation bonding system as required by the state’s approved surface mining program because the claims were based on state, not federal law; the state’s surface mining program was not incorporated into federal law; and the PDEP Secretary had no federally imposed duty to implement the state’s program); see also *W. Va. Highlands Conservancy v. Norton*, 147 F. Supp. 2d 474, 481 (S.D. W. Va. 2001) (holding the Eleventh Amendment barred a citizen suit against the Secretary of the West Virginia Division of Environmental Protection for violating the SMCRA’s permanent bonding requirements because “federal law is subsumed in the approved state program and, even where inconsistent with federal law and disapproved by OSM [the federal Office of Surface Mining], must be enforced as state law, absent affirmative OSM action” withdrawing the program).

laws, including the CWA.¹⁴⁹

The facts in *Bragg* involved a federally approved state surface mining program, which authorized West Virginia to promulgate mine operation and reclamation standards, and to issue, as well as enforce, permits.¹⁵⁰ The Fourth Circuit found this program was state law, not federal law, because the version of “cooperative federalism” employed in the SMCRA provides “*extraordinary deference to the States*.”¹⁵¹ The *Bragg* court based its conclusion on what it called the unique structure of the SMCRA—a structure which calls for the federal government to “hand over to the States the task of enforcing minimum national standards . . . providing only limited federal mechanisms to oversee State enforcement.”¹⁵² According to the Fourth Circuit, the SMCRA calls for either state regulation of surface coal mining within its borders or federal regulation, “but not both.”¹⁵³ The statutory federalism of the SMCRA, therefore, was “quite unlike the cooperative regime under the Clean Water Act.”¹⁵⁴ The Fourth Circuit’s errors in reaching this conclusion are startling.

First, the *Bragg* court took language out of context appearing in section 503 of the SMCRA that directs states wishing “to assume *exclusive jurisdiction*” over the regulation of surface mining to submit a state program to the Secretary for his approval.¹⁵⁵ In

¹⁴⁹ See Hasselman, *supra* note 96, at 224-29 (criticizing the *Bragg* decision for misconstruing the SMCRA and misapplying Supreme Court precedent, and commenting that if the rationale in the case is widely adopted or extended to other environmental statutes, it could cripple the ability of citizens to hold state regulators accountable for their environmental regulatory obligations under other cooperative federalism laws like the CAA and CWA); see also Puder & Veil, *supra* note 96, at 91-93 (analyzing the *Bragg* decision and addressing legal and political questions raised in its “wake” in the “context of the decision’s broader cooperative federalism theme”).

¹⁵⁰ SMCRA § 503, 30 U.S.C. § 1253 (2000) (setting out the elements of a state program); see also *Bragg*, 248 F.3d at 294. “[B]ecause of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States.” *Id.* (quoting 30 U.S.C. § 1201(f) (2000)).

¹⁵¹ *Bragg*, 248 F.3d at 293 (emphasis added).

¹⁵² *Id.* at 293-94; accord *Pa. Fed’n of Sportsmen’s Clubs*, 297 F.3d at 318 (explaining that “this ‘either-or’ arrangement illustrates why, as the *Bragg* court observed, the regulatory structure is not quite *cooperative* federalism—SMCRA does not provide for shared regulation”).

¹⁵³ *Bragg*, 248 F.3d at 293.

¹⁵⁴ *Id.* at 294.

¹⁵⁵ 30 U.S.C. § 1253(1)(a) (2000) (emphasis added).

emphasizing and isolating the phrase “exclusive jurisdiction,”¹⁵⁶ and finding in it a basis to distinguish the SMCRA from other cooperative federalism laws like the CWA, the *Bragg* court ignored the many indicia of residual federal authority in states with “regulatory primacy.”¹⁵⁷ For example, the SMCRA preempts any state law that is weaker than the comparable federal standard.¹⁵⁸ Not only are mining activities in a state with an approved regulatory program subject to direct federal enforcement,¹⁵⁹ but the Office of Surface Mining (OSM) can enter and inspect any mine, at any time, in any state with an approved regulatory program in order to evaluate that state’s administration of its program.¹⁶⁰ Further, OSM can enforce any part of a state’s regulatory program if it finds that the state is doing an inadequate job,¹⁶¹ and can replace the entire state regulatory program with a federal program if the state fails to “implement, enforce, or maintain its approved State program.”¹⁶² Once in place, a federal program automatically preempts any state law

¹⁵⁶ *Bragg*, 248 F.3d at 294. It is worth noting that this phrase appears nowhere else in the statute and is used in § 1253(1)(a) merely to introduce a set of detailed requirements for states intending to seek delegated regulatory authority from the federal government.

¹⁵⁷ *Id.* at 289 (explaining a state’s “primacy” status as “status under which its law exclusively regulates coal mining in the State”).

¹⁵⁸ SMCRA § 505, 30 U.S.C. § 1255 (2000).

¹⁵⁹ SMCRA § 521, 30 U.S.C. § 1271 (2000).

¹⁶⁰ SMCRA § 517(a), 30 U.S.C. § 1267(a) (2000). An inspector has a duty to notify the state regulatory authority of any violations she finds in a state with an approved regulatory program, and must wait ten days, unless there is an imminent danger of significant environmental harm, before proceeding. SMCRA § 521(a), 30 U.S.C. § 1271 (2000).

