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Anuradha Sivaram

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Why Citizen Suits Against States Would Ensure the Legitimacy of Cooperative Federalism Under the Clean Air Act

Anuradha Sivaram*

Although hailed as a “model of cooperative federalism,” the Clean Air Act often leaves state governments and the United States Environmental Protection Agency (EPA) in an uneasy stalemate over the implementation of emissions reductions regulations. As states often face pressure from polluting industries to reduce federally-enforceable Clean Air Act commitments, and as the United States EPA does not have the capacity to closely control state compliance with federal law, there arise instances where states shirk their obligations under the Clean Air Act. For decades, private and non-profit organizations have been able to use the citizen suit provision of the Clean Air Act to enjoin such state implementation failures. This Note challenges the Sixth Circuit’s decision to curtail the scope of such suits in Sierra Club v. Korleski. This Note explores the history of the citizen suit provision and finds that it has been consistently used to prevent states from subverting national environmental goals under the Clean Air Act. Contrary to the Sixth Circuit’s contention, this Note argues that Endangered Species Act caselaw is inapposite for an analysis of the scope of the Clean Air Act citizen suit provision. This Note concludes by arguing that authorizing private party suits to enjoin states from flouting voluntary Clean Air Act obligations does not offend the Tenth or Eleventh Amendments of the United States Constitution and instead promotes the legitimacy of the cooperative federalism scheme.

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INTRODUCTION

Since its debut in the 1970 Clean Air Act Amendments, the citizen suit provision has become a staple of contemporary environmental law. Countless crusaders have invoked this cause of action to abate pollution directly from regulated sources, especially in the wake of faltering government enforcement efforts. However, the creators of the citizen suit were initially wary of the power of private actors to disrupt state enforcement of environmental laws. Furthermore, although Congress expressly intended citizen suits to be lodged against private polluters as well as government agencies, this desire was somewhat tempered by fears that overzealous citizens would interfere with legitimate government operations. Accordingly, the original citizen suit provision allowed private parties to sue both states and the EPA Administrator in their capacities as polluters, but only allowed suits to enforce administrative or regulatory failures against the EPA Administrator, leaving unanswered the question of whether citizens may sue state environmental agencies in their capacities as regulators.

For decades, courts interpreted this ambiguity about the scope of the citizen suit provision broadly, and entertained suits against state officials for neglecting to implement the Clean Air Act properly. However, in Sierra Club v. Korleski, the Sixth Circuit departed abruptly from this practice, determining that the Sierra Club could not proceed under the citizen suit provision of the Clean Air Act to seek injunctive relief against a state that refused to implement Clean Air Act regulations.

3. H.R. CONF. REP. NO. 91-1783, at 56 (1970) (discussing the potentially disruptive effects of citizen suits and accordingly limiting the ability of citizens to commence such actions before notifying the government, or after the government initiates its own enforcement action).
5. H.R. CONF. REP. NO. 91-1783, at 55–56 (1970) (enabling citizen suits against violators, government agencies, or the Administrator to abate any violation by specifying that “[s]uits against violators, including the United States and other government agencies, to the extent permitted by the Constitution, would also be authorized”).
6. Id. at 56 (“Suits against the Administrator are limited to alleged failure to perform mandatory functions to be performed by him.”).
7. See Part III.B. infra.
8. 681 F.3d 342 (6th Cir. 2012).
This Note establishes that by so ruling, the court improperly interpreted ambiguous language in the Clean Air Act, ignored longstanding caselaw, and disregarded EPA policies allowing private lawsuits against states in their capacities as regulators for administrative failures. Furthermore, the Note illustrates that because of the difficulty of ensuring good-faith state participation in a cooperative federalism system, such suits are necessary to compel states’ compliance with laws they have agreed to implement. Because Congress has been all too eager to suspend EPA sanctions against uncooperative states, citizen suits—brought by parties less subject to political influence—will more likely ensure that states perform their roles as administrators of Clean Air Act regulations and will more effectively preserve the balance of powers between states and the federal government in a cooperative federalism program.

I. THE ORIGINS OF CITIZEN ACTION UNDER THE CLEAN AIR ACT

A. Citizen Suits as Multipurpose Environmental Enforcement Tools

1. The modern environmental movement heralded the birth of citizen suits.

Citizen suits “tap into private citizens’ interest, knowledge, and resources” to supplement state and federal enforcement efforts. Historically, private individuals brought actions for nuisance to abate pollution, although a few early federal environmental laws contained provisions under which citizens could bring an action to fight environmental damage. The rise of statutory environmental law and the concomitant displacement of common law in the 1970s transferred more environmental enforcement responsibility to the bailiwick of public officials. At the same time, lawmakers influenced by civil rights statutes incorporated citizen suit provisions into these federal environmental statutes, using this form of action to grant individuals a new

9. See discussion at Part III.A. infra.
10. See discussion at Part III.B. infra.
11. See discussion at Part IV. infra.
12. See discussion at Part IV.A.1. infra.
14. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. A (1979) (noting that cases brought under a public nuisance theory included those to enjoin dust, odors, and fumes).
18. May, supra note 2, at 10,704 (characterizing citizen suits as originating “in a fulcrum of necessity due to inadequate resources and resolve”).
and expanded role in governance, particularly in the realm of environmental law.¹⁹

2. The Clean Air Act citizen suit provision used broad language to define its scope.

Nearly every major contemporary federal environmental statute contains a citizen suit provision.²⁰ These causes of action are “virtually identical, largely because they were ‘lifted’ from the first environmental citizen suit provision in the 1970 Clean Air Act.”²¹ The Clean Air Act citizen suit provision authorizes “any person” to commence a civil action against “any person” who is “alleged to have violated . . . or to be in violation of (A) an emission standard or limitation . . . or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.”²²

