Bragg v. W. Va. Coal Ass'n and the Unfortunate Limitation of Citizen Suits against the State in Cooperative Federalism Regimes

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In Bragg v. West Virginia Coal Association, the Fourth Circuit held that the Eleventh Amendment to the U.S. Constitution bars a private citizen from suing in federal court to enjoin a state regulator from issuing surface mining permits in violation of state-administered regulations approved under the federal Surface Mining Control and Reclamation Act (SMCRA). The decision, which relegates challenges to state regulators by both environmentalists and industry to state courts, represents an instance of woefully bad statutory construction and misapplication of Supreme Court precedent. If its reasoning is widely adopted or extended to other environmental statutes, it could cripple citizens' ability to hold state regulators accountable for their environmental regulatory obligations.
INTRODUCTION

When miles of West Virginia's native streams were buried by tons of mining debris from an aggressive form of coal mining known as "mountaintop removal," environmental advocates looked to federal courts to intercede. In fact, the courts seemed like the only place they could turn. Despite protests by environmentalists, the Director of the West Virginia Department of Environmental Protection (the Director) continued to approve surface mining permits for activities within 100 feet of perennial and intermittent streams, without making findings that development within those "buffer zones" would not injure the streams.¹ Not only was this practice in direct violation of state law, it also violated the federal Surface Mining Control and Reclamation Act (SMCRA), the federal mining law designed to avert such environmental devastation.²

But invoking the power of SMCRA to stop the Director's permit approvals was not as simple as it seemed. SMCRA is a "cooperative federalism" statute, meaning that Congress designed it with a partnership with the states in mind. SMCRA set national minimum surface mining standards, but encouraged the states to pass their own statutes by promising that the state would be allowed to enforce its own surface mining law. West Virginia qualified to enforce its own surface mining law by

passing the West Virginia Surface Coal Mining and Reclamation Act [the West Virginia Act], approved in 1981.³

In April 2001, a citizens' group suing under the federal SMCRA won an injunction in federal district court against the Director.⁴ The injunction forbade the Director from issuing permits for surface mining activities without making findings required by federal and state regulations. On appeal, however, the Fourth Circuit Court of Appeals reversed, holding that sovereign immunity barred the suit because the case concerned violations of state law.⁵ On January 22, 2002, the Supreme Court denied certiorari.

This Note seeks to untangle the difficult question of when private citizens may invoke the power of the federal government to cut short a state's authority under a "cooperative federalism" statute due to the state's failure to enforce its own regulatory program. It opens by briefly describing the legal and factual background of Bragg v. W.Va. Coal Ass'n, and then summarizes the district and circuit courts' decisions. Next, it analyzes the Fourth Circuit's holding, concluding that the court misinterpreted SMCRA and wrongly applied binding Supreme Court precedent when it held that sovereign immunity barred suit in federal court. Finally, it discusses possible ramifications for citizen suits against state authorities under other cooperative federalism statutes, such as the Clean Air Act and the Clean Water Act, if the Bragg court's holding is broadly adopted. It concludes that the circuit court's reasoning could damage citizens' prospects for holding state authorities responsible for enforcing other environmental protection statutes, thereby crippling an important mechanism for maintaining the integrity of the environment.

I

TECHNICAL AND LEGAL BACKGROUND

A. Mountaintop Removal Mining

Bragg involved "mountaintop removal," a surface mining method practiced in several coal mining states and especially

widespread in West Virginia. Layer by layer, the mountaintop is blasted away, exposing seams of coal underneath. After the coal is mined, the earth that was removed, called "overburden," is put back in an effort to "restore the approximate original contour of the land." The overburden swells while it waits to be replaced, however, and the excess rock that remains after restoration is dumped into neighboring valleys. This dumping creates "valley fills," which replace steep rocky mountains with gently contoured hills. Valley fills usually land in streams, adversely affecting water quantity and quality and the surrounding wildlife. In addition to the profound negative impact on the local environment caused by landscape alteration and stream filling, other activities attendant to the mining process, such as blasting, traffic, dust, and noise, cause more human impacts, such as damaging property, interfering with wells, and creating other disruptions.

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8. This is required by SMCRA. 30 U.S.C. § 1265(b)(3) (1994).
11. See Williams, supra note 6, at 38.
12. Bragg v. Robertson, 72 F. Supp. 2d 642, 661-62 (S.D. W. Va. 1999) (Robertson II) ("If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated."). The district court filed two other opinions arising from Bragg's lawsuit: Bragg v. Robertson, 83 F. Supp. 2d 713 (S.D. W. Va. 2000) (Robertson III) (approving a consent decree with the director of West Virginia's environmental protection division over all but two counts in Bragg's complaint against the director) and Bragg v. Robertson, 54 F. Supp. 2d 653 (S.D. W. Va. 1999) (Robertson I) (approving a consent decree with the U.S. Army Corps of Engineers over counts not concerning SMCRA).
13. See Bragg, 248 F.3d at 286; see also Goodell, supra note 7. Its intense impact on the environment makes mountaintop removal mining more controversial than most mining practices. The environmental community has also litigated over SMCRA's implementation. For example, when the Department of the Interior approved West Virginia's state SMCRA statute, environmental groups challenged Interior's approval on the grounds that people biased against environmental controls staffed the state's review board. See Tug Valley Recovery Cir. v. Watt, 703 F.2d 796 (4th Cir. 1983) (dismissing case because plaintiffs did not allege that board members had a financial interest in the cases they decided). The coal industry is highly influential in West Virginia, especially in state politics. For example, coal industry representatives commonly make major donations to state officials' election campaigns. Coal mining interests gave $500,000 to West Virginia Governor Underwood's 1996 campaign, and donated to the campaigns of all seventeen West Virginia State Senators serving in 1997. Diamond, supra note 7, at 910 n.174. The industry and the West Virginia "political establishment," as the Fourth Circuit put it,
B. The Surface Mining Control and Reclamation Act of 1970

In the 1970s, growing concern about such environmental destruction led Congress to pass the Surface Mining Control and Reclamation Act (SMCRA) to protect the environment from damage caused by surface mining while allowing this effective and profitable method of coal extraction to continue. To accomplish these joint goals, SMCRA's architects used a "cooperative federalism" model. In this structure, Congress passes a statute laying out minimum standards for a state regulatory program. The states then create regulatory programs and submit them to the governing federal agency for approval. If the federal agency approves, the state is allowed to regulate the subject matter governed by the statute, tempered by federal oversight.