¹⁶¹ SMCRA § 504(g), 30 U.S.C. § 1254(b) (2000); *see also* SMCRA § 505(a), 30 U.S.C. § 1255(a) (providing that no state law or regulation in effect on the date of the law’s enactment “shall be superseded . . . except” to the extent it is “inconsistent with the provisions of [the] Act”); *DK Excavating Co. v. Miano*, 549 S.E.2d 280, 285 (2001) (holding state surface mining laws inconsistent with the SMCRA were not enforceable as state law pursuant to 30 U.S.C. § 1255(a)); *W. Va. Highlands Conservancy v. Norton*, 147 F. Supp. 2d 474, 478 n.5 (S.D. W. Va. 2001). Unless the Virginia Supreme Court reconsiders *DK Excavating* or the U.S. Supreme Court overrules it, the controlling state decision recognizes that the

federal regulatory prong of SMCRA preempts inconsistent and inadequate state law, while *Bragg*, the controlling federal decision, holds ‘our federalism’ commits regulation of state-adopted SMCRA programs, however inadequate and inconsistent with federal law, to West Virginia alone unless and until federal revocation proceedings are initiated by the Secretary of the Interior.

W. Va. Highlands Conservancy, 147 F. Supp. 2d at 478 n.5.

¹⁶² SMCRA § 504(a), 30 U.S.C. 1254(a)(3) (2000); *see also W. Va. Highlands Conservancy*, 147 F. Supp. 2d at 480-81, n.9. The court in *West Virginia Highlands Con-*

that interferes with its implementation.¹⁶³

Second, in its eagerness to emphasize the SMCRA's "extraordinary deference to the States,"¹⁶⁴ the *Bragg* court failed to see the state features in cooperative federalism laws such as the CWA, despite specifically distinguishing that law from the SMCRA. For example, like the SMCRA, the CWA provides for the delegation to states of permitting, inspection, enforcement, and standard-setting authority,¹⁶⁵ and for suspension of the federal permitting program upon submission of an approved state program.¹⁶⁶ Also, like the SMCRA, the CWA authorizes states to adopt and enforce any standard or pollution abatement requirement that is equal to, or more stringent than, its federal counterpart.¹⁶⁷ Thus, the indicia of reserved federal authority and "extraordinary deference" to states are apparent in both laws, and there simply is not the sharp distinction between the two laws that the Fourth Circuit implies in *Bragg*.¹⁶⁸

servancy listed other instances of overriding federal authority in the SMCRA, and stated

This Court is unable to reconcile (1) Section 1255 preemption, (2) OSM's explicit finding that the West Virginia alternative bonding system did not meet the objectives of SMCRA, (3) *partial* disapproval of state programs by OSM under Section 1253, (4) Section 1271 provisions, and (5) *Molinary* with our Court of Appeals' account of SMCRA cooperative federalism. Nevertheless, as a faithful servant of the law, the undersigned must apply strictly the law as proclaimed by the superior tribunal.

Id. Molinary v. Powell Mountain Coal Co., 125 F.3d 231, 236 (4th Cir. 1997) held that the exclusive *regulatory* jurisdiction provided for in §§ 1253(a) and 1254(a) does not encompass exclusive *adjudicatory* jurisdiction.

¹⁶³ SMCRA § 504(g), 30 U.S.C. § 1254(g) (2004).

¹⁶⁴ *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 293 (4th Cir. 2001).

¹⁶⁵ CWA § 402(b), 33 U.S.C. § 1342(b) (2004).

¹⁶⁶ CWA § 402(c), 33 U.S.C. § 1342(c) (2004). Other parts of the CWA contain comparable provisions for delegation of federal permits for the discharge of dredged or fill material into navigable waters and protection of state sovereignty. *See* 33 U.S.C. § 1344(g)-(k), (t) (2004).

¹⁶⁷ CWA § 510, 33 U.S.C. § 1370 (2004).

¹⁶⁸ The *Bragg* court points to section 101(f) of the SMCRA, 30 U.S.C. § 1201(f), as proof that Congress's choice of a state regulatory primacy structure was "careful and deliberate." 248 F.3d at 294. Yet, when this language is compared to the direction contained in section 101(b) of the CWA, 33 U.S.C. § 1251(b) (2004) (stating it is "the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . and to implement the permit programs under sections 1242 and 1344"), one has to wonder which law, the SMCRA or the CWA, tilts the balance more towards the states. *See also* CWA § 101(g), 33 U.S.C. § 1251(g) (granting states exclusive jurisdiction to allocated quantities of water within their jurisdiction, and saying those rights "shall not be superseded, abrogated or otherwise impaired" by the statute).

Third, in its effort to distinguish away the CWA, the *Bragg* court misinterpreted what the Supreme Court said, and did, in *Arkansas v. Oklahoma*,¹⁶⁹ mistakenly relying on that case as proof that the CWA “‘effectively incorporate[d]’ State law into the unitary federal enforcement scheme, making State law, in certain circumstances federal law,” unlike the SMCRA.¹⁷⁰ The Court in *Arkansas*, however, specifically declined to address the question whether the CWA required the EPA to apply the downstream state’s water quality standards precisely because the permit involved was a federal permit issued under section 402(a) of the CWA,¹⁷¹ and not under a delegated state regulatory program (section 402(b)),¹⁷² inferring that the answer might be different if it were a section 402(b) permit.¹⁷³ Further, somewhat ominously in light of *Bragg*, the *Arkansas* Court noted that Congress in crafting the CWA protected certain state sovereign interests, what the Fourth Circuit in *Bell Atlantic Maryland* referred to as “islands of state sovereignty,”¹⁷⁴ citing as an example section 510, which “allows [s]tates to adopt more demanding pollution-control standards than those established under the Act.”¹⁷⁵

According to *Bragg*, in giving states “exclusive regulatory control through enforcement of *their own* approved laws, Congress intended that the federal law establishing minimum national standards would ‘drop out’ as operative law and that the State laws would become the sole operative law.”¹⁷⁶ The adoption of

¹⁶⁹ 503 U.S. 91 (1992).

¹⁷⁰ *Bragg*, 248 F.3d at 294.

¹⁷¹ 33 U.S.C. § 1342(a).

¹⁷² 33 U.S.C. § 1342(b).