Early proponents of the new citizen suit provision championed the potential of citizen suits to help the government enforce laws where it would otherwise not have the resources to do so.²³ Congress adopted the Senate amendment authorizing citizen suits in the conference report for the 1970 Clean Air Act Amendments,²⁴ enabling individuals to act as “private attorney[s] general” to rectify environmental harms.²⁵ However, in response to concerns about the potential for citizen suits to lead to an overenforcement of laws and to interfere with government enforcement actions,²⁶ the drafters limited lawsuits

²³ 116 CONG. REC. 33,104 (1970) (statement of Sen. Philip Hart) (arguing that the lack of damage awards, the provision that attorneys’ fees may be awarded to either party, and the requirement that citizens give notice to executive officials before commencing suit all serve to limit the burden that citizen suits may impose on courts). See also 116 CONG. REC. 32,927 (1970) (statement of Sen. Ed Muskie) (“Citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and the courts alike.”).
²⁵ NRDC v. EPA, 484 F.2d 1331, 1337 (1st Cir. 1977).
²⁶ See 116 CONG. REC. 32,925 (1970) (statement of Sen. Roman Hruska). Senator Hruska argued that the citizen suit provision was “far-reaching” and “novel,” and that it was “predicated on the erroneous assumption” that Executive Branch officials “will not perform and carry out their responsibilities and duties under the Clean Air Act.” Id. Senator Hruska expressed concern that citizen suits would interfere with the EPA’s enforcement discretion, would subject executive officials to harassing lawsuits, and would overwhelm already-crowded courts. Id. See also Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987) (cautioning that the “citizen suit is meant to supplement rather than to supplant governmental action”).
against the Administrator to only those that would enforce a nondiscretionary
duty.27 Additionally, the authors included a notice provision to ensure that state
and federal officials were alerted before a citizen group proceeded with a suit,
so as to guard against disruptive overenforcement.28 Although the legislative
history of the Clean Air Act reveals that the drafters intended for the citizen suit
provision to be used only to seek injunctions, the modern citizen suit
provision—section 304 of the Clean Air Act—allows plaintiffs to recover civil
penalties as a result of the 1990 amendments to the Clean Air Act.29 Though
some courts continue to view citizen suits as “interstitial” enforcement
mechanisms, appropriate only when officials “fail to exercise their enforcement
responsibility,”30 some commentators conclude that citizen suits have left an
“indelible imprint on modern federal jurisprudence,” and continue to “propel
the field of environmental law.”31

B. The Structure and Operation of the Clean Air Act

1. “Cooperative federalism” principles undergird the Clean Air Act.

The Clean Air Act attempts to reconcile two competing goals: protecting
the “polity’s desire for pristine air” and satisfying its “equally fervent desire for
the benefits of life in a modern industrial economy.”32 In addition to this
aspiration, the Act aims to balance pollution control, enforcement authority,
and policymaking power between federal and state governments.33 As
pollution control is in the domain of a state government’s traditional “police
powers,”34 the Clean Air Act reserves a significant amount of enforcement
authority for the states.35 The Clean Air Act maintains a balance between

28. Id.
expressly excludes damage actions.”); 116 CONG. REC. 33,103 (1970) (staff memoranda submitted by
Sen. Ed Muskie) (“The bill provides no action for damages, only for the abatement of violation of
standards, which are public policy.”). But see H.R. CONF. REP. NO. 101-952, at 297 (1990) (amending
the citizen suit provision to allow for civil penalties).
60–61).
31. May, supra note 2, at 10,705–06.
32. Maine v. Thomas, 874 F.3d 883, 884 (1st Cir. 1989).
33. See Michael R. Barr, Introduction to the Clean Air Act: History, Perspective, and Direction
for the Future, in THE CLEAN AIR ACT HANDBOOK 3 (Julie R. Domike & Alec C. Zacaroli eds., 2011)
(“Shared responsibility and authority . . . lies at the heart of the [Clean Air Act].”).
34. BLACK’S LAW DICTIONARY 1276 (9th ed. 2009) (defining “police power” as “the inherent
and plenary power of a sovereign to make all laws necessary and proper to preserve the public security,
order, health, morality, and justice”).
35. W.A. Harrington, Construction, Applicability, and Effect of § 304 of Clean Air Amendments
(describing how the 1970 Clean Air Amendments “explicitly preserved the principle that each state
should have the primary responsibility for assuring air quality” within its entire geographic area).
Indeed, so local was air pollution control that prior to the 1970 Clean Air Amendments, the federal
federal and state enforcement by employing a “cooperative federalism” structure.\footnote{Jim Wedeking, \textit{Environmental Federalism}, in \textit{PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW} 119 (James R. May ed., 2011) (“Environmental law predominantly uses a hybrid system, called “cooperative federalism” where federal law is implemented to some degree by the states.”).} Under this paradigm, states elect to implement federal laws in exchange for federal funds,\footnote{Id. at 120 (“States receive substantial subsidies to administer . . . programs while retaining some control over the regulated industries in their states and the ability to introduce innovative regulatory schemes.”).} thus in theory, the agreement is mutually beneficial.\footnote{Id. (“[B]oth EPA and the states gain something out of [the cooperative federalism] arrangement.”).}

A state wears two hats in a cooperative federalism scheme: individual states act as regulators by creating federal laws,\footnote{Once the EPA approves a state regulation designed to reduce air pollution, the regulation is incorporated into the state SIP and is enforceable as federal law. \textit{See infra} note 293 and accompanying text.} implementing those laws in their states, and enforcing those laws against private parties. However, states are also themselves regulated by these laws, for example, in their capacities as owners of polluting facilities.\footnote{Id. at 133, 135 (“States assume two roles under environmental law: that of the regulators and that of the regulated. . . . Although states are regulators, they can also be major contributors of environmental contamination.”).} This duality explains why citizen suit provisions in major environmental statutes come in two varieties: those to enforce “environmental lawmaking requirements against the agencies charged with lawmaking responsibilities” and those to enforce “the resulting environmental standards” against regulated facilities.\footnote{Richard J. Lazarus, \textit{The Making of Environmental Law} 190 (2004) (“Both types of citizen suit have proven essential to the successful operation of an environmental lawmaking regime because each has shown its ability to respond to structural problems that would otherwise undermine the regime’s effectiveness.”).}