SMCRA's version of cooperative federalism splits enforcement responsibility between the U.S. Secretary of the Interior and state regulatory authorities. Although Congress established certain minimum standards for regulation of surface mining under SMCRA, states are encouraged to enact their own
laws incorporating these (or more stringent) standards. States are encouraged to develop their own programs for surface mining regulation and submit them to the Department of Interior's Office of Surface Mining (OSM) for approval. To win approval of its plan, a state must pass a law meeting at least the minimum protective standards and must demonstrate its ability to enforce the law. If the Secretary approves the plan, the state becomes a "primacy state," meaning that it receives exclusive regulatory jurisdiction over surface mining and state officials administer the plan. If a state fails to submit a plan, submits a plan that does not win approval, or if the Secretary withdraws approval due to ineffective enforcement, the state is governed by a federal plan developed and administered by OSM.

In accordance with SMCRA, West Virginia passed the West Virginia Act and won approval of its program from Interior in 1981. The West Virginia Act vests responsibility for regulation of surface coal mining in the Director of the State Division of Environmental Protection. One of the Director's duties is to issue permits for surface mining. Before permitting mining activity within 100 feet of a perennial or intermittent stream, the Director is required to find that the activity will not adversely affect the normal flow or gradient of the stream, fish migration, water quantity or quality, or other environmental resources of the stream, nor contribute to violations of State or Federal water quality standards. This rule is known as the "buffer zone rule." The Bragg plaintiffs' chief allegation against the State Director was that he routinely issued permits for valley fills without making the findings required by the buffer zone rule. The Director did not dispute that allegation and admitted that as to valley fills, the findings could never be made. He instead argued

21. Id.
24. W. VA. CODE § 22-3-4 (Michie 1998); Bragg, 248 F.3d at 289.
25. W. VA. CODE § 2-5.2 (1998); 30 C.F.R. § 816.57; Bragg, 248 F.3d at 287. At the time the Bragg plaintiffs filed suit, West Virginia regulations required slightly more stringent findings than did the federal regulations.
that the Eleventh Amendment’s state sovereign immunity barred the suit.27

C. The Eleventh Amendment and State Sovereign Immunity

States’ immunity from federal court suits by private citizens is born of old common-law traditions, general concepts of federalism, and the Eleventh Amendment to the U.S. Constitution.28 Congress passed the Eleventh Amendment in the 1790s to overrule Chisholm v. Georgia.29 Because the Amendment is generally read as a sweeping prohibition against private suits against the states in federal courts,30 the Supreme Court has carved out exceptions to soften its impact.31 The most important is found in Ex parte Young,32 in which the Court held that federal courts may grant injunctive relief against state officials for ongoing violations of federal law. The case rests on

27. Id. at 648.
28. “The 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.” U.S. Const. amend. XI.
29. 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, 1034 n.4 (1983) (hereinafter Fletcher, A Historical Interpretation) (citing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)). Chisholm allowed, under the diversity jurisdiction of Article III, a suit by a South Carolina citizen to enforce debts owed by Georgia. In response, Congress immediately passed the Eleventh Amendment, but the plain language of the Amendment does nothing to grant or affirm an unconsenting state’s immunity from suit by its own citizens. Thus, there has been disagreement over the original intent behind the Amendment. Some scholars argue that the Amendment was intended only to clarify that the state-citizen party-based jurisdiction of Article III applied only when the state was a plaintiff, an interpretation that would allow private citizens to sue the state they lived in, or, if there were another basis, such as a federal question, for jurisdiction, other states. In contrast, the Supreme Court has essentially adopted the position that the Amendment acts as a sweeping prohibition against federal courts exercising jurisdiction over actions brought by individuals against states regardless of the plaintiff’s state of residency. Compare Fletcher, A Historical Interpretation, at 1035, with Lawrence C. Marshall, Fighting the Words of the Eleventh Amendment, 102 HARV. L. REV. 1342 (1989). Professor Fletcher argues that the Supreme Court’s interpretations have finally departed entirely from the actual text of the Eleventh Amendment, and now rely instead on the general principles of federalism and sovereign immunity that are said to inform the Amendment itself. See William A. Fletcher, The Eleventh Amendment: Unfinished Business, 75 NOTRE DAME L. REV. 843, 857-58 (2000) (hereinafter Fletcher, Unfinished Business); see also Bragg, 248 F.3d at 291 (lending support to Professor Fletcher’s view).
30. See, e.g., Hans v. Louisiana, 134 U.S. 1 (1890); Bragg, 248 F.3d at 291.
31. See Fletcher, A Historical Interpretation, supra note 29, at 1040.
32. 209 U.S. 123 (1908).
the fiction that a state official is stripped of his or her official character when acting counter to federal law.  

