2003

The Effect of the Supreme Court's Eleventh Amendment Jurisprudence on Environmental Citizen Suits: Gotcha!

Hope M. Babcock
Georgetown University Law Center, babcock@law.georgetown.edu

This paper can be downloaded free of charge from:
http://scholarship.law.georgetown.edu/facpub/951


This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: http://scholarship.law.georgetown.edu/facpub
Part of the Constitutional Law Commons, Environmental Law Commons, and the Jurisprudence Commons
THE EFFECT OF THE SUPREME COURT'S ELEVENTH AMENDMENT JURISPRUDENCE ON ENVIRONMENTAL CITIZEN SUITS: GOTCHA!

HOPE BABCOCK

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

I. INTRODUCTION

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. As a result, many people are finding they are unable to vindicate federal rights in any court when the defendant is a state or a state agency. The most recent example of this is the Court's decision in South Carolina State Ports Authority v. Federal Maritime Commission,² 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.³

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 laws against states, as Justice Breyer warned in his dissent in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board.⁴ States are important players in the administration of many environmental laws, as recipients of delegated federal regulatory authority. States also own, operate, and construct potentially polluting facilities, such as hazardous waste landfills, hospitals, prisons, airports, roads, and reservoirs that may violate federal law. Thus, they are often targets of citizen suits.

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.⁵ In an atmosphere in which states are assuming a more

---

¹ Professor of Law, Georgetown University Law Center.

2. John T. Noonan, Jr., Narrowing the Nation's Power: The Supreme Court Sides with the States 156 (2002).


3. See Alden v. Maine, 527 U.S. 706, 707 (1999) (referring to previous Eleventh Amendment Supreme Court cases and stating that "subsequent decisions reflect a settled doctrinal understanding that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution"); William A. Fletcher, The Eleventh Amendment: Unfinished Business, 75 Notre Dame L. Rev. 843, 857 (2000) (saying "all nine Justices have abandoned any thought, or pretense, that the text of the Eleventh Amendment matters").


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 environmentalists. If environmental plaintiffs cannot enforce federally mandated standards and programmatic requirements against the states that run these programs, history advises that the states may under-perform. Thus, a reinvigorated Eleventh 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.

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

(refering to the Court's holding that 11 U.S.C. § 106(c) does not waive immunity from an action seeking monetary recovery in a bankruptcy proceeding, and stating that "[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). Abate and Cogswell suggest that it is inappropriate to apply the doctrine of sovereign immunity to shield federal polluting facilities from citizen suits. They argue that "Congress has incorporated limitations on citizen suits and remedies," and that applying the doctrine will cause substantial injustice, "removing controversies from the courts and placing them in ill-equipped forums, thereby producing final determinations without the necessary procedural safeguards[,] and . . . inefficiently allocating controversies to other forums when well-suited for court resolution"). Id. at 7.


7. Id. 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, 1199-1216 (1995) (describing EPA's tepid enforcement efforts against "recalcitrant states regarding inspection and maintenance programs" under the Clean Air Act). But see id. (arguing that while states had a poor record before enactment of the basic environmental laws, that record has improved considerably).


9. Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (2000) ("[A]ny citizen may commence a civil action on his own behalf . . . against . . . any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution. . . . ") (emphasis added).
The text of the Eleventh Amendment is surprisingly clear and short given how far a field from the text the Court has wandered and how much controversy its application has created. The Amendment 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." Over the years, the Supreme Court has found license in this language to apply the Amendment to suits brought to enforce federal mandates in federal court against states by citizens of the same state, to suits in state court, not just federal court, and to federal administrative adjudicatory proceedings. At the same time, the Court has narrowed the basis on which Congress can abrogate that immunity, on which a state will be considered to

10. U.S. CONST. amend. XI (emphasis added). The Supreme Court's decision in Chisholm v. Georgia, 2 U.S. 419 (1793), which held that Article III had abrogated any preexisting immunity the states might have had and thereby allowed the Court to exercise jurisdiction over a private lawsuit brought against the state of Georgia to collect a debt, led to the swift adoption of the Eleventh Amendment, which reversed that holding.