2. \textit{States craft unique implementation plans to achieve the Clean Air Act’s emissions reductions goals.}

Although the EPA Administrator promulgates National Ambient Air Quality Standards (NAAQS) for a variety of pollutants, state environmental protection agencies are primarily responsible for creating and compiling rules and policies in a State Implementation Plan (SIP) to outline the exact mechanisms for achieving emissions reductions to meet the NAAQS.\footnote{See 42 U.S.C. §§ 7407(a), 7409 (2012).} After the EPA Administrator develops air quality criteria based on the latest scientific knowledge on adverse health and welfare effects for a pollutant,\footnote{David Wooley & Elizabeth Moss, \textit{Clean Air Act Handbook} § 1:3 (2012), available on Westlaw (citing 42 U.S.C. § 7408(a)(2)).} the Administrator must promulgate numeric primary and secondary NAAQS to
limit the atmospheric concentration of the pollutant to a level that is adequate to protect public health and welfare, with a margin of safety.\footnote{Id. (citing 42 U.S.C. § 7409).} Within three years after the Administrator promulgates a national standard for a pollutant, each state must adopt and submit a SIP to the EPA.\footnote{42 U.S.C. 7410(a)(1).} The SIP must describe in detail a state’s plan to achieve and maintain the NAAQS within its jurisdiction by outlining the rules that it will promulgate to cut emissions from various sources within its boundaries.\footnote{See 42 U.S.C. § 110(a)(2)(A). See also WOOLEY & MOSS, supra note 43 § 1:19.} The SIP also contains a state’s emission inventory and monitoring network information, details about the state’s enforcement mechanisms, and guidance documents on which a state will rely to satisfy its emissions reductions obligations.\footnote{WOOLEY & MOSS, supra note 43, § 1:19.}

There are three ways in which states can fail as regulators in relation to the SIP. A state may neglect to submit a SIP or a SIP revision, or it may submit an incomplete SIP revision.\footnote{I refer to this type of regulatory failure as a “failure to submit” or a “submission failure.”} A state may also fail to implement the terms of an approved SIP by passing laws that contravene the SIP provisions.\footnote{I refer to this type of regulatory failure as a “failure to implement” or an “implementation failure.”} Finally, a state may fail to enforce the terms of a SIP against polluting entities within its borders.\footnote{I refer to this type of regulatory failure as a “failure to enforce” or an “enforcement failure.”}

If a state refuses to submit a SIP or submits one that is inadequate, meriting EPA disapproval, the Clean Air Act requires the EPA to impose mandatory sanctions.\footnote{42 U.S.C. § 7509 (2012); Alec C. Zacaroli, Meeting Ambient Air Standards: Development of the State Implementation Plans, in THE CLEAN AIR ACT HANDBOOK, supra note 33, at 43, 53.} Section 179 of the Act authorizes two types of mandatory sanctions: federal highway funding sanctions, which limit transportation grants to a state, and offset sanctions, which require high emissions reductions from new sources of pollution in a noncompliant area.\footnote{42 U.S.C. § 7509(a), (b). See also Zacaroli, supra note 51, at 54. Notably, the conference report to the 1990 Clean Air Act Amendments introducing the eighteen-month waiting period did not explain the significance of the delayed imposition of sanctions. See H.R. CONF. REP. NO. 101-952, at 335 (1990). Thus, there is no legislative history support for the Sixth Circuit’s conclusion, described infra Part II.B., that the eighteen-month waiting period encourages negotiations between the EPA and states.} The EPA must apply one of the two sanctions eighteen months after it determines that a state is not in compliance with the SIP, and must apply both sanctions if the state fails to correct the deficiency within twenty-four months after the EPA’s determination.\footnote{42 U.S.C. § 7509(a). See also Zacaroli, supra note 51, at 54.} Generally, the EPA first imposes offset sanctions, and subsequently imposes highway sanctions, but will stay or lift the sanctions upon the state’s revision of its defective SIP.\footnote{See 40 C.F.R. § 52.31 (2011). See also Marcia Spink, Assoc. Dir. for Policy & Sci., EPA Region 3, Sanctions, Federal Implementation Plans (FIPs) and SIP Calls Under the Clean Air Act (Feb. 22, 2009) (presentation slides on file with author).}
submit an adequate SIP by the end of the two-year window during which EPA can impose both of its available sanctions, the EPA must also promulgate a Federal Implementation Plan (FIP) to directly regulate sources of pollution within the state’s non-compliant air quality control regions.55

If the EPA approves a SIP, the state shall adopt it and retain primary enforcement authority over its provisions.56 However, the approved SIP also becomes regulation enforceable in federal court.57 The Clean Air Act provides that the current provisions of a SIP remain in force until the EPA fully approves a revision.58 Where a state fails to properly implement the terms of the approved SIP, the EPA may impose mandatory sanctions against such state, again according to section 179.59

The EPA may also, after thirty days’ notice, enforce a SIP provision against a violator in any state pursuant to the discretionary penalty provision in section 113(a)(1) of the Clean Air Act.60 Additionally, under this discretionary provision, if the EPA Administrator finds that a state has failed to adequately enforce its SIP, it may—after giving notice to the state—choose to wholly assume enforcement responsibilities until the state agrees to remedy its enforcement failure.61

II.