¹⁷³ *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). It is true that EPA regulations require NPDES permits to comply with the applicable water quality requirements of all affected states. 40 C.F.R. 122.4(d). This requirement “effectively incorporates into federal law those state-law standards the Agency reasonably determines to be ‘applicable.’” *Arkansas*, 503 U.S. at 110. However, as the *Bragg* court points out, that is not the end of the story. 248 F.3d at 294. As the Court in *Arkansas* notes, only those state standards the EPA has approved and determined to be applicable are incorporated into an NPDES permit, and states promulgate water quality standards with substantial guidance from the EPA. 503 U.S. at 110. Another feature of the case was that it involved interstate water pollution, which the Court has long recognized to be controlled by federal law, giving the upstream state’s standards “a federal character.” *Id.*

¹⁷⁴ *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 300 (4th Cir. 2001) (describing how the Telecommunications Act of 1996 “partially flooded the existing statutory landscape with specific preempting federal requirements, deliberately leaving *numerous islands of State responsibility*”) (emphasis added).

¹⁷⁵ *Arkansas*, 503 U.S. at 107.

¹⁷⁶ *Bragg*, 248 F.3d at 295; see also *Pa. Fed’n of Sportsmen’s Clubs v. Hess*, 297

federal minimum standards by a state as part of a federally approved state regulatory program, therefore, means that any violation of those standards, even if the state standard is exactly the same as the federal standard, involves state, not federal law.¹⁷⁷ An injunction from a federal court against state officials would be commanding them to comport with the state's own laws, and not with federal law, because only the state law is operative and directly regulates the issuance of permits.¹⁷⁸ Any such command to a state is "so abhorrent to the values underlying our federal structure as to fall outside the bounds of the *Ex parte Young* exception."¹⁷⁹ To construe the SMCRA's statutory federalism design as allowing citizens to enforce the statute's national minimum standards against state officials, therefore, would end exclusive state regulation and undermine the federalism established in the Act.¹⁸⁰

F.3d 310, 326 (3d Cir. 2002) (making short work of plaintiff's argument that the Pennsylvania surface mining regulatory program, with its Pennsylvania-specific standards, has been incorporated, or "codified" into federal law by virtue of its appearance in the Code of Federal Regulations).

¹⁷⁷ *Pa. Fed'n of Sportsmen's Clubs*, 297 F.3d at 324, leaves a slight opening for suit in federal court under an approved regulatory program, if the challenged element of the approved state program is inconsistent with—i.e., less stringent than—the federal requirements. A challenge of this type would, however, add an additional element of proof to the claim of what otherwise would have entailed only a showing of the violation.

¹⁷⁸ *But see Cox v. City of Dallas, Texas*, 256 F.3d 281, 308 (5th Cir. 2001) (finding plaintiffs alleged violations of federal, not state, law when they sued state officials for allowing an open dump in violation of section 4003 of the RCRA, 42 U.S.C. § 6943, and, therefore, *Pennhurst* did not bar their lawsuit); *cf. Farricelli v. Holbrook*, 215 F.3d 241, 246 (2d Cir. 2000) (remanding to the district court the question whether claims filed under Subchapters C and D of the RCRA were filed under federal or state law); *Clean Air Council v. Mallory*, 226 F. Supp. 2d 705, 717 (E.D. Pa. 2002) (relying on *Concerned Citizens of Bridesburg v. Phila. Water Dep't*, 843 F.2d 679 (3d Cir. 1988) for the proposition that Pennsylvania's SIP is federal law as a basis for holding that plaintiff's challenge to the state's incomplete implementation of its I/M program raised a cognizable federal claim); *accord Citizens for Pa.'s Future v. Mallory*, 2002 WL 31845880 (E.D. Pa. Dec. 18, 2002).

¹⁷⁹ *Bragg*, 248 F.3d at 296.

¹⁸⁰ *Id.* at 295-96. The court construes the SMCRA as allowing citizen suits to enjoin officials in a primacy State to comport with the *federal* provisions establishing the core standards for surface coal mining would end the exclusive State regulation and undermine the federalism established by the Act. Thus, rather than advancing the federal interest in preserving this statutory design, Bragg's interpretation would frustrate it.

Id. at 295. In support of this conclusion, the court notes that, while minimum national federal standards drive the law, there is no evidence in the statute of Congress's desire to implement those standards directly, nor did it "invite the States to enforce *federal* law directly." *Id.*

The Fourth Circuit recognized that the federal interests in the SMCRA are stronger than those at issue in *Pennhurst II* because the federal rights under the SMCRA “were created by the state pursuant to a federal invitation to implement a program that met certain minimum standards set by Congress,” and because the federal government “retains an important modicum of control over the enforcement of that State law.”¹⁸¹ Nonetheless, the court found that *Pennhurst II* controlled—the federalism design of the statute meant that the relief the citizens requested fell on the “‘Eleventh Amendment side of the line’” between the type of relief barred by *Pennhurst II* and that permitted under *Ex parte Young* because it impaired the state’s dignity.¹⁸² According to the court, the state’s dignity

does not fade into oblivion merely because a State’s law is enacted to comport with a federal invitation to regulate within certain parameters and with federal agency approval. . . . The West Virginia statute and implementing regulations are solely the product of its own sovereignty, enacted pursuant to its democratic processes, and, as was the case in *Pennhurst*, a State’s sovereign dignity reserves to its own institutions the task of keeping its officers in line with that law.¹⁸³

Applying *Pennhurst II* means that citizens can only enforce a law like the SMCRA, as it is now state law, in state court absent affirmative federal action withdrawing, or otherwise preempting, the state program.¹⁸⁴ However, as discussed earlier in this Article, federal withdrawal or preemption of a delegated state regulatory program is highly unlikely.¹⁸⁵ State court is not a desirable forum for environmental litigants pursuing states, as discussed later in this Article, because they may well encounter other problems and jurisdictional barriers—including sovereign immunity under state law.