11. However, suits against state officials for violations of state law are barred by the Eleventh Amendment. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (holding that the doctrine from Ex parte Young, 209 U.S. 123 (1908), is inapplicable to a suit brought against a state official to compel compliance with state law, and stating that "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").

12. Hans v. Louisiana, 134 U.S. 1 (1890) (holding that the Eleventh Amendment confirms that principles of state sovereign immunity are embedded in the constitutional structure and thus bars a citizen from bringing suits in federal court against his/her own state). The Eleventh Amendment also bars suits brought by Indian tribes, see Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991), and by foreign countries, see Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).


15. Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) (holding Congress cannot abrogate a state's immunity pursuant to its Commerce Clause powers). However, Congress can abrogate a state's immunity under section 5 of the Fourteenth Amendment, see id. at 59, although "[t]here must be a congruence and proportionality between the injury to be prevented or remedied [by the legislation] and the [legislative] means adopted to that end." See City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (emphasis added). Moreover, the law must be based on a sufficient legislative record to
have waived its immunity, and the circumstances in which a court will find that a litigant has successfully raised an *Ex parte Young* exception to state immunity. The Court's vague and overly broad rationales for protecting states from private lawsuits—to prevent affronts to the dignity of the states and to preserve essential
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 id.* at 526. *See also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (finding Congress did not validly abrogate the Eleventh Amendment in the Americans with Disabilities Act (ADA) 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) (finding that although the Age Discrimination in Employment Act (ADEA) 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/disproportionate remedy); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672-91 (1999) (holding the Trademark Remedy Clarification Act was not a section 5 enactment).


17. 209 U.S. 123 (1908). In *Ex parte Young*, the Court found the Eleventh Amendment does not bar suits brought against state officials, in their official capacity, for prospective injunctive relief, or prospective declaratory relief, designed to remedy ongoing violations of federal law. *Id.* at 159-60. *See also* Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 648 (2002), where the Court authorized suit seeking injunctive relief against the Maryland public service commissioners in their official capacity. *But see* Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945) (barring suits for recovery of money brought only against state officials when "the state is the real, substantial party in interest").

18. *See, e.g.*, Idaho v. Cœur d'Alene Tribe, 521 U.S. 261, 287-88 (1997) (declining to apply the *Ex parte Young* doctrine when important state sovereign functions are involved); *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) (finding 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").

19. *See* *Seminole Tribe*, 517 U.S. at 58 ("The Eleventh Amendment does not exist solely in order to 'prevent[ ] 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.'") (first alteration in original) (citations omitted). *See also* *Alden v. Maine*, 527 U.S. 706, 715 (1999) (noting that states "retain the dignity, though not the full authority, of sovereignty"); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (holding that the limit on federal judicial power is an essential element of constitutional design, as
state functions\textsuperscript{20}—can 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" of the state, i.e., state departments and agencies, where the state is the real party in interest.\textsuperscript{21} The lower courts have interpreted this extension broadly, sweeping in most state agencies that might run afoul of a federal environmental mandate.\textsuperscript{22} Additionally, the Court considers that the Amendment "sufficiency partakes" of subject matter jurisdiction so that a state may assert it as a defense for the first time on appeal.\textsuperscript{23}

To a large extent the Court's federalism jurisprudence, 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

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 subjected when a federal court orders that state's officials conform their conduct with their own laws); In re Ayers, 123 U.S. 443, 505 (1887) ("The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.").

\textsuperscript{20} Coeur d'Alene Tribe, 521 U.S. at 283 (holding the Eleventh Amendment bars an Indian tribe from seeking injunctive relief in federal court in a suit to establish title to land and stating that "[n]ot only would the relief block all attempts by these officials to exercise jurisdiction over a substantial portion of land but also would divest the State of its sovereign control over submerged lands"). See also Alden, 527 U.S. at 749 ("[T]o press a State's own courts into federal service ... is ... 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," permitting courts and private litigants to disrupt the basic resource allocations of state governments).


\textsuperscript{22} See, e.g., 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 agent of the University that is entitled to immunity from suit in federal court). Eleventh Amendment immunity, however, does not extend to cities or counties. See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 609 n.10 (2001); Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 400-01 (1979); Lincoln County v. Luning, 133 U.S. 529, 530 (1890). The Court has left open the question whether Eleventh Amendment immunity stretches to interstate compact commissions or officials. See Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 50 n.20 (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") (citation omitted). 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 nuisance suit challenging noise levels).