THE OHIO SIP: FROM LEGISLATION TO LITIGATION

A. Ohio’s State Implementation Plan

1. The permitting methods in the original Ohio SIP were cumbersome.

The EPA conditionally approved the most recent version of Ohio’s SIP on

55. 42 U.S.C. §§ 7410(c). See also Zacaroli, supra note 51, at 53.
56. 42 U.S.C. § 7410(a)(1)–(2).
57. McCarthy v. Thomas, 27 F.3d 1363, 1365 (9th Cir. 1999).
58. 42 U.S.C. § 7410(n)(1) (“Any provision of any applicable implementation . . . shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.”); see also Gen. Motors Corp. v. United States, 496 U.S. 530, 540 (1990) (“There can be little or no doubt that the existing SIP remains the ‘applicable implementation plan’ even after the State has submitted a proposed revision.”); Coal. Against Columbus Ctr. v. City of New York, 967 F.2d 764, 772 (2d Cir. 1992) (“The State and the City clearly have a continuing obligation to meet the specific requirements of the current SIP until the EPA approves a revised version.”).
59. 42 U.S.C. § 7509(a)(4) (“For any implementation plan or plan revision . . . if the Administrator . . . finds that any requirement of an approved plan (or approved part of a plan) is not being implemented, unless such deficiency has been corrected within 18 months after the finding . . . one of the sanctions referred to in [section 179(b)] of this section shall apply, as selected by the Administrator, until the Administrator determines that the State has come into compliance . . . . If the . . . deficiency has not been corrected within 6 months thereafter, sanctions under both paragraph (1) and paragraph (2) of [section 179(b)] shall apply until the Administrator determines that the State has come into compliance.”).
60. 42 U.S.C. § 7413(a)(1).
61. Id. § 7413(a)(2).
October 10, 2001, and approved the remaining provisions on January 22, 2003. As it stood prior to the litigation in *Sierra Club v. Korleski*, the SIP required the Director of the Ohio EPA to ensure that all new sources of pollution use the best available technology (BAT) before authorizing an emissions permit for such sources. BAT is an emission limitation based on the “maximum degree of reduction of pollutants” which the permitting authority determines is achievable on a case-by-case basis after analyzing information in a facility’s permit application. Thus, the original Ohio SIP initially required the Director of the Ohio EPA to “issue a permit . . . on the basis of the information appearing in the application” and after determining that the source would operate using the BAT.

2. *S.B. 265 intended to streamline the permitting process for smaller sources of pollution, but instead merely generated controversy.*

In March 2006, motivated by both economic and efficiency concerns, the Ohio State Legislature passed Senate Bill (S.B.) 265, a bill proposed by industry groups. The legislation attempted to streamline the permitting process for Ohio businesses by exempting sources emitting fewer than ten tons of pollutants per year from the BAT requirements. These sources would not be subject to a case-by-case permit determination, as historically required by the SIP. S.B. 265 thus directly conflicted with the permitting procedure previously approved by the EPA and codified in the Ohio SIP.

The press criticized S.B. 265 for effectively flouting federal emissions reductions requirements by “trampling on measures that keep Ohio’s skies clean, all while claiming to get rid of red tape.” Others criticized the measure for its potentially large deleterious environmental impacts, and for violating

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62. Conditional Approval Implementation Plans—Ohio, 66 Fed. Reg. 51,570, 51,571 (Oct. 10, 2001) (specifying that the Ohio EPA would have one year to submit the necessary changes to its rules to correct deficiencies, until which federal PSD regulations would govern).


68. S.B. 265, OHIO LEGISLATURE, http://www.legislature.state.oh.us/bills.cfm?ID=126_SB_265 (last visited Sept. 22, 2012) (“Best available technology requirements shall not apply to an air contaminant source that has the potential to emit, taking into account air pollution controls installed on the source, less than ten tons per year of emissions.”).


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Clean Air Act anti-backsliding requirements, which prohibit the implementation of a SIP revision that interferes with any requirement of the Clean Air Act, or that increases overall emissions.71 Even the Director of the Ohio EPA admitted that the proposed regulation was not environmentally neutral.72 Industry groups, however, championed the bill.73 Businesses had previously expressed concern that Ohio’s system for issuing permits was more onerous and unpredictable than the system of other states, and hoped that the shift from an “ad hoc” BAT determination would be more efficient.74

Despite its environmental drawbacks, the Ohio legislature approved S.B. 265 and incorporated the new regulations into the Ohio Administrative Code.75 However, the United States EPA did not approve the measure for incorporation into the Ohio SIP.76 The EPA found that Ohio provided an incomplete proposal because it did not demonstrate in its SIP revision application that “all the rule changes contained in the revision will comply with [the Clean Air Act’s New Source Review] program requirements.”77 The Ohio EPA and the United States EPA remained in a stalemate while Ohio began implementing its new law without submitting additional support material to, and without obtaining approval from, the EPA.78

Hearings] (statement of John Paul, President of the National Regional Air Pollution Control Agencies) (testifying that seventy-six out of every one hundred permits issued by his air pollution control agency are for sources that emit less than ten tons per year of pollutants); Id. (statement of Bruce Buckheit, former Director of Air Enforcement for the U.S. Environmental Protection Agency) (suggesting that Ohio industry may have to operate under both the old and new definitions of BAT to comply with anti-backsliding rules until the EPA approves the rule).
72. S.B. 265 Hearings, supra note 70 (statement of Joe Koncelik, Assistant Director, Ohio EPA).
73. See id. (statement of Fred Connelly, Ohio Paint Council) (describing the bill as striking a balance by “making the permitting and reporting process more efficient while at the same time, promoting a clean environment”).
75. OHIO ADMIN. CODE 3745-31-05 (2012).
77. Id. (citing additional “approvability issues” in addition to the BAT exemption for sources emitting fewer than ten tons of pollutants per year). The New Source Review Program is a permitting scheme whose requirements help to ensure that emissions from new facilities do not slow the progress of achieving clean air. See New Source Review, ENVT. PROT. AGENCY, http://www.epa.gov/nsr/ (last visited Mar. 19, 2013).
78. Letter from Bharat Mathur, Acting Regional Adm’r, U.S. Envtl. Prot. Agency, to Christopher Korleski, Dir., Ohio EPA (May 22, 2009) (on file with author) (expressing “continued concern” regarding the Ohio EPA’s failure to submit an approvable request for a SIP revision reflecting proposed changes to its air pollution control rules pursuant to S.B. 265).
B. The District Court’s Dual Analyses

1. The district court first determined that the plain meaning of the Clean Air Act citizen suit provision prevented Sierra Club from bringing its lawsuit.