Given the structural similarities between the SMCRA and the

¹⁸¹ *Id.* at 296.

¹⁸² *Id.* at 296-97. For an analysis noting the significant differences between the underlying facts in *Pennhurst* and those in *Bragg*, see Hasselman, *supra* note 96, at 223-24.

¹⁸³ *Bragg*, 248 F.3d at 297. The court went on to note that West Virginia law, as required by the SMCRA, gave citizens the right to take their grievances to state court and try there to hold the State Director accountable for any violations of the West Virginia Surface Coal Mining and Reclamation Act. *Id.*

¹⁸⁴ *Accord* W. Va. Highlands Conservancy v. Norton, 147 F. Supp. 2d 474, 481 (S.D. W. Va. 2001). *But see infra* Part V.C (discussing the problems with that resolution).

¹⁸⁵ *Supra* Part II.

CWA, identified earlier in this Part, it is hard to see why the *Bragg* court's de-centrist reasoning, and its application of *Pennhurst II*, would not resonate in a CWA citizen suit against a state. This is not as far-fetched as one might think. A Wisconsin district court, in an opinion before *Bragg*, flagged the *Pennhurst II* issue in a citizen suit brought against two state environmental officials for violating the CWA's permitting provisions in a state with delegated permitting authority.¹⁸⁶ While noting under the CWA's federalism design that the EPA and state regulatory agencies share concurrent enforcement authority over violations of state-issued permits, the district court said that "Congress clearly intended the states to take the *leading role in issuing and enforcing the NPDES system.*"¹⁸⁷ Although that court went on to say that it would follow the lead of other courts that had found jurisdiction to entertain citizen suits alleging violations of the CWA's permitting provisions without addressing the *Pennhurst II* question,¹⁸⁸ it is worth wondering whether the judge would have deferred the issue had he had the Fourth Circuit's *Bragg* decision before him.

Applying these disparate strands of the Court's Eleventh Amendment jurisprudence to the CWA leaves one with the uneasy feeling that citizens seeking to enforce mandatory federal duties against states may face a formidable barrier. Congress has not validly abrogated the Eleventh Amendment in the CWA. Quite the contrary, according to various appellate courts, the language of section 505 explicitly preserves the Amendment's application, and courts are not likely to find that the states have waived their immunity under the CWA.

With regard to *Ex parte Young*, while no lower court has found

¹⁸⁶ *Froebel v. Meyer*, 13 F. Supp. 2d 843, 844-55 (E.D. Wis. 1998).

¹⁸⁷ *Id.* at 855 (emphasis added); see also *California v. United States Dep't of the Navy*, 845 F.2d 222, 225 (9th Cir. 1988) (finding that, once approved, state programs are administered under state law); *District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980) ("The state courts are the proper forums for resolving questions about state NPDES permits, which are, after all, questions of state law.").

¹⁸⁸ *Froebel*, 13 F. Supp. 2d at 855 (citing *Natural Res. Def. Council v. Cal. Dep't of Transp.*, 96 F.3d 420, 424 (9th Cir. 1996)). *Natural Resources Defense Council* allowed injunctive relief to proceed under the CWA against the State Secretary of Transportation. 96 F.3d at 424. The court in *Natural Resources Defense Council* said that because Congress intended to encourage and assist the public to participate in enforcing standards promulgated to reduce water pollution, it would be reasonable to conclude that Congress "implicitly intended to authorize citizens to bring *Ex parte Young* suits against state officials with the responsibility to comply with clean water standards and permits." *Id.*

that enforcement suits brought under the CWA implicate a state's special sovereignty interests as implicated in *Coeur d'Alene*, that question has not been raised when citizens have challenged a state's administration of its delegated authorities.¹⁸⁹ Similarly, while no court has yet found that the CWA offers a preclusive remedial scheme, environmental plaintiffs have lost the opportunity to seek civil penalties from states, unless sought against an individual state official in his official capacity, and their right to some forms of injunctive relief may be open to question. But these problems are mere annoyances when compared to the potential effect of the Fourth Circuit's *Bragg* decision on CWA citizen suits.

Assuming *Ex parte Young* may not provide the shield from the preclusive effect of the Eleventh Amendment that future environmental plaintiffs would like, it is worth examining whether there are alternative legal theories that might avoid the need to raise the doctrine altogether, and what the effect might be if citizens can no longer go to federal court to seek relief against state defendants.

V

POSSIBLE WAYS AROUND THE SOVEREIGN IMMUNITY BARRIER

Seminole Tribe eliminated the Commerce Clause as a basis for congressional abrogation of the Eleventh Amendment.¹⁹⁰ However, under certain circumstances, section 5 of the Fourteenth Amendment and the Spending Clause, although untested, may

¹⁸⁹ The plaintiff in *Swartz v. Beach* arguably raised state programmatic concerns when he alleged that individual state officials took his property by issuing a CWA permit that authorized the discharge of coalbed methane (CBM) waters that damaged his property and by failing to perform their statutory duty to remedy that damage. 229 F. Supp. 1239, 1249 (D. Wyo. 2002). The District Court dismissed portions of these counts to the extent plaintiff sought monetary damages against state officials in their official capacity and to enjoin them from violating state law. *Id.* at 1252-53. The court did, however, allow the request for punitive damages against officials in their individual capacity to proceed. *Id.* at 1253. The court also found it had subject matter jurisdiction over the remaining portions of these claims under *Ex parte Young* because the CWA's remedial scheme would not be pre-empted by the application of *Ex parte Young*, and because the state's "special sovereignty interests" were not implicated by its regulation of a "small ephemeral stream." *Id.* at 1255-56.