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.

The general thinking 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,* which suggests that section 505 of the CWA implicitly authorizes suits against states under the *Ex parte Young* exception to the Eleventh Amendment. Although there are two other exceptions to the application of the Eleventh Amendment, abrogation and waiver, this paper concentrates on the effectiveness of the *Ex parte Young* doctrine because of the Court's encouraging words in footnote 17. Unfortunately, citizen suits under the CWA, and other environmental laws authorizing private rights of action, may be vulnerable to an Eleventh Amendment defense because of how the lower courts have narrowed the reach of that doctrine.

In *Ex parte Young,* the Court held that the Eleventh Amendment does not bar suit against a state official acting in violation of federal law. Although often termed a legal fiction, the doctrine is premised on the unassailable idea that a state cannot authorize its officials to violate the Constitution and laws of the United States. Thus, such an action is not considered an action of the state and cannot be shielded from suit by a state's immunity. Therefore, when this

25. *See id.* at 75 n.17 (distinguishing the CWA 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).
26. *Ex parte Young,* 209 U.S. 123, 159-60 (1908) (stating that the state official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.") (citation omitted).
27. *See Idaho v. Cœur d'Alene,* 521 U.S. 261, 270 (1997) (calling the *Ex parte Young* doctrine a fiction to the extent that it distinguishes between a state and an officer acting on the state's behalf.
28. *See Hafer v. Melo,* 502 U.S. 21, 30 (1991) ("'Since Ex parte Young,' we said, '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.'") (quoting Scheuer v. Rhodes, 416 U.S. 232, 237 (1974)) (first alteration in original) (internal citation omitted); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (stating that the *Ex parte Young* doctrine is necessary "to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States'") (quoting *Ex parte Young,* 209 U.S. at 160).
doctrine applies, a state officer can be sued for violating a mandatory federal duty.\textsuperscript{29}

Although the courts have narrowed the effectiveness of \textit{Ex parte Young} as a shield against an Eleventh Amendment motion to dismiss in several ways,\textsuperscript{30} only one of these—the characterization of the law, under which suit has been

\textsuperscript{29}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. \textit{Ex parte Young}, 209 U.S. at 150-51. \textit{See also} Seminole Tribe v. Florida, 517 U.S. 44, 71 n.14 (1996) (noting that the opinion leaves open alternative means to ensure that states comply with federal laws by pointing out that “an individual can bring suit against a state officer . . . to ensure that the officer’s conduct is in compliance with federal law”) (citations omitted); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (noting that \textit{Ex parte Young} “ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law”). A state official can raise as a defense the lack of “direct authority and practical ability to enforce the challenged statute.” Nat’l Audubon Soc’y, Inc. v. Davis, 307 F.3d 835, 846 (9th Cir. 2002).

\textsuperscript{30}For example, litigants relying on the \textit{Ex parte Young} exception are entitled only to prospective relief and that which does not require payment of funds from the state. \textit{See Pennhurst}, 465 U.S. at 102-03. \textit{See also} Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 29 (1981) (\textit{Pennhurst I}) (“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 obligation” as the structural relief here); Edelman v. Jordan, 415 U.S. 651 (1974) (holding the Eleventh Amendment does not bar suit to compel future state compliance with federal standards governing the processing of welfare applicants, but does bar an injunction ordering retroactive payment of previously owed benefits); Natural Res. Def. Council v. Cal. Dep’t of Transp., 96 F.3d 420 (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 the Eleventh Amendment did not bar a suit alleging the attorney’s fees provision in Wyoming’s surface mining statute violated the Surface Mining Control and Reclamation Act (SMCRA) because the suit sought prospective relief, rather than retrospective relief). \textit{See also} MSA Realty Corp. v. Ill., 990 F.2d 288, 295 (7th Cir. 1993) (holding, among other things, “that the eleventh amendment 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”). \textit{Cf.} Manning v. S.C. Dep’t of Highway & Pub. Transp., 914 F.2d 44, 48-49 (4th Cir. 1990) (barring a landowner’s Declaratory Judgment Act suit, which sought a declaration that his rights were violated under certain South Carolina condemnation statutes, because issuance of declaratory judgment would have the same effect as a full-fledged award of damages). Additionally, the Court has not allowed litigants to use the \textit{Ex parte Young} doctrine to seek relief against a state where the relief requested would implicate the special sovereignty interest of the state, \textit{see Cort v’Alona Tribe}, 521 U.S. at 261 (holding the Eleventh Amendment barred an Indian tribe from seeking injunctive relief in a federal court against a state in a suit to establish title to submerged lands), or where the relief they would gain under the doctrine would exceed that authorized by Congress in the law they were seeking to enforce, \textit{see Seminole Tribe}, 517 U.S. at 74 (stating that “where 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 \textit{Ex parte Young}”).
brought—is discussed here because it is the most problematic for environmental litigants.