The Sierra Club used section 304 of the CAA, the citizen suit provision, to challenge Ohio’s failure to implement its existing BAT rule. The Sierra Club argued that because S.B. 265 resulted in less stringent emissions limitations than the original SIP, the new law violated the anti-backsliding provisions of the Act, which prohibit the implementation and enforcement of a SIP revision that would, among other things, increase emissions. Sierra Club also argued that Ohio violated the Clean Air Act by issuing permits contrary to the terms of the SIP and by implementing S.B. 265 without approval from the EPA.

The district court examined decisions of other circuits holding that section 304 may be used to compel state compliance with a SIP, but found the decisions to be unpersuasive because they did not provide a “convincing analysis” of how to interpret the terms of the citizen suit provision. The court proceeded to analyze the plain meaning of the term “violation.” The court reasoned that Sierra Club’s interpretation of the word “violation”—which would include the failure of a state to enforce a SIP provision—was “awkward.” Instead, the court found it more natural to conclude that the agency “violated its duty to enforce the law” by failing to enforce its provisions and therefore did not violate the Clean Air Act by merely failing to implement a portion of its SIP. The district court thus determined that Ohio’s implementation of S.B. 265 without approval from the EPA is a multifaceted regulatory failure, and can be described in several ways. On the one hand, by failing to submit a proper revision of the permitting rule to the EPA, Ohio committed a submission failure. On the other hand, by willingly issuing permits in contravention of the approved SIP, Ohio was technically failing to enforce the provisions of the current SIP, and thus committed multiple enforcement failures. Finally, Ohio’s actions can also be characterized as a failure to implement the proper version of the SIP. Although Ohio’s actions can be described in each of these three ways, I use the term “failure to implement” or “implementation failure” to describe the issuance of permits under S.B. 265 because that is how the Sierra Club characterizes this violation. See Complaint ¶ 4 at 3, Sierra Club v. Korleski, 654 F. Supp. 2d 722 (S.D. Ohio 2009) (No. 2:08-cv-865).

See supra note 1 and accompanying text.


81. See Complaint, supra note 79, ¶ 51 at 10.

82. Id. The anti-backsliding provisions of the Clean Air Act appear at 42 U.S.C. §§ 7410, 7515. See supra note 71 and accompanying text.

83. Complaint, supra note 79, ¶ 1 at 10.

84. Korleski, 654 F. Supp. 2d at 729 (discussing Am. Lung Ass’n of N.J. v. Kean, 871 F.2d 319 (3d Cir. 1989)).

85. Id. at 705.

86. See note 83 supra and accompanying text.

87. Korleski, 654 F. Supp. 2d at 730 (“To my ear, saying that a government agency ‘violates’ an emission standard when it fails to enforce it is awkward.”).

88. Id. at 730.
citizens may not bring suits against state regulators for administrative failures, and held that the citizen suit provision was intended to be used only against persons who directly emitted pollutants in excess of an emissions standard.\(^89\)

2. **Upon reconsideration, the district court concluded that the citizen suit provision allows suits against states in their capacities as regulators.**

Despite expressing ambivalence about using citizen suits to police state enforcement efforts, the district court ultimately ruled that Ohio violated the Clean Air Act by exempting sources from BAT requirements without EPA approval. After the district court denied its motion for summary judgment, Sierra Club filed a motion for reconsideration,\(^90\) in which it argued that “every post-1977 [Clean Air Act] Amendment case and U.S. EPA federal policy make clear that citizens may sue states and local agencies when they fail to fulfill SIP commitments.”\(^91\) Sierra Club also relied on a Federal Register publication to show that the federal government harbored a longstanding belief that citizens could bring suits against states in their capacities as regulators.\(^92\) Sierra Club argued that citizen suits are one of the three established ways to ensure that states fulfill their SIP commitments under the Clean Air Act,\(^93\) the other two being lawsuits by the United States government to levy discretionary penalties per section 113\(^94\) or to impose mandatory sanctions under section 179.\(^95\)

The State of Ohio argued that the court owed no deference to the “ cursory, informal agency statements” that the Sierra Club cited in its memorandum and claimed that the State’s construction of the Clean Air Act citizen suit provision limiting lawsuits against states was more faithful to the purpose of the Act.\(^96\) In its reply brief, however, Sierra Club argued for the first time that the Sixth Circuit’s prior holding in *United States v. Ohio Department of Highway Safety*

\(^89\) See *id.* at 731.
\(^91\) Id. at 6.
\(^92\) Id. at 10–11 (citing 74 Fed. Reg. 33,933–33,939 n.16 (July 14, 2009) (determining that “commitments approved by [the] EPA under section 110(k)(3) of the [Clean Air Act] are enforceable by [the] EPA and citizens under, respectively, sections 113 and 304 of the [Clean Air Act]” and citing to cases in which courts have entertained section 304 actions against states to comply with SIP provisions)).
\(^93\) Id. at 12.
\(^95\) 42 U.S.C. § 7509.
\(^96\) Defendant’s Opposition to Plaintiff’s Motion for Reconsideration and Reversal of Interlocutory Order Denying Plaintiffs’ Motion for Partial Summary Judgment On Count One at 2, Sierra Club v. Korleski, 716 F. Supp. 2d 699 (S.D. Ohio) (No. 2:08-cv-865). The State argued that the “text, surrounding context, and legislative history” of the Clean Air Act citizen suit provision all establish that the failure to perform a regulatory duty to enforce the Clean Air Act does not state a cause of action under the citizen suit provision. *Id.*
governed the present decision. In that case, the EPA brought a discretionary suit against Ohio under section 113 of the 1970 Clean Air Act Amendments in order to enjoin the state from issuing licenses to vehicles that did not pass an inspection plan, in contravention of the SIP. At the time of the determination, section 113 enabled the Administrator to issue an order or bring a civil action against “any person” in violation of “any requirement” of an applicable implementation plan. The Sixth Circuit noted that there was “little contemporaneous legislative history” concerning this provision, but looked to the statements of Senator Edward Muskie in the legislative history of the 1977 Clean Air Act Amendments to discern the legality of suits against states in the 1970 version of section 113. Because the 1970 version of the Clean Air Act gave the EPA “several mechanisms” to ensure state compliance with federal law, including levying discretionary penalties under section 113, the Sixth Circuit found that the EPA could sue states for issuing unlawful permits that would, in turn, allow others to pollute in excess of authorized limits, instead of only pursuing individual permittees. The Sixth Circuit therefore concluded that the Ohio EPA was a “person” who could “violate” the Clean Air Act by failing to properly enforce its SIP provisions.