¹⁹⁰ See *supra* Part IV.A.1 (discussing the second prong of the abrogation exception as applied to CWA).

provide a valid ground for congressional abrogation.¹⁹¹ In addition, various federal courts, which have disclaimed jurisdiction to hear a citizen suit based on the Eleventh Amendment, have assured citizens that they can either rely on the federal government to prosecute their cause or bring the same actions in state court. However, as discussed below, neither of these suggestions does much to assure that either citizens will be able to navigate around the Eleventh Amendment or that the violations they seek to rectify will indeed be corrected.

A. *Alternative Grounds for Congressional Abrogation*

The Court has recognized section 5 of the Fourteenth Amendment as a valid basis for congressional abrogation of the Eleventh Amendment.¹⁹² A citizen asserting this basis for congressional abrogation must allege a violation of her due process or equal protection rights or of the Privileges and Immunities Clause.¹⁹³ Assertions under the Equal Protection Clause

¹⁹¹ The Treaty Power in the Constitution may present another basis for abrogation of the Eleventh Amendment with respect to its application to CWA citizen suits, assuming one can establish it as a constitutional basis for the CWA. U.S. CONST. Art. II, § 2, cl. 2. See John O'Connor, Note, *Taking TRIPS to the Eleventh Amendment: The Aftermath of the College Savings Cases*, 51 HASTINGS L.J. 1003, 1031-40 (2000) (discussing the possibility of Congress abrogating Eleventh Amendment immunity by enacting legislation protecting intellectual property rights pursuant to its Treaty Power); see also *Missouri v. Holland*, 252 U.S. 416 (1920) (sustaining legislation regulating the killing of migratory birds as a constitutional exercise of Congress's authority under the Treaty Power). But see Carlos Manuel Vazquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713, 715 (2002) (saying that the Eleventh Amendment still constrains Congress's power to abrogate immunity when it acts to implement a treaty).

¹⁹² See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997) (citing U.S. CONST. amend XIV, cl. 5) (saying section 5 of the Fourteenth Amendment affirmatively grants Congress the power to abrogate sovereign immunity since it was passed after the Eleventh Amendment); *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) (acknowledging the Fourteenth Amendment provides a basis for abrogation); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."). The court's most recent application of section 5 of the Fourteenth Amendment to abrogate a state's sovereign immunity was in *Tennessee v. Lane*, 124 S. Ct. 1978, 1980 (2004) (holding that Title II of the Americans with Disabilities Act, (42 U.S.C.A. §§ 12131, 12202) as applied to "the fundamental right of access to the courts" is a valid exercise of Congress's enforcement power under the Fourteenth Amendment).

¹⁹³ See, e.g., 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, 265-66 (1997) (suggesting environmental citizen suits brought

have met with mixed success depending on whether they meet the Court's test of congruity and proportionality,¹⁹⁴ and whether there is clear evidence in the legislative record of a pattern of past constitutional violations by the state.¹⁹⁵ Because it is hard to imagine how the Fourteenth Amendment might be implicated in a suit to abate a violation of the CWA (other than a substantial procedural irregularity by the state and perhaps not even then), it seems unlikely that a claimant could meet the Court's test of congruence and proportionality, let alone make the necessary evidentiary showing required by *Kimel*.¹⁹⁶ Therefore, the Fourteenth Amendment holds out little hope as an alternative ground for congressional abrogation of the Eleventh Amendment in a CWA citizen suit against a state.

The Spending Clause,¹⁹⁷ which authorizes the CWA grants that

to vindicate property interests are in some sense authorized by the Equal Protection and Due Process Clauses of the Fourteenth Amendment). *But see Coll. Sav. Bank*, 527 U.S. at 673 (holding the false advertising provision of the Lanham Act was not a property right protected under the Fourteenth Amendment because it did not include a right to exclude).

¹⁹⁴ *Boerne*, 521 U.S. at 519-20 (putting forth the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" as the test for determining whether a law is substantive in operation and effect, thus exceeding the scope of Congress's enforcement power under section 5 of the Fourteenth Amendment); *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81-82 (2000) (describing the "congruence and proportionality" test utilized in *Boerne* as differentiating between appropriate "prophylactic legislation" and an inappropriate attempt to effect "a substantive redefinition of the Fourteenth Amendment"). *But see Lane*, 124 S. Ct. at 2008-09 (Scalia, J., dissenting) (referring to this test as "flabby" because it is "a standing invitation to judicial arbitrariness and policy-driven decision making").

¹⁹⁵ *See Kimel*, 528 U.S. at 89 (finding the Age Discrimination Enforcement Act's legislative history insufficient to support congressional abrogation of the Eleventh Amendment); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999) (commenting upon Congress's failure to point to a pattern of patent infringement by the states, "let alone a pattern of constitutional violations"); *see also Whalin, supra* note 6, at 240 (warning the new standard of judicial review in *College Savings Bank* may provide the federal courts "with a hunting license to challenge all environmental statutes to determine whether the evidence at the time they were enacted supported the legislation").

¹⁹⁶ *See Reynolds v. Ala. Dep't of Transp.*, 4 F. Supp. 2d 1092, 1107-08 (M.D. Ala. 1998) (saying the teaching of *Boerne* is "there must be a substantial constitutional hook: the principal object of the legislation must be to address rights that are judicially recognized [as prohibited by the Fourteenth Amendment]"); *see also Froebel v. Meyer*, 13 F. Supp. 2d 843, 851 (E.D. Wis. 1998) (finding no such "hook" in a CWA suit brought against a state agency).