For decades, the Eleventh Amendment provided few cases for the Supreme Court, but as the breadth of the administrative functions of all levels of government expanded, the types of relief sought against officials has grown more complex. The increasing relevance of the Eleventh Amendment has been reflected in the frequency with which the Supreme Court has addressed it. The Supreme Court has decided more Eleventh Amendment cases since 1976 than in the preceding 180 years. These cases, and the trends they represent, provide the backdrop for Bragg's holding that the State of West Virginia was not subject to an injunction from a federal court.

For Bragg, the most important of these cases was Pennhurst State School & Hospital v. Halderman. In Pennhurst, the Court held that Ex Parte Young's exception allowing federal courts to intercede did not extend to injunctions to remedy violations of discretionary state law. Accordingly, the Court overturned the Third Circuit's order that Pennsylvania close a large hospital and establish several smaller hospitals and residential programs for the residents according to a Pennsylvania statute.

Pennhurst is consistent with the general trend of the Court's Eleventh Amendment jurisprudence, which has been to broaden the scope of state immunity from private suits in federal court. Since 1996, the Court has limited Congress's ability to abrogate state immunity to narrow instances under Section Five of the Fourteenth Amendment. In Seminole Tribe v. Florida, the Court held that Congress could not abrogate state immunity when acting (as it had when enacting SMCRA) pursuant to its Commerce Clause powers. A pair of cases in 1999 held that states were immune from suit despite statutes designed specifically to abrogate state immunity from suit for violations of patents and trademarks. Also in 1999, Alden v. Maine held that

33. Fletcher, A Historical Interpretation, supra note 29, at 1041.
34. Id.
35. Fletcher, Unfinished Business, supra note 29, at 844.
37. Id. at 97.
38. This analysis of recent Eleventh Amendment holdings comes from Fletcher, Unfinished Business, supra note 29, at 844-45.
Congress could not require state appearance in state court any more than it could in federal court.41

II
THE DECISIONS

A. The District Court Decision

In 1998, Patricia Bragg and the other plaintiffs brought suit against the Director of the Department of Environmental Protection in the Southern District of West Virginia under the citizen-suit provision of SMCRA.42 All but two of Bragg's claims were settled. The remaining claims both concerned the buffer-zone rule.43 The plaintiffs alleged first that the Director regularly issued mountaintop removal permits without even attempting to make the requisite findings (Count 2), and second, that because valley fills have an inherent adverse affect on stream ecology, the director could never make such findings for valley fill permits (Count 3).44 The Director admitted that he made none of the required findings for authorization of valley fills and conceded that because of the inherent damage the findings could never be made. Instead, he argued that the Eleventh Amendment barred the suit entirely.45

On cross-motions for summary judgment, the district court rejected the defendants' argument that the suit was barred by the sovereign immunity granted the states by the Eleventh Amendment.46


42. See Bragg v. Robertson, 72 F. Supp. 2d 642 (S.D. W. Va. 1999) (Robertson I). SMCRA allows that "any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter. . . against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this chapter which is not discretionary with the Secretary or with the appropriate State regulatory authority. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties." 30 U.S.C. § 1270 (a)(2) (1994).

43. See supra text surrounding notes 24-29.


45. Robertson I, 72 F. Supp. 2d at 648. The Director also advanced textual arguments that the buffer-zone rule allowed valley fills in perennial and intermittent streams. See id. at 647.
Amendment to the U.S. Constitution. It found that the suit fell into the exception carved out by *Ex parte Young.* The court also agreed with the plaintiffs that (1) the Director had a nondiscretionary duty to make the findings required under the buffer-zone rule before issuing permits for valley fills, and (2) the Director had a nondiscretionary duty to deny permits for valley fills in intermittent and perennial streams because the environmental damage inherent in such fills made the findings impossible. Accordingly, the court granted Bragg’s request for an injunction against issuance of “any further surface mining permits under current law that would authorize placement of excess spoil in intermittent and perennial streams for the primary purpose of waste disposal.” The district court also entered consent decrees approving settlements on all the counts except the buffer zone counts (counts 2 and 3).

The district court’s decision met with controversy as soon as it was announced. Some industry and political officials interpreted it as both a ban on mountaintop removal mining and a regulatory taking of property. Senator Robert Byrd, a West Virginia Democrat, tried unsuccessfully to add a rider to the year-end federal omnibus appropriations bill that would have overturned the part of the decision requiring valley fills to obtain water pollution permits. St. Louis-based Arch Coal, the nation’s second-largest coal producer with mines throughout Central Appalachia as well as the West, laid off close to 400 people and took a $365 million write-down. Governor Cecil Underwood speculated that the decision would end all mining in West Virginia.

In response, the State Director appealed the district court’s rulings that his duties under the federal SMCRA statute were nondiscretionary and that the Eleventh Amendment did not bar

46. Id. at 649.
47. Id. at 663.
48. Id.
51. Id.
52. Goodell, supra note 7, at 37.
53. See
54. Goodell, supra note 7, at 37.
55. Diamond, supra note 7, at 910.
the suit. The coal companies and associations appealed the consent decree on grounds that the Eleventh Amendment prohibited such intervention by the federal court, and also on grounds that SMCRA's citizen suit provision did not provide jurisdiction to the district court.

B. The Circuit Court Decision

The Fourth Circuit panel unanimously held that the Eleventh Amendment barred Bragg's suit against the Director.\textsuperscript{56} In an opinion drafted by Judge Niemeyer, the circuit court made three holdings. First, it held that the Eleventh Amendment barred Bragg's suit against the State Director. Second, it held that West Virginia had not impliedly waived its immunity by participating in the SMCRA scheme. Finally, it held that although sovereign immunity barred the lawsuit, the district court had jurisdiction to enter the consent decrees on the plaintiffs' other claims.