The Korleski district court, on reconsideration, agreed that it was bound by Ohio Department of Highway Safety. The court explained that because the Sixth Circuit established that a “state ‘violates’ a SIP each time it fails to enforce it . . . . [t]he same logic applies” to the present case. The court also acknowledged the persuasive effect of the cases cited by Sierra Club and of the EPA’s interpretation of the citizen suit provision. The Ohio EPA temporarily resumed a permit-by-permit evaluation of BAT to comply with the court’s order, until the Sixth Circuit reversed the district court.

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97. Plaintiff’s Reply to the Defendant’s Opposition to Plaintiff’s Motion for Reconsideration and Reversal of Interlocutory Order Denying Plaintiff’s Motion for Partial Summary Judgment On Count One at 2, 4–5, Sierra Club v. Korleski, 716 F. Supp. 2d 699 (S.D. Ohio) (No. 2:08-cv-865) (citing United States v. Ohio Dep’t of Highway Safety, 635 F.2d 1195, 1204 (6th Cir. 1980)).
98. Ohio Dep’t of Highway Safety, 635 F.2d at 1197.
99. Id. at 1197 (quoting section 113 of the 1970 Clean Air Amendments, codified at 42 U.S.C. § 1857c-8(a)(1) (2012)).
100. Id. at 1202.
101. Id. (quoting CONG. REC. S9168 (June 8, 1977) (statement of Sen. Ed Muskie) (“By providing roads and highways that facilitate and encourage extensive use of motor vehicles, the States have played a substantial, if unintentional role in causing the pollution problems that result.”).
102. Id. at 1204.
103. Id.
104. Sierra Club v. Korleski, 716 F. Supp. 2d 699, 708 (S.D. Ohio 2010) (acknowledging that although section 304 was distinct from the section of the statute in dispute in Ohio Dep’t of Highway Safety, there was “no reasonable way to distinguish the two”).
105. Id.
106. Id. at 708 n.2 (determining that the EPA’s interpretation of the citizen suit provision is “some” authority, but that it is not controlling).
107. Memorandum from Michael Hopkins, Ass’t Chief, Dep’t of Air Pollution Control, Ohio EPA, to All Permit Writers and Reviewers 1 (July 2, 2010) (on file with author).
C. The Sixth Circuit’s Reversal

On appeal, the Sixth Circuit first examined the Supreme Court’s analysis of the citizen suit provision in the Endangered Species Act in *Bennett v. Spear*. In that case, the Court determined that since section 1540(g)(1)(C) of the Endangered Species Act specifically allowed citizen suits to enforce nondiscretionary duties of the Secretary of the Interior, the section did not authorize a citizen suit for simply “any” violation of the Act. The Supreme Court also reasoned that allowing citizen suits against the Secretary for a failure to perform administrative duties would impermissibly subject the Secretary to civil and criminal penalties, and concluded that such failures should not constitute “violations” under any provision of the Endangered Species Act.

The Sixth Circuit noted that the Clean Air Act citizen suit provision contains language “virtually identical” to the Endangered Species Act citizen suit provision, and found the *Bennett* Court’s reasoning instructive in construing the provisions of the Clean Air Act. Drawing on the majority’s statutory construction style, the Sixth Circuit held that the word “violation” in the Clean Air Act did not apply to a failure to administer a statute, because the word appeared elsewhere in the Act in reference to actions that merited civil and criminal penalties. The majority reasoned that it was “implausible” that the act contemplated that civil and criminal penalties would be levied against those who administer a substantive law, reasoning that if it allowed a state’s regulatory failure to constitute a “violation” under the citizen suit provision, the EPA would then be able to levy “ruinous fines” upon the director of the Ohio EPA. Thus, the court would not construe a failure to administer the SIP as a “violation.”

The Sixth Circuit emphasized that the Clean Air Act contemplated negotiation between branches of federal and state governments, not a “compulsory resolution” by an unaccountable judiciary responding to citizen suits against state administrations. The court instead found that the EPA’s ability to impose sanctions under section 179 of the Clean Air Act for a state’s

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109. The Secretary of the Interior is the Administrator charged with implementing the Endangered Species Act. See *Endangered Species Program*, U.S. FISH AND WILDLIFE SERV., http://www.fws.gov/endangered/ (last updated Nov. 7, 2012). In that sense, the Secretary’s roles and duties are similar to the Administrator of the Environmental Protection Agency under the Clean Air Act.
111. *Korleski*, 681 F.3d at 346 (citing 42 U.S.C. § 7604(a)(2) (2012)).
112. *Id.* at 349 (referring to the Supreme Court’s reasoning that because the term “violation” was used in contexts where the Endangered Species Act called for civil and criminal penalties, maladministration of the statute could not be considered a “violation”).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 352.
failure to properly administer a SIP was adequate to ensure compliance, and recommended that plaintiffs wait and sue the EPA Administrator if the Administrator fails to levy sanctions against Ohio. The court also reasoned that a citizen suit brought to compel state enforcement would disrupt any “cooperative resolution . . . worked out between branches of the state and federal governments” and thus disturb the process that the Clean Air Act envisioned would remedy these enforcement failures. The court dismissed the precedential value of Ohio Department of Highway Safety, holding that its definition of “violation” to include a regulatory failure had no binding effect on the meaning of the term “violation” in the citizen suit provision, since Ohio Department of Highway Safety only interpreted the discretionary penalty section of the Act. Although the dissent argued that such an interpretation violates the canon of statutory construction that presumes that all terms in a statute have a consistent meaning, the majority disregarded such reasoning and essentially overruled its previous decision in Ohio Department of Highway Safety. The Sixth Circuit thus did not allow Sierra Club to enjoin the Ohio EPA’s violation of the Clean Air Act until the EPA formally approved or rejected S.B. 265 for incorporation into the SIP.