¹⁹⁷ U.S. CONST. art. I, § 8, cl. 1 (empowering Congress "to pay the Debts and provide for the common Defence and general Welfare of the United States"). Although states will not be considered to have waived their Eleventh Amendment immunity by merely accepting federal funds, *Atascadero State Hosp. v. Scanlon*, 473

finance state regulatory programs,¹⁹⁸ may hold out slightly more hope around the barrier to congressional abrogation that *Seminole Tribe* erected.¹⁹⁹ Courts have pretty consistently held that federal-state cooperative programs enacted under the Spending Clause fall within the ambit of the Supremacy Clause,²⁰⁰ and that conflicting local laws must yield.²⁰¹ Although the Court has held Congress can only use this power to advance “the general welfare,”²⁰² this should not be a problem with respect to state grants to abate water pollution, nor should the requirement that whatever conditions Congress imposes must be related to “the federal interest in particular national projects or programs.”²⁰³ Although the Court has allowed the federal government to place conditions on a state’s receipt of federal funds,²⁰⁴ it has said these

U.S. 234, 246-47 (1985), the federal government can condition the receipt of those funds upon the state’s waiver of sovereign immunity. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). However, to be judicially enforceable, these conditions must be explicit. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981). Arguably, Congress has explicitly conditioned state program grants in the CWA to those which finance states’ administration of their delegated authorities. 33 U.S.C. § 1256 (2000). Private litigants should be able to enforce these conditions under the Supremacy Clause. *See, e.g.*, *Blum v. Bacon*, 457 U.S. 132, 145-46 (1982) (holding that New York’s no-cash and loss or theft rules, which precluded providing emergency financial assistance to families with dependent children, conflicted with federal regulations and, therefore, were invalid under the Supremacy Clause).

¹⁹⁸ CWA § 106, 33 U.S.C. § 1256.

¹⁹⁹ *See Fletcher, supra* note 2, at 853 (“If Congress acts under the Spending Clause of Article I, specifically and clearly giving a state money in exchange for a waiver of the state’s sovereign immunity, the state’s waiver should have binding consequence.”).

²⁰⁰ *See, e.g.*, *Blum*, 457 U.S. at 145-46. *But see Quern v. Mandley*, 436 U.S. 725, 734 (1978) (suggesting while “federal eligibility standards are mandatory on States that adopt . . . [a program enacted under the Spending Clause, the law] in no way obligates a State to continue that program”). The court in *O’Brien v. Massachusetts Bay Transit Authority*, 162 F.3d 40 (1st Cir. 1998), held that

[I]ndividual Justices have from time to time suggested that the authority for adhering to Federal Law when Congress employs its spending power is not to be located in the Supremacy Clause. But these moments have been few and far between and . . . have not debilitated the general conclusion that the laws of a jurisdiction that receives federal funds must, when a relevant conflict looms, give way to federal law.

Id. at 43 n.2 (citation omitted).

²⁰¹ *See, e.g.*, *Dalton v. Little Rock Family Planning Serv.*, 516 U.S. 474, 477-78 (1996) (stating a provision of a state constitution is invalid if it conflicts with the Medicaid Act); *cf. CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993) (stating that when “a state statute conflicts with, or frustrates, federal law, the former must give way”).

²⁰² *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937).

²⁰³ *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion).

²⁰⁴ *See South Dakota v. Dole*, 483 U.S. 203, 206 (upholding the power of Congress

obligations must be explicit.²⁰⁵ This requirement should also not pose a problem with regard to CWA state program grants. Congress has conditioned those grants to require, among other things, the establishment of water quality monitoring procedures and adequate emergency and contingency plans comparable to the authority given the EPA, as well as the filing of annual reports to the EPA for approval of its state program for the prevention, reduction, and elimination of pollution in accordance with the purposes and provisions of the statute.²⁰⁶ However, there may be a problem if the Court were to consider the conditions contained in section 106 as too coercive and thus barred by the Tenth Amendment.²⁰⁷

B. Federal Enforcement

The Court in *Alden* found no lessening in the enforceability of federal mandates after it had barred private enforcement in that case because of the availability of the federal sovereign to en-

to place conditions on a state's receipt of federal funds); *see also* *Jim C. v. Ark. Dep't of Ed.*, 235 F.3d 1079 (8th Cir. 2000) (en banc) (holding section 504 of the Rehabilitation Act of 1973 is a valid exercise of Congress's spending power, and that Arkansas waived its immunity with respect to section 504 suits by accepting federal funds). Dwyer comments on the potential unconstitutionality of EPA's I/M regulations under the Tenth Amendment, saying, "after *South Dakota v. Dole*, which appears to permit almost any conditions on federal grants to states, EPA has available a constitutional route to the same destination." Dwyer, *supra* note 15, at 1205 n.110 (citation omitted).

²⁰⁵ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981).

²⁰⁶ CWA §§ 106(e), (f), 33 U.S.C. §§ 1256 (e), (f) (2000).

²⁰⁷ *See Dole*, 483 U.S. at 211 (recognizing that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion,'" but refusing to hold that a conditional grant of federal highway funds to states that establish the minimum drinking age of twenty-one falls within that category); *cf.* *Printz v. United States*, 521 U.S. 898, 925 (1997) (striking down the Brady Handgun Violence Protection Act's requirement that state and local law enforcement officers conduct background checks of handgun purchasers, and saying, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs"); *Alden v. Maine*, 527 U.S. 706, 758 (1999) ("When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations."); *see also* *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999) ("[T]he point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity."). *But see* Dwyer, *supra* note 15, at 1193 (commenting on the constitutional importance, with respect to the Court's anti-commandeering federalism decisions, of the "exit option" in environmental laws for states who do not assume delegated authority).

force them.²⁰⁸ But, as the dissenters noted, the likelihood of this happening is small.²⁰⁹ This is certainly true in the case of enforcing federal pollution control laws for the reasons given previously—limited federal prosecutorial resources and lack of political will to enforce against the states.²¹⁰