1. Eleventh Amendment Ruling

Bragg argued that her suit sought to enforce federal law, reasoning that because states are still bound by SMCRA's requirements after their own statutes have been approved, the regulations promulgated by West Virginia pursuant to SMCRA had the force of federal law.\textsuperscript{57} The Fourth Circuit differed in its interpretation of the SMCRA enforcement scheme, however, holding that once the state statute and regulatory system was approved by the federal Office of Surface Mining (OSM), federal requirements "drop[ped] out" and the state law became the only controlling law.\textsuperscript{58}

The court then determined that the case was controlled not by \textit{Ex Parte Young} but by \textit{Pennhurst State School & Hospital v. Halderman},\textsuperscript{59} which held that the Eleventh Amendment bars suit against a state official to compel compliance with state law.\textsuperscript{60} The district court's injunction, which commanded a state official to comply with state law and state regulations, therefore represented an Eleventh Amendment violation that the Fourth

\textsuperscript{57} Id. at 291.
\textsuperscript{58} Id. at 294-95.
\textsuperscript{60} Bragg, 248 F.3d at 296-97.
Circuit found “abhorrent to the values underlying our federal structure.”  

2. **Immunity Waiver Ruling**

Bragg's second argument contended that West Virginia impliedly waived its sovereign immunity when it submitted its plan to the Secretary of the Interior. The citizen-suit provision of SMCRA specifically states that the district courts have jurisdiction over citizen suits, regardless of the parties' citizenship or the amount in controversy. However, it only permits suits “against the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution.” The court held that it could not presume intent to require a state to waive its sovereign immunity without clear and unequivocal language to that effect, and that the Eleventh Amendment language in the statute showed Congress's intent to preserve the states' sovereign immunity, not require them to waive it.

3. **Consent Decree Ruling**

Despite its determination that the Eleventh Amendment barred Bragg's suit against the State Director, the Fourth Circuit ruled that the district court had subject matter jurisdiction to enter the consent decree. The coal companies argued that the district court lacked subject matter jurisdiction to enter the consent decree because (1) the Director's failure to make the statutory findings was discretionary, (2) the duties arose under the West Virginia Act, so that SMCRA's citizen suit provision was not pertinent, and (3) since Counts 2 and 3 (Bragg's unsettled claims) were barred by the Eleventh Amendment, the settled counts were also barred. The Fourth Circuit found, however, that jurisdiction was proper. The right of petitioners to recover depended upon which of two alternative constructions was given to the Constitution or a law, and since petitioner's claim was not "patently without merit," the district court was justified in

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61. *Id.* at 296.
62. *Id.* at 298.
64. *Id.* (emphasis added); *Bragg*, 248 F.3d at 298.
65. *See Bragg*, 248 F.3d at 298.
66. *Id.* at 299-300.
67. *Id.* at 298-99.
68. *Id.* at 299.
exercising jurisdiction. Distinguishing between the claims addressed in the consent decree from those addressed in the summary judgment motions, the Fourth Circuit rejected the coal companies' invocation of the Eleventh Amendment as a defense because the Director had not raised that defense to the consent decree (although he had raised it against counts 2 and 3).70

III
ANALYSIS

This section first evaluates the validity of the Bragg decision and concludes that Bragg was incorrectly decided. Second, it discusses the impact broad application of this decision could have on plaintiffs' abilities to challenge state actions under other environmental statutes that use cooperative federalism-based regulatory approaches.

A. Evaluating the Validity of the Bragg Decision

The Fourth Circuit decision in Bragg misapplied the law in at least three major ways. First, its interpretation of SMCRA does not accord with the plain meaning of the language in the statute, which indicates that the federal act is still operative in primacy states. Second, even if SMCRA's language was not clear, the court violated Chevron v. NRDC by not deferring to the reasonable interpretation of the agency administering the statute. Third, the circuit court misapplied Pennhurst State School and Hospital v. Halderman because Pennhurst did not extend sovereign immunity from federal court suit to state officials for failure to perform a nondiscretionary function.


70. Bragg, 248 F.3d at 300.
1. **Misinterpretation of SMCRA**

The *Bragg* court held that once a state is granted primacy by OSM, its laws and regulations passed pursuant to SMCRA become the only law operative over surface mining in the state, and that the federal law and regulations "drop out."\(^7^1\) In doing so, it relied on a segment of Section 1253 of SMCRA (the "exclusive jurisdiction" language) that asks any state wishing to "assume exclusive jurisdiction over the regulation of surface coal mining" to submit its program to OSM.\(^7^2\) Yet other language in SMCRA shows that the federal Act remains directly operative in three ways after a state program is approved. First, SMCRA's description of regulators' duties shows that the federal act directly governs state regulators after program approval, and that state regulators have a duty to enforce their programs. Second, SMCRA continues to apply to mine operators, even in primacy states. Third, the citizen suit provision of SMCRA authorizes suits against state regulators. In addition, the circuit court's *Bragg* decision appears to overrule *Molinary v. Powell Mountain Coal Co., Inc.*, a previous Fourth Circuit decision finding that SMCRA remains operative in a primacy state.\(^7^3\)

SMCRA explicitly notes that even when a state's program has been approved by the OSM, the state is still enforcing federal law, not just state law. This statement directly conflicts with the Fourth Circuit's conclusion that federal law drops out when a state achieves primacy. This conflict is most clearly seen in SMCRA's descriptions of regulators' duties under the federal Act. Throughout SMCRA, Congress refers to the duties of "the regulatory authority," which it defines as "the State regulatory authority where the State is administering this chapter under an approved State program or the Secretary where the Secretary is administering this chapter under a Federal program."\(^7^4\) This definition shows that Congress intended the federal Act to remain operative, even in a primacy state like West Virginia. Therefore, references in substantive portions of the federal Act to "the regulatory authority" include state authorities.\(^7^5\) This

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\(^{71}\) *Bragg*, 248 F.3d at 289.