III. THE PENNhurst Decision and Its Potential Impact on Citizen Suits Brought Against States Under Delegated Federal Programs

The problem originates with how some circuits are applying Pennhurst State School & Hospital v. Halderman, which holds that citizens cannot sue state officials in federal court for violations of \textit{state law}, regardless of the nature of relief sought. The question \textit{Pennhurst} raises for potential environmental litigants is whether a claim made under a delegated federal regulatory program is asking a federal court to enforce \textit{federal law} or \textit{state law} against a state. The Fourth Circuit, in \textit{Bragg v. West Virginia Coal Ass'n}, answered that question by saying, under the Surface Mining Control and Reclamation Act (SMCRA), it is unquestionably \textit{state law}. The \textit{Bragg} court's answer has serious implications not only for citizen suits under SMCRA, but, also for potential suits brought under other pollution control laws like the CWA, because of the similarities between the federalism structures of SMCRA and other pollution control laws.

The Fourth Circuit, in \textit{Bragg}, found that a federally approved state surface mining program, which authorized West Virginia to promulgate mine operation and reclamation standards and issue permits, was state law, not federal law, because the version of "cooperative federalism" employed in SMCRA provides for "\textit{extraordinary deference to the States}". The circuit court further said SMCRA calls for either state or federal regulation of surface coal mining within its borders, "but not both[,]" finding in SMCRA a unique 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." According to the circuit court, SMCRA's federalism model is, therefore, "quite unlike the cooperative regime under the Clean Water Act." The errors committed by the Fourth Circuit in reaching this conclusion are surprising.

32. Id. at 106.
33. 248 F.3d 275 (4th Cir. 2001).
35. \textit{Bragg}, 248 F.3d at 297 ("[R]ather than asking the States to enforce the federal law, Congress through SMCRA invited the States to create their own laws, which would be of 'exclusive' force in the regulation of surface mining within their borders.") (citation omitted).
36. Id. at 293 (emphasis added) (citation omitted).
37. Id.
38. Id.
39. Id. at 294.
First, the Bragg court over-emphasized language appearing in section 503 of 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.\textsuperscript{40} In emphasizing the phrase "exclusive jurisdiction,"\textsuperscript{41} and finding in it a basis to distinguish 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" under SMCRA (for example, the federal Office of Surface Mining's (OSM) power to withdraw federal approval of a state regulatory program and substitute a federal program in its stead,\textsuperscript{42} enforce against violations in states with regulatory primacy,\textsuperscript{43} and enter any mine site in a state with an approved regulatory program\textsuperscript{44}). If anything, SMCRA is the more federal of the two laws.

Second, in its eagerness to emphasize SMCRA's "extraordinary deference to the States,"\textsuperscript{45} the Bragg court failed to see the state features in cooperative federalism laws like the CWA,\textsuperscript{46} which the court specifically distinguished from SMCRA.\textsuperscript{47} Thus, the indicia of reserved federal authority and "extraordinary deference to States" are apparent in both laws, and there is simply not the sharp distinction between the two laws that the Bragg court implies.