Araiza identifies the extent to which the federal government will increase its own enforcement effort to make up the shortfall in citizen lawsuits as a major variable in determining *Alden*'s effect on state violation of federal environmental mandates.²¹¹ He says he has an "initial suspicion" that an increase in federal enforcement may not be forthcoming because of the agency's increased focus on cooperation rather than deterrence in dealing with violators, and because of the federal government's reluctance to impose penalties on state government entities—a reluctance made even stronger by the fact that states are the EPA's main partner in the cooperative federalism scheme.²¹² Araiza contrasts this reluctance with the attitude of individual plaintiffs who have suffered injury from some violation by a state entity, or who have a law reformer's broader interest in environmental protection in general. These individuals have no reason to re-

²⁰⁸ See *Alden*, 527 U.S. at 759 (noting the availability of U.S. attorneys to sue on behalf of the plaintiff employees); see also *id.* at 755 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.") (internal citations omitted); *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996) (sovereign immunity is no barrier to a suit initiated by the United States, even where the relief sought is monetary in nature); *United States v. Texas*, 143 U.S. 621, 645 (1892) (finding the power of the federal government to bring suit against the states necessary to "the permanence of the Union"); Whalin, *supra* note 6, at 236-37 (saying absent express consent from a state to be sued, environmental plaintiffs only recourse is against the EPA for failing to "ensure that the state operating under delegated authority properly fulfilled its duties," but noting "such a suit would be fraught with difficulties"); cf. Araiza, *supra* note 7, at 1531 (noting the "irony," given the Court's devolutionist tendencies, that a result of lessening the accountability of state regulatory conduct through judicial review may be less delegation to them).

²⁰⁹ *Alden*, 527 U.S. at 810 (Souter, J., dissenting) (calling the prospect of federal enforcement whenever private enforcement is barred by the Court's decision "a whimsy").

²¹⁰ Whalin adds the federal government "will use its discretion to select which actions to bring" and that "[t]hese policy choices will reflect the viewpoint of the administration in power" and not necessarily "the priorities of the aggrieved private party." Whalin, *supra* note 6, at 239.

²¹¹ Araiza, *supra* note 7, at 1549; see also *Alden*, 527 U.S. at 810 (Souter, J., dissenting) (implying the need for significant expansion in federal litigating forces).

²¹² Araiza, *supra* note 7, at 1549-52.

frain from suing to seek penalties even against their own state.²¹³

An additional problem with relying on only federal enforcement to correct state CWA violations is that any failure of the EPA to enforce against a polluting state facility or against a state with an inadequately administered or enforced program will be shielded from private suit under *Heckler v. Chaney*.²¹⁴ While it is true that if the EPA were to intervene in a citizen suit otherwise barred by the Eleventh Amendment, the lawsuit could continue with the EPA as the principal party and the private plaintiffs could intervene in the EPA's suit,²¹⁵ an intervenor carries less weight in the ensuing litigation than a principal party.²¹⁶ Thus, having to rely on the federal sovereign to shoulder the entire load of ensuring that states comply with the CWA's mandates is hardly reassuring to environmentally concerned citizens.

C. Enforcement of Federal Mandates in State Courts

Environmental litigants can also try to enforce federal mandates against states in state court under state law.²¹⁷ Even though it is well established that state courts can hear federal claims,²¹⁸ state laws frequently contain their own jurisdictional

²¹³ Of course, as Araiza points out, this is exactly the type of lawsuit on which "*Alden* shuts the door." *Id.* at 1552-53.

²¹⁴ 470 U.S. 821, 832-33 (1985) (holding an agency's refusal to initiate an enforcement action was "presumptively unreviewable").

²¹⁵ R.I. Dep't of Env'tl. Mgmt. v. United States, 286 F.3d 27, 45 (2002) ("If the United States joins a private suit after it has been initiated by otherwise-barred private parties and seeks the same relief as the private parties, this generally cures any Eleventh Amendment or sovereign immunity defect, and the private parties may continue to participate in the suit.").

²¹⁶ See, e.g., *Van Hoomissen v. Xerox Corp.*, 497 F.2d 180, 181 (9th Cir. 1974) (A district court's discretion, under the rule of permissive intervention, to grant or deny application for permissive intervention "includes discretion to limit intervention to particular issues."); *General Ins. Co. of America v. Hercules Const. Co.*, 385 F.2d 13, 18 (8th Cir. 1967) ("An intervenor accepts the pleadings as he finds them."); see also *Arizona v. California*, 460 U.S. 605, 615 (1983) (noting that "permission to intervene does not carry with it the right to relitigate matters already determined in the case, unless those matters would otherwise be subject to reconsideration").

²¹⁷ See *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 297 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002). ("Because the West Virginia courts are open to such suits, the federal interest in maintaining the State's compliance with its own program may be fulfilled via suit in that forum, in a manner that does not offend the dignity of the State."). See also Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 *YALE L.J.* 1003, 1003 (2001) (arguing state courts are a "niche" waiting to be filled by environmental litigants who lack Article III standing).

²¹⁸ See, e.g., *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 826 (1990) (finding a "presumption of concurrent jurisdiction" over claims arising under Title VII

barriers, including standing and sovereign immunity, and many states do not offer prevailing parties fees or costs. Further, most state judges are elected and, thus, are more sensitive to any political pressure that might be brought to bear on them.²¹⁹ Once in the state court system, the *Rooker-Feldman* doctrine prevents federal courts, other than the Supreme Court, from reviewing how the state court handled the matter, making state court decisions interpreting federal environmental laws virtually immune from federal review.²²⁰ Thus, the practical realities of such lawsuits make state court a problematic venue for most citizens seeking to vindicate federal statutory mandates.

There simply are no fail-safe alternative solutions for environmental litigants should a state raise the Eleventh Amendment as a defense to a suit brought against it for its failure to comply with the CWA (or with any other cooperative federalism law). This is why the *Bragg* decision and the potential ripple effect of its application of *Pennhurst* to SMCRA citizen suits are so troubling.