III. KORLESKI AS A REVISIONIST READING OF CITIZEN SUIT CASELAW

A. Congressional Failure to Clarify the Scope of Citizen Suits

The drafters of the 1970 Clean Air Act Amendments intended for citizen suits to be brought “against violators, government agencies, and the Administrator to seek abatement of such violations or for enforcement of the provisions of the Act.” Although the disjunctive use of both “abatement” and “enforcement” might indicate that Congress envisioned that suits would be brought against states in their dual capacities as regulators and as regulated entities, there is no mention of states as regulators in the legislative history of the Clean Air Act, which may indicate Congress’s intent to prevent citizen groups from suing states for administrative failures. While the 1970 conference report explicitly authorized suits against the EPA Administrator for failure to
perform his obligations\textsuperscript{123}—including enforcement duties under the Act\textsuperscript{124}—it made no such allowance for suits against state agencies.\textsuperscript{125} Furthermore, the authors of the original citizen suit provision curtailed the incentives of private parties to bring citizen suits at all by limiting remedies to injunctive relief.\textsuperscript{126}

However, the original authors also intended for the citizen suit provision to be read broadly and to create opportunities for widespread citizen participation in environmental enforcement.\textsuperscript{127} The drafters nevertheless authorized citizen suits to function as an “effective tool” that would “apply important pressure” in enforcing the Clean Air Act,\textsuperscript{128} despite acknowledging the limitations of citizen-based enforcement.\textsuperscript{129} Regulated groups remarked at the breadth of the citizen suit provision: at least one entity foresaw its use as a mechanism to compel states to comply with SIP requirements.\textsuperscript{130} The repeated failure of the drafters to limit suits against states may reflect an intent to permit suits against states in any capacity.\textsuperscript{131}

The legislative history of the 1977 Clean Air Act Amendments indicates that lawmakers again failed to specify whether section 304 of the Act could be used to sue states as regulators. In 1975, Richard Ayres of the Natural Resources Defense Council requested Congress to clarify the scope of the

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\bibitem{123} \textsc{H.R. Conf. Rep. No. 91-1783}, at 55–56 (1970). The drafters restricted suits against the Administrator to enforce only non-discretionary duties, although the original bill allowed suits to enforce any provision of the Act. \textit{See id.}
\bibitem{125} \textsc{H.R. Conf. Rep. No. 91-1783}, at 56 (1970) ("The conference substitute retains provisions for citizen suits with certain limitations. Suits against the Administrator are limited to alleged failure to perform mandatory functions to be performed by him. Suits against violators, including the United States and other government agencies to the extent permitted by the Constitution, would also be authorized.").
\bibitem{126} \textit{See, e.g.}, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 62 (1987) (determining that the citizen suit provision of the Clean Air Act was “wholly injunctive” in nature).
\bibitem{127} \textit{See H.R. Conf. Rep. No. 91-1783}, at 55–56 (1970). \textit{See also} \textsc{116 Cong. Rec. 32,922–26} (1970) (statement of Sen. Ed Muskie) ("Citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike... Section 304 would provide that a citizen enforcement action might be brought against and [sic] individual or a government agency.").
\bibitem{128} \textit{Id.}
\bibitem{129} \textsc{116 Cong. Rec. 32,927} (1970).
\bibitem{130} \textit{See Air Pollution Act: Hearings on S. 3229, S. 3466, and S. 3546 Before the Subcomm. on Air and Water Pollution of the S. Comm. on Public Works, 91st Cong. 1585} (1970) (Statement of Collier, Shannon Rill & Edwards), \textit{reprinted in} \textsc{S. Comm. on Public Works, 93d Cong., Legislative History of the Clean Air Amendments of 1970, 1586–87} (1974) ("Authorization to private persons for the initiation of civil actions seems equally broad, requiring only an allegation that any such provision, standard, or requirement has been violated. Under a broad construction, § 304 would permit citizens’ suits against persons and government agencies as follows: ... (8) Actions against... State agencies to enforce emission requirements, schedules and timetables of compliance and all other provisions of implementation plans adopted pursuant to § 111... The capacity for multiple litigation derived from this section is almost limitless.").
\bibitem{131} \textit{See, e.g.}, Am. Lung Ass’n of N.J. v. Kean, 871 F.2d 319, 325 (3d Cir. 1989) ("The omission of discussion on the issue [of suits against state regulators] can thus... easily be seen as ratifying the... practice of allowing such suits.").
citizen suit provision to “assure the broadest possible reach” by allowing citizens to bring suit against state officials for failing to implement SIPs.\textsuperscript{132} The House of Representatives, however, rejected three bills in committee which would have expressly authorized citizens to sue states for a “failure to perform any duty or act mandatory to the State under section 110.”\textsuperscript{133} Instead, Congress increased the remedies available to the EPA to enforce state compliance with SIPs.\textsuperscript{134} The 1990 Clean Air Act Amendments modified the citizen suit provision to allow for the recovery of civil penalties in citizen suits,\textsuperscript{135} but again did not address whether such suits may be brought against a state for maladministration of its laws. Thus, the repeated failure of Congress to clarify the reach of the citizen suit provision left little guidance for agencies, citizens, and courts interpreting the law over the years.