\(^{73}\) *Molinary v. Powell Mountain Coal Co., Inc.*, 125 F.3d 231 (4th Cir. 1997).


\(^{75}\) *See, e.g.*, 30 U.S.C. § 1265(a) (1994) (*Any permit issued under any approved State or Federal program pursuant to this chapter to conduct surface coal mining operations shall require that such surface coal mining operations will meet all*)
indicates that state authorities themselves are subject to provisions of federal law. Also, the phrase "administering this chapter" shows that Congress viewed approved state authorities as administering the federal act, not just an independent state law.

Not only are state authorities enforcing federal law, but SMCRA also creates a federal law duty on the part of the state regulatory authority to enforce its state program when it makes permit decisions. Section 1260 reads in its pertinent part: "(b) No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing . . . that (1) the permit application is accurate and complete and that all the requirements of this chapter and the State or Federal program have been complied with." The use of the word "shall" shows that this duty is nondiscretionary. Because West Virginia's buffer-zone rule forbids the State Director from issuing mining permits without specific findings and also uses nondiscretionary language, the State Director was required to condition permit approval on compliance with the rule.

Not only does SMCRA continue to exercise force over administrators in primacy states, but it also continues to govern mine operators. SMCRA includes mechanisms for the federal regulatory authority to step in and enforce SMCRA directly against a mine operator in a primacy state when the state does not act on a violation, even without taking over a state's program or finding that state's program inadequate. In addition, general oversight provisions, such as requiring yearly inspections of primacy states' programs, also show Congressional intent to keep the federal Act operative after program approval.

SMCRA's citizen-suit provision also directly authorizes suits "to compel compliance with this chapter . . . against . . . the appropriate State regulatory authority [for failure to] perform any act or duty under this chapter which is not discretionary," and applicable performance standards of this chapter, and such other requirements as the regulatory authority shall promulgate.

76. 30 U.S.C. § 1260(b) (1994) [emphasis added].
77. W. VA. CODE ST. R. § 2-5.2; 30 C.F.R. 816.57 ("No land within 100 feet of a . . . stream shall be disturbed by surface mining activities unless the regulatory authority specifically authorizes [them]. . . . The regulatory authority may authorize such activities only upon finding that—(1) Surface mining activities will not cause or contribute to the violation of applicable State of Federal water quality standards. . .")
vests jurisdiction in the federal district courts for such citizen suits. Accordingly, the Fourth Circuit effectively removed the citizen suit provision of SMCRA from the statute by holding that the federal law does not operate on a State regulatory authority.

In defining SMCRA's grant of "exclusive jurisdiction" to primacy states to enforce surface mining so broadly, Bragg appears to overrule Molinary v. Powell Mountain Coal Co., Inc., an earlier Fourth Circuit decision interpreting the same SMCRA section. Molinary held that (1) when a state is granted exclusive jurisdiction to regulate surface mining, it does not necessarily also get exclusive jurisdiction to adjudicate, and (2) the district courts have jurisdiction over a citizen suit brought against a mining company for violation of state regulations issued "pursuant to" SMCRA. Although Bragg's holding that federal law "drops out" conflicts directly with Molinary, Bragg did not discuss, disapprove or distinguish the earlier case. The only attention Bragg gives Molinary is a brief citation in the court's discussion of why the district court had jurisdiction to enter the consent decree, noting that Molinary accords with the interpretation that Section 1270 "confers on federal district courts subject matter jurisdiction over at least some sorts of claims."

2. Misapplication of Chevron

Chevron v. NRDC requires that courts must effectuate Congress's intent where Congress has spoken directly on an issue. It also requires that where Congress has not spoken

83. Id. at 236.
84. Id. at 237. Section 1270 is SMCRA's citizen-suit provision. The second holding only impacts the analysis of Bragg by analogy, because the Molinary plaintiffs sued under Section 1270(f), which authorizes suits against operators for violations of permits "issued pursuant to SMCRA." The plaintiffs in Bragg sued under Section 1270(a)(2), which authorizes suit against State regulatory authorities but does not use the phrase "pursuant to." In Molinary, the plaintiffs sued an operator, so the question of sovereign immunity was not expressly presented. But the court held that federal jurisdiction over suits alleging violation of Virginia's approved state surface mining program was consistent with the federal grant of "exclusive jurisdiction" over the regulation of surface coal mining in Section 1253(a): "Exclusive regulatory jurisdiction simply does not encompass exclusive adjudicatory jurisdiction. Common sense dictates that a government's acts in regulating a subject are distinctly different than its acts in adjudicating a party's rights related to the subject." Id. at 236.
directly on an issue, courts must sustain an agency's permissible construction of the statute it is authorized to enforce, even if the court would prefer another interpretation. The Fourth Circuit extends *Chevron* deference to agency interpretations of jurisdictional matters.

Not only does language in the statute weigh against a holding that federal law drops out when a state achieves primacy, the agency authorized to administer SMCRA interprets the statute to mean that state SMCRA programs are enforceable as federal law. The Department of the Interior made that explicit in 1979 when it published its opinion that "the Act's State programs, while adopted in the first instance by the States, will also become Federal law when approved by the Secretary of Interior, being promulgated as Federal regulations and enforceable as such in the United States courts." Interior also argued the same point in an amicus brief in *Molinary*, and the court in that case deferred to the agency's interpretation as required by *Chevron*. Although Interior took the same position in *Bragg*, the court did not show deference to the agency, did not cite or justify its departure from *Chevron*, and did not acknowledge *Molinary*'s deference to the Secretary under *Chevron*. In defining the law at issue as state law, the *Bragg* court substituted its interpretation of the relationship between state and federal law in SMCRA for a permissible interpretation by the agency in charge of enforcing the statute.