Third, in its effort to distinguish the CWA, the Bragg court misinterpreted what the Supreme Court said, and did, in \textit{Arkansas v. Oklahoma},\textsuperscript{48} mistakenly relying on the 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[\textsuperscript{49}], unlike SMCRA. In fact, the Court in \textit{Arkansas} specifically declined to address the question of whether the CWA required EPA to apply the downstream state's water quality standards precisely because the permit involved was a federal permit issued under section 402(a),\textsuperscript{50} and not under a delegated state permit program (section 402(b)),\textsuperscript{51} inferring that the answer might be different.

\begin{itemize}
\item \textsuperscript{40} 30 U.S.C. § 1253(a) (2000) (emphasis added). It is worth noting that this phrase appears nowhere else in the statute and is used in § 1253(a) merely to introduce a set of detailed requirements for states intending to seek delegated regulatory authority.
\item \textsuperscript{41} \textit{See Bragg}, 248 F.3d at 294.
\item \textsuperscript{42} 30 U.S.C. § 1254(a)(3) (2000).
\item \textsuperscript{43} \textit{Id.} § 1271.
\item \textsuperscript{44} \textit{Id.} § 1267(a).
\item \textsuperscript{45} \textit{See Bragg}, 248 F.3d at 293 (reading SMCRA to "exhibit I extraordinary deference to the States").
\item \textsuperscript{46} See, for example, 33 U.S.C. § 1342(b) (2000), delegating to states permitting, inspection, enforcement, and standard setting authority, and \textit{id.} § 1342(c), delegating authority to the states to suspend the federal permitting program upon submission of an approvable state program.
\item \textsuperscript{47} \textit{See Bragg}, 248 F.3d at 294.
\item \textsuperscript{48} 503 U.S. 91 (1992).
\item \textsuperscript{49} \textit{Bragg}, 248 F.3d at 294 (referencing \textit{Arkansas}, 503 U.S. at 110) (alteration in original).
\item \textsuperscript{50} 33 U.S.C. § 1342(a) (2000).
\item \textsuperscript{51} \textit{Id.} § 1342(b).
\end{itemize}
if it were a section 402(b) permit. Moreover, somewhat ominously in light of Bragg, the Court in Arkansas noted that Congress, in crafting the CWA, protected certain state sovereign interests, citing as an example section 510, which allows states to adopt more demanding pollution control standards than those established under the Act.

Under the Bragg court's understanding of how SMCRA works, "federal law establishing minimum national standards . . . 'drop[s] out' as operative law and . . . the State law[] . . . become[s] the sole operative law." The adoption of 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 it is exactly the same as the federal standard, involves state, not federal law. Any injunction from a federal court against state officials would be commanding those officials to comport with the state's own laws because only the state law is operative and directly regulates the issuance of permits. According to the Bragg court, under Pennhurst, 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."

The Bragg court recognized that the federal interests in SMCRA are stronger than those at issue in Pennhurst because the federal rights under SMCRA were created by a 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 . . . State law." Nonetheless, the court found that Pennhurst controlled, i.e., 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 and that permitted under Ex parte Young because it impaired the state's dignity.

52. Arkansas, 503 U.S. at 104.
56. Bragg, 248 F.3d at 296. The Third Circuit, in a similar case under SMCRA, leaves a slight opening for suit in federal court under an approved regulatory program—namely, suit may be tenable under the Ex parte Young doctrine if the challenged element of the approved state program is "inconsistent with—i.e., less stringent than" the federal requirements. See Pa. Fed'n of Sportsmen's Clubs, Inc., 297 F.3d at 324. 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.
57. Bragg, 248 F.3d at 296.
58. Id. at 297-98.
does not fade into oblivion merely because a State's law is enacted to comply 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. 59

Applying Pennhurst means that citizens can only enforce a law like SMCRA, as it is now state law, in state court where they may well encounter other problems and jurisdictional barriers—including sovereign immunity under state law. While the federal government could withdraw or otherwise preempt a state’s regulatory authority, in this political climate, the chances of that happening seem highly unlikely.