CONCLUSION

“The Framers split the atom of sovereignty” and established “two orders of government, each with its own direct relationship,

despite compelling evidence of a congressional expectation of exclusive federal jurisdiction); Elmendorf, *supra* note 217, at 1013. Elmendorf admits the case for concurrent jurisdiction over federal claims under the CWA, the SMCRA, and the CAA, while strong, is “not airtight,” given venue clauses in each law that could be read to signify exclusive federal jurisdiction. *Id.* at 1014, 1020-21; *see also* Davis v. Sun Oil Co., 148 F.3d 606, 612 (6th Cir. 1998) (holding RCRA’s citizen suit provision did not provide for exclusive federal jurisdiction); *cf.* Araiza, *supra* note 7, at 1532 n.97 (saying whether citizen suit provisions authorize suit in state court is “an important threshold issue”).

²¹⁹ See John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L.J. 217 (2001) (saying that the environment has emerged as the most prominent issue in state judicial elections, questioning the fairness and integrity of that process, and documenting the disproportionate influence of probusiness special interests groups in the election process); *see also* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 624-25 (1981) (speculating about the psychology of state judges’ attentiveness to federal questions); Elmendorf, *supra* note 217, at 1034 n.169.

²²⁰ The *Rooker-Feldman* doctrine precludes a federal district court from exercising appellate jurisdiction over state court judgments. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), which collectively stand for the proposition that 28 U.S.C. § 1331 is a grant of original jurisdiction and does not authorize district courts to exercise appellate jurisdiction over state court judgments, which Congress has reserved to the U.S. Supreme Court under 28 U.S.C. § 1257(a).

its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”²²¹ The CWA, like many environmental laws, proposed a federalism design that maintained some semblance of balance between the two halves of the atom. The Court’s Eleventh Amendment jurisprudence seriously threatens that balance by potentially depriving environmental litigants of a judicial remedy against a state for violation of a federal mandate.²²² In an era of heightened devolution of regulatory responsibilities to the states, any imbalance poses serious problems for environmental plaintiffs who act as an important corrective for failings in the devolution model.

The Fourth Circuit’s application of *Pennhurst II* in *Bragg* to bar a citizen suit that otherwise would have been protected from the Eleventh Amendment under *Ex parte Young* is particularly troubling. Given the extent to which *Bragg* misapprehended the federalism structures of the SMCRA and the CWA, the court’s assurance that its holding will have no effect on citizen suits brought under the CWA provides little comfort that its decentrist reasoning will not resonate in those cases as well.²²³ While it is possible environmental litigants may be able to avoid the *Ex parte Young* doctrine entirely by pursuing one of the alternative approaches suggested in this Part, such as relying on the Spending Clause as a ground for abrogating state sovereign immunity or on the EPA to withdraw or cabin in some way the delegation of federal programmatic authority to a state, each of these alternatives has its problems. Since there are no certain alternative courses of action for citizens under these circumstances, unless the Court acts to constrain the excesses of its Eleventh Amendment jurisprudence, states may be able to ignore federal environ-

²²¹ *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (quoted by Young, *supra* note 73, at 1671).

²²² See *Alden v. Maine*, 527 U.S. 706, 811 (1999) (Souter, J., dissenting) (commenting on the Court’s abandonment of a principle nearly as inveterate as sovereign immunity, and much closer to the hearts of the Framers, “that where there is a right, there must be a remedy”).

²²³ See Puder & Veil, *supra* note 96, at 109. Puder and Veil note the “glaring parallel” between SMCRA and cooperative federalism in other environmental laws, and state that this may lead other courts to disregard

the hedging dicta offered in the *Bragg* ruling, transfer the reasoning to other environmental laws with primacy provisions, deny environmental citizen litigants the *Ex parte Young* exception to state sovereign immunity, confine the review of state laws that implement a federal blueprint to state courts, and effectively curtail federal environmental citizen suits.

Id.

mental mandates largely without peril.²²⁴

²²⁴ For an indication that the Court might be cabining the exuberance of its Eleventh Amendment jurisprudence, see *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003) (holding that state employees may recover money damages in federal court in the event of a state's failure to comply with the Family and Medical Leave Act's family care provision, and that Congress may abrogate a state's Eleventh Amendment immunity from suit in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of power under section 5 of the Fourteenth Amendment). *But see Tennessee v. Lane*, 124 S. Ct. 1978, 1994 (2004), in which the majority limited its finding that Title II of the ADA abrogated a state's immunity to "the class of cases implicating the fundamental right of access to the courts." In this fractious 5-4 opinion, the fault lines among the Justices on the Eleventh Amendment are still evident and may well be responsible for the cabined majority opinion. *See, e.g., id.* at 2006 (Rehnquist, C.J., dissenting) (rejecting the majority's "as applied approach" to Title II, and finding it does not abrogate a state's immunity because it fails the *Boerne* "congruence-and-proportionality-test," as it authorizes "private damages suits against a State for merely maintaining a courthouse that is not readily accessible to the disabled, without regard to whether a disabled person's due process rights are ever violated"; a problem made worse by "the lack of record evidence showing that inaccessible courthouses cause *actual* Due Process violations") (emphasis added); *id.* at 2008-13 (Scalia, J., dissenting) (saying that Congress's authority to impose "prophylactic § 5 legislation" should be limited to those states "in which there has been an *identified history* of relevant constitutional violations," suggesting limiting the *Boerne* analysis to congressional action under § 5 that is directed to racial discrimination—all other laws must show that they "enforce" the provisions of the Fourteenth Amendment—and finding that requiring access for disabled persons to public buildings "cannot remotely be considered a means of 'enforcing' the Fourteenth Amendment"); *id.* at 2013 (Thomas, J., dissenting) (writing separately for the sole purpose of disavowing "any reliance on *Hibbs*" in Rehnquist's dissent).