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87. *Id.* at 842-43.
88. See *Virginia v. Browner*, 80 F.3d 869, 878 (4th Cir. 1996) (rejecting state argument that Chevron deference was inappropriate because EPA's area of expertise is the environment, not jurisdictional rules: "[i]f Congress has decided that EPA has sufficient expertise in the area, it is not our place to say otherwise").
90. *Molinary*, 125 F.3d at 235-36.
91. *Bragg*, 248 F.3d at 286.
92. *Id.* at 299 (briefly citing *Molinary*); see *Molinary*, 125 F.3d at 235-36 (applying *Chevron*, 467 U.S. 837 (1984)).
93. The *Bragg* court also held that Section 1270(a)(2) did not evince clear and unequivocal Congressional intent to require a state administering SMCRA to waive its sovereign immunity from federal judicial review of the state's nondiscretionary duties. *Bragg*, 248 F.3d at 298. Section 1270(a)(2) authorizes suits against the appropriate State regulatory authority "to the extent permitted by the eleventh amendment to the Constitution." 30 U.S.C. § 1270(a)(2) (1994). The court held that such language indicated Congress's desire to preserve states' Eleventh Amendment immunity. *Bragg*, 248 F.3d at 298. For support, the *Bragg* court cited a Second Circuit case, *Burnette v. Carothers*, 192 F.3d 52, 57 (2d Cir. 1999), which concluded that similar language in the Clean Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation and Liability Act did not show Congress's intent to abrogate state immunity. This holding only becomes damaging to plaintiffs in light of the rest of the opinion, which labeled the state
3. Misapplication of Pennhurst

*Pennhurst* uses broad language that can be read as a prohibition against assertion of federal jurisdiction over *Young*-type injunctions to comply with state law, but its reasoning shows that its prohibition was not intended to apply to a situation like that in *Bragg*. The *Pennhurst* Court emphasized the discretion inherent in the officials' duties under the state statute in question and drew a distinction between those cases where the official was acting without authority or beyond his authority and those cases where the official just made an error in the exercise of his authority.94

The *Pennhurst* plaintiffs, a class of mentally retarded adults who were or could become residents of Pennhurst Hospital, claimed that the hospital did not provide the “adequate habilitation” required under the Pennsylvania Mental Health and Mental Retardation Act of 1966 (the “MH/MR Act”),95 and that conditions there violated the Eighth and Fourteenth Amendments to the U.S. Constitution.96 The case's complicated procedural history eventually led the Third Circuit to avoid the constitutional issues and decide the case solely on state-law grounds.97 The Third Circuit determined that the state officials in charge of Pennhurst Hospital were violating the MH/MR Act's guarantee of adequacy, and it affirmed the district court's order closing down the hospital and ordering officials to find its residents new arrangements.98 The Supreme Court overturned the Third Circuit's decision, holding that the federal court could

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98. Pennhurst, 465 U.S. at 93, 95.
not order the state officials to revamp their hospitals pursuant to a state statute that "gave petitioners broad discretion," even if they may have erred in the exercise of that discretion. The Court held that sovereign immunity bars a suit challenging a mistake made by a state official in the course of making a decision within his power. The Court declared 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."  

Bragg presents a significantly different situation than Pennhurst. First, the duties SMCRA required of the State Director under the buffer-zone rule were nondiscretionary. The district court decided as much, and the Fourth Circuit did not overrule or seriously challenge that determination. The emphasis the Pennhurst Court placed on the distinction between discretionary and nondiscretionary duties shows that Pennhurst's prohibition should not be automatically applied even when the lawsuit in question more clearly invokes state, as opposed to federal, law.  

Second, unlike in Pennhurst, the situation at issue in Bragg requires a federal court injunction remedy in order to hold state officials responsible to the supreme authority of the United States. The duties at issue in Bragg were only enacted because West Virginia chose to seek primacy status in a federal regulatory scheme. When a state official has accepted duties in a cooperative arrangement between state and federal authorities, a federal suit seeking to hold him or her to those responsibilities does not offend the state's dignity.  

Third, the district court in Pennhurst imposed an elaborate, expensive scheme on the state officials, requiring hearings for each individual and the establishment of smaller, community-based facilities for Pennhurst's residents. In contrast, Bragg

99. Id. at 111.
100. Id. at 110 n.20. Later in the opinion, the Court openly questioned the wisdom of the doctrine allowing injunctions against state officials acting outside their authority, but did not go so far as to dismantle the doctrine. It simply said that suits would be authorized only in cases in which the duties in question were nondiscretionary. Id. at 114 n.25.
101. Id. at 105.
104. See Pennhurst, at 101.
105. Bragg, 248 F.3d at 297, (discussing the state's dignity interest as the basis for sovereign immunity and citing Alden v. Maine, 527 U.S. 706, 715 (1999), and Idaho v. Cœur d'Alene Tribe, 521 U.S. 261, 268 (1997)).
sought a classic negative *Ex Parte Young* injunction, requiring no affirmative actions by the State Director, while simply enjoining him from future violations of the law.\textsuperscript{107}

The *Bragg* court acknowledged most of these distinctions between *Bragg* and *Pennhurst*. It recognized that "the state-law claims at issue in *Pennhurst* were of a different character from the claims at issue in this case."\textsuperscript{108} It noted that "the rights at issue were created by the State pursuant to a federal invitation."\textsuperscript{109} It also acknowledged that the Secretary of the Interior retains important controls over the enforcement of the State program.\textsuperscript{110} But without any effort to show that those differences did not matter, as this Note urges they do, the court simply concluded that the injunctive relief sought by Bragg and the other plaintiffs fell "on the Eleventh Amendment side of the line by some distance."\textsuperscript{111} Simply put, the court applied the outcome of *Pennhurst* without applying its reasoning.