Given the structural similarities, not dissimilarities, between SMCRA and the CWA, pointed out earlier in this article, it is hard to see why the same conclusion would not hold true for CWA citizen suits, and why the Bragg court's de-centrist reasoning would not resonate in other courts, as it already has, 60 although not yet in a CWA case. Applying the reasoning in Bragg and its application of Pennhurst to the CWA, however, is not as far fetched as one might like to think. A Wisconsin district court, in an opinion issued before Bragg, flagged the Pennhurst 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. 61 While noting that under the CWA's federalism design, EPA and the state regulatory agencies share concurrent enforcement authority over violations of state-issued permits, the district court said that “Congress clearly intended the

59. Bragg, 248 F.3d at 297 (citations omitted).
60. See, e.g., Pa. Fed'n of Sportsmen's Clubs, Inc., 297 F.3d at 313-14, 324-30 (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); 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 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, must be enforced as state law, absent affirmative OSM action" withdrawing the program). Cf. Farricielli v. Holbrook, 215 F.3d 241 (2d Cir. 2000) (remanding to the district court the question of whether claims filed under Subchapter C and D of the Resource Conservation and Recovery Act (RCRA) were filed under federal or state law). But see Cox v. City of Dallas, 256 F.3d 281 (5th Cir. 2001) (holding that plaintiffs alleged violations of federal law, not state law, when they sued state officials for allowing an open dump in violation of RCRA, and, therefore, Pennhurst did not bar their lawsuit).
states to take the leading role in issuing and enforcing the NPDES system.' Although that court went on to say that it would follow the lead of other courts that had found jurisdiction to entertain citizen actions alleging violations of the CWA's permitting provisions without addressing the Pennhurst question, it is worth wondering whether the judge would have deferred the issue had he had the Bragg decision before him.

IV. CONCLUSION

This discussion of the lower courts' application of Pennhurst to delegated federal environmental regulatory programs leaves one with the uneasy feeling that citizens seeking to enforce mandatory federal duties under the CWA against states may face a formidable barrier. While no court has yet applied Pennhurst to bar a CWA citizen suit, there is enough of a concern in the Bragg decision to imagine that might happen, even though that court badly misapprehended the cooperative federalism structure of both SMCRA and the CWA.

Looking on the bright side, it is possible that litigants, faced with an Eleventh Amendment defense, may be able to avoid Ex parte Young entirely by arguing that the Eleventh Amendment has been waived by a state's acceptance of federal grant money under the Spending Clause. Alternatively, as the Court suggested

62. [Footnote]

63. [Footnote] The district court, as an example of such decisions, cited Natural Res. Def. Council v. Cal. Dep't of Transp., 96 F.3d 420 (9th Cir. 1996). In that case, the Ninth Circuit allowed a claim for injunctive relief to proceed under the CWA against the State Secretary of Transportation, and stated that since Congress intended to encourage and assist the public to participate in enforcing the standards promulgated to reduce water pollution ..., it would seem 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. at 424 (citations omitted).

64. [Footnote] 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, see 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.");), the federal government can condition the receipt of those funds, South Dakota v. Dole, 483 U.S. 203 (1987). However, to be judicially enforceable these conditions must be explicit. Pennhurst I, 451 U.S. at 25. Arguably Congress has explicitly conditioned state program grants in 33 U.S.C. § 1256 (2000) (CWA section). The Supremacy Clause would provide the basis for private litigants to enforce these conditions. See, e.g., Blum v. Bacon, 457 U.S. 132 (1982) (holding that New York's no-cash and loss or theft rules, which precluded providing emergency financial assistance, conflicted with federal regulations and were therefore invalid under the Supremacy Clause).
in *Alden v. Maine*, 65 citizens can always pressure the federal government to enforce against the state itself, or exercise its authority to withdraw, or cabin in some way, the delegation of federal authority to the state. Citizens can also seek relief in state court against recalcitrant states. 66 So all may not be lost for those interested in assuring that states abide by the federal mandates under which they have assumed regulatory authority. However, each of these alternatives is wanting in some way. This is what makes the Court's Eleventh Amendment jurisprudence potentially so troubling for environmental litigants.

65. 527 U.S. 706, 759 (1999) (noting the availability of U.S. attorneys to sue on behalf of the plaintiff employees). But see id. at 810 (Souter, J., dissenting) (calling the prospect of federal enforcement whenever private enforcement is barred "whimsy").