Through a misapplication of the law, *Bragg* urges the Supreme Court further toward overturning *Ex Parte Young* than the other recent sovereign immunity cases. Although the *Bragg* court avoided an explicit contradiction of *Ex Parte Young* by defining the statute at issue as state law, it is at least clear that the ruling hampers attempts to obtain injunctive relief under a federally instigated program. The decision makes the leap to explicitly overruling *Ex Parte Young* much shorter.

**B. The Impact of Bragg**

The *Bragg* decision cripples citizens' ability to compel state regulators to comply with SMCRA in federal courts within the jurisdiction of the Fourth Circuit. While this outcome will detrimentally affect the environment, it pales in comparison to the effect broad application of the concepts in *Bragg* could have. The Clean Air Act, Clean Water Act, and other significant environmental statutes are all based on the cooperative federalism principles embodied in SMCRA. Should courts begin to follow the *Bragg* court's decision, the strength that citizen enforcement has lent to those statutes could be ripped away.

\begin{itemize}
  \item \textsuperscript{107} *Robertson II*, 72 F. Supp. 2d at 663.
  \item \textsuperscript{108} *Bragg*, 248 F.3d at 296.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id. The court did not reconcile this observation with its holding that federal law "drops out" when a state gains primacy.
  \item \textsuperscript{111} Id. (internal quotations omitted).
\end{itemize}
leading to a new and less enforceable environmental protection scheme in the United States.

1. Impact under SMCRA

_Bragg_ clearly disallows SMCRA citizen suits in federal court against state regulators. While cases may still be brought in state court, federal action has been limited to an unappealing choice of takeover of state plans or inaction.\(^1\) This prohibition is a disappointment to environmental groups and neighbors of coal fields who seek to make Fourth Circuit states' enforcement of surface mining regulations more stringent, and who question the willingness of state courts to enforce SMCRA's requirements as stringently as federal courts.\(^2\)

A somewhat less obvious effect of the reasoning in _Bragg_ is that it equally disallows federal court lawsuits against state regulatory authorities by industry representatives.\(^3\) Should West Virginia, or another Fourth Circuit state, enact some regulation more onerous to industry than the federal requirements of SMCRA, or otherwise take some action a coal company dislikes, industry representatives would not be able to seek relief in federal court any more than would environmentalists.

2. Impact Under Other Environmental Statutes

Many environmental laws employ cooperative federalism. Depending on the breadth of its application, the rationale in _Bragg_ could be extended to limit the ability of private parties to bring suit against state regulatory authorities under other environmental statutes. Both the Clean Air Act and the Clean Water Act include citizen-suit provisions similar to the one at issue in _Bragg_, and both could be potential targets of an

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113. Telephone Interview with Joseph Lovett, Mountain State Justice, Inc. (lead counsel for Bragg). The assumed greater neutrality of federal courts (appointed for life, fewer ties to state government), along with states' tendencies to under-value externalities, are common justifications for the federalization of environmental regulation.

114. Note that the West Virginia Coal Association tried to raise the State Director's sovereign immunity as a defense not only to the buffer-zone counts but the consent decree as well. _Bragg_, 248 F.3d at 299.
extension of Bragg’s analysis.\textsuperscript{115} Such an extension would frustrate Congressional intent to establish national standards for environmental protection under various statutes, and would leave much more enforcement responsibility in the hands of overworked federal agencies.

\textit{a. Clean Air Act}

According to the Clean Air Act Amendments of 1990 (CAAA), Congress enacts National Ambient Air Quality Standards (NAAQS) and the states, if they wish to participate, enact State Implementation Plans (SIPs), which set out how the state will achieve the NAAQS.\textsuperscript{116} The CAAA’s citizen-suit provision has been held to authorize suits against states for failure to regulate.\textsuperscript{117} To that extent, the relationship between federal and state authorities under the CAAA is similar to the relationship in SMCRA.

At least one commentator expressed concern, even before Bragg, that after \textit{Alden v. Maine}\textsuperscript{118} and \textit{Seminole Tribe v. Florida},\textsuperscript{119} a lawsuit seeking changes in the way a state implements its 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.\textsuperscript{120} While that commentator concluded that, at least after \textit{Alden}, a suit seeking changes in a state’s SIP could probably go forward,\textsuperscript{121} the possibility under \textit{Bragg} that the SIP could be interpreted as state law raises a new concern about citizen suits under the CAAA. Since the implementation of a plan to achieve the NAAQS is governed by the state in states with approved programs, and by the federal government in states without an approved program, the structure is at least facially

\textsuperscript{115} See William D. Araiza, \textit{Alden v. Maine and the Web of Environmental Law}, 33 \textit{LOY. L.A. L. Rev.} 1513, 1533 (2000); see also \textit{Clean Air Act}, 42 U.S.C. § 7604 (1994) ("[a]ny person may commence a civil action on his own behalf against any person (including the United States, and any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution). . . . Nothing in this section shall restrict any right which any person . . . may have under any statute or common law . . . to seek any other relief (including relief against the Administrator or a State agency)"); \textit{Clean Water Act}, 33 U.S.C. § 1365 (1994) (same language).


\textsuperscript{118} \textit{Alden v. Maine}, 527 U.S. 706 (1999).


\textsuperscript{120} Araiza, \textit{supra} note 115, at 1529.

\textsuperscript{121} \textit{id.} at 1530.
similar to SMCRA’s. It may not be difficult for a court looking for a way to give states greater protection from suit under the CAAA to analogize to Bragg and hold that the SIP is state law, thus preventing plaintiffs from being able to seek Ex Parte Young-type injunctions in federal court.\textsuperscript{122}

b. Clean Water Act

The Clean Water Act\textsuperscript{123} may be insulated from impact by Bragg’s explicit discussion of it, but structurally it is just as vulnerable to the same analysis. Under the Act, EPA sets “effluent limitations” which restrict the quantities, rates, and concentrations of particular substances that are discharged from point sources.\textsuperscript{124} The states then set “water quality standards,” which establish the desired condition of a waterway.\textsuperscript{125} Thus, a group of sources, even if they are all in compliance with the effluent limitations, may be regulated further to ensure the waterway’s quality.\textsuperscript{126} The primary method of regulation is the National Pollutant Discharge Elimination System, a permit program administered by a state if EPA has approved the state’s program, and by EPA where a state has not gained EPA’s approval.\textsuperscript{127} The Act prohibits issuance of a permit for a point source unless the agency can guarantee compliance with the affected state’s water quality standards.\textsuperscript{128} Thus, the state standards are “incorporate[d] into federal law” and treated as federal law.\textsuperscript{129}

The Bragg court specifically discussed the CWA’s cooperative federalism scheme as “quite unlike” SMCRA’s, because of the simultaneous use of state and federal enforcement.\textsuperscript{130} It contrasted the CWA with its interpretation of SMCRA as providing for “mutually exclusive” regulation of surface mining by states or Interior.\textsuperscript{131} Whether or not that construction of

\begin{footnotes}
\footnotetext[122]{See id. But see Espinosa v. Roswell Tower, Inc., 32 F.3d 491, 492 (10th Cir. 1994) (noting that the state’s Clean Air Act SIP has the force and effect of federal law).}
\footnotetext[124]{Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992).}
\footnotetext[125]{Id. A state’s standards are subject to EPA approval. Id.}
\footnotetext[126]{Id.}
\footnotetext[127]{33 U.S.C. § 1342 (1994); Arkansas v. Oklahoma, 503 U.S. at 102.}
\footnotetext[128]{Arkansas v. Oklahoma, 503 U.S. at 103.}
\footnotetext[129]{Id. at 110.}
\footnotetext[130]{Bragg v. W. Va. Coal Ass’n, 248 F.3d 275, 294 (2001). See supra text surrounding footnotes 71-85 for discussion of why the Bragg court was incorrect in its determination that SMCRA did not involve similar simultaneous regulation.}
\footnotetext[131]{Bragg, 248 F.3d at 294.}
\end{footnotes}
SMCRA's "exclusivity" is valid, the Bragg court did not appear to intend that its ruling would affect the Clean Water Act. Still, the holding that the state program in Bragg was state law, and the holding that the state standards in Arkansas v. Oklahoma were federal law, are only opposite labels on systems that are actually quite similar.

For the time being Bragg will stand. The Supreme Court denied certiorari on January 22, 2002, preventing further discussion of Bragg. Whether another federal circuit will disagree with the holding of Bragg, creating a split in the circuits that the Supreme Court will be inclined to settle, or whether the analysis in Bragg will be extended to another cooperative federalism statute, remains unclear. Clearly, however, environmental groups and industry representatives are no longer free to sue state mining regulators in federal court under SMCRA in several coal-heavy states, including West Virginia, Virginia and North Carolina. Environmentalists in the Fourth Circuit may also be warier of suing state regulators for failure to enforce under other statutes, since they would run the risk of an extension of Bragg.

CONCLUSION

Bragg v. West Virginia Coal Association holds that the Eleventh Amendment to the U.S. Constitution bars a private citizen from suing in federal court to enjoin a state regulator from issuing surface mining permits in violation of a federally approved, state regulatory program for surface mines. Bragg determines that once a state's program for regulation of surface mining is approved by the Department of the Interior under the Surface Mining Control and Reclamation Act (SMCRA), the federal act "drops out," and only state law governs. Although the holding suffers from an unreasonably narrow construction of the federal statute, fails to accord Chevron deference to the Department of the Interior's statutory interpretation of SMCRA, and contradicts prior Eleventh Amendment sovereign immunity case law, the Supreme Court's denial of certiorari on January 22, 2002, assures that environmentalists and coal-industry advocates in the coal-heavy Fourth Circuit may only challenge state regulators' actions under SMCRA in state court.

If other circuits adopt Bragg's holding or extend its reasoning to other cooperative federalism statutes, the decision's ultimate effect may be to frustrate federalism instead of promoting it. It

132. Id. at 286.
could increase the risks Congress faces when delegating environmental enforcement to the states, making the relationship between the federal and state governments even more antagonistic than it already is. In addition, future courts seeking to give states more protection from citizen suits may find it easy to apply Bragg's analysis to state programs under other environmental statutes. This extension of Bragg could jeopardize citizens' and regulated parties' ability to hold their state officials responsible for the regulatory commitments they make and could frustrate federal enforcement.

The ultimate impact of the Bragg decision will depend on how persuasive other circuits find its flawed reasoning. The best outcome for the environment of West Virginia, as well as for the rest of the country, would have been a sound overruling of the Fourth Circuit's decision by the Supreme Court. Since that is no longer possible, environmentalists must hope that other federal circuit courts contradict the Bragg court's holding, and that the Fourth Circuit does no more to strip away citizens' ability to hold their state governments accountable.