B. The Sixth Circuit Strayed from an Established Theory of SIP Enforcement.

1. Courts have permitted suits against states in their capacities as regulators for decades under the Clean Air Act.

In the face of ambiguous legislative history, circuit courts have split on whether to allow citizen suits against states for violating SIP provisions, with the majority of courts holding that such suits can be lodged against states for administrative failures. In \textit{Friends of the Earth v. Carey}, one of the first major Clean Air Act cases, the Second Circuit determined that it had the power to issue an order against the violating state even if it determined that the EPA was “attempting to negotiate consent orders or [had] not been joined as a party in the citizen suit.”\textsuperscript{136}

The Second Circuit determined that state negotiations with the EPA are “no substitute for enforcement and for timely compliance with the [SIP’s]
mandated strategies” and allowed the citizen suit to proceed even though the EPA was negotiating with the state. Although the court acknowledged the “desirability of attaining compliance through consensual means,” it noted that “the citizen suit provision reflected a deliberate choice by Congress to widen citizen access to the courts,” to ensure that the Act would be implemented and enforced. Although the Second Circuit found that EPA participation in a suit would be welcome, as it is the “agency vested by Congress with important overall responsibilities” related to SIP enforcement, the court determined that it was not a necessary element in an enforcement action, as “the very purpose of the citizens’ liberal right of action is to stir slumbering agencies and to circumvent bureaucratic inaction that interferes with the scheduled satisfaction of the federal air quality goals.”

At the same time that the Second Circuit decided *Friends of the Earth*, the D.C. Circuit reached the opposite conclusion about the power of citizen suits to compel state action under the same version of the Clean Air Act. In *Citizens Ass’n of Georgetown v. Washington*, the court reviewed the legislative history of the Act and found that “an allegation that a government instrumentality has failed to enforce the Clean Air Act does not satisfy the statutory requirement [of the citizen suit provision] that the government instrumentality be alleged to be in violation of an ‘emission standard or limitation.’” The court concluded that the plain language of the citizen suit provision only allowed private parties to pursue suits against polluters and, “under certain conditions, the Administrator of the EPA.” Under this interpretation, the court dismissed a citizen suit that was brought to enjoin the District of Columbia from issuing air permits without preconstruction review as required under the District’s air quality implementation plan.

Since the initial circuit split, every court to have decided the issue has followed the Second Circuit’s interpretation of section 304 in *Friends of the Earth* to allow private groups to enjoin state officials’ violations of the SIP, thereby eschewing the D.C. Circuit’s ruling in *Citizens Ass’n of Georgetown*. The Sixth Circuit itself adopted such a position in *United...*
States v. Ohio Department of Highway Safety, discussed supra Part II.A.2. Another court within the Sixth Circuit’s jurisdiction embraced an identical rule: in Kentucky Resources Council, Inc. v. EPA,145 a citizen’s group brought an action against national and state government entities under circumstances similar to the Korleski case. The district court found that it had the authority to issue an injunction against a Kentucky regulation imposing a “less stringent standard than the current SIP” absent approval from the EPA, because it was unable to approve anything “less than full compliance with the SIP.”146

Courts now rationalize the absence of strong legislative history support for citizen suits against states by arguing that Congress’s repeated failures to address whether citizen suits may be lodged against states may be seen as “ratifying the Second Circuit practice of allowing such suits [in Friends of the Earth].”147 These courts do not find a reasonable basis to distinguish penalty provisions that condition federal funding on state compliance with the Clean Air Act148 from citizen suit provisions that ensure that states will enact the regulatory schemes to which they have committed themselves, finding that both further congressional goals to elicit robust state enforcement of SIPs.149

Only the court in Sweat v. Hull revisited the argument that allowing citizen suits to compel states to enforce SIP provisions would frustrate the intent of Congress.150 In a footnote, the court found that the defendant did not support its claim that a citizen suit to compel such immediate state action would be inappropriate because Congress “obviously intended to afford the states adequate time to cure deficiencies.”151 Additionally, the court found that such an interpretation was contrary to the plain meaning of the terms of the

implement a vehicle inspection and maintenance program as required by the SIP); Am. Lung Ass’n of N.J. v. Kean, 871 F.2d 319 (3d. Cir. 1989) (allowing citizens groups to bring a suit against the state in its capacity as a regulator for failing to promulgate rules to control ozone as required by the SIP); Clean Air Council v. Mallory, 226 F. Supp. 2d 705, 720–21 (E.D. Pa. 2002) (awarding an injunction against a state for actions performed in its capacity as a regulator because the state violated a SIP that contained valid, identifiable strategies for compliance with federal standards); Sweat v. Hull, 200 F. Supp. 2d 1162, 1170–71 (D. Ariz. 2001) (allowing citizens to sue the state in its regulatory capacity for repealing laws that were required by the SIP); Coal. for Clean Air, Inc. v. S. Coast Air Quality Mgmt. Dist., No. 97-6916, 1999 WL 33842864 at *3 (C.D. Cal. Aug. 27, 1999) (allowing a citizen suit against the South Coast Air Quality Management District in its capacity as a regulator for failure to implement thirty-one of the thirty-two control measures in its 1994 SIP and ultimately awarding an injunction); Citizens for a Better Env’t v. Deukmejian, 731 F. Supp. 1448, 1457 (N.D. Cal. 1990) (determining that the state violated its SIP as a regulator by failing to promulgate rules in the appropriate time period and adopting a remedial timetable as injunctive relief).

146. Id. at 929 (determining that the Kentucky statute allowing for lower standards than approved in the SIP “violated a central tenet” of the Clean Air Act).
147. Kean, 871 F.2d at 325.
148. Id. (citing 42 U.S.C. § 7506 (2012)).
149. Id.
151. Id.
statute and to established caselaw.\(^{152}\)

Thus overall, there seems to be a consistent corpus of caselaw across other jurisdictions upholding the ability of citizens to sue states for administrative violations of a SIP.\(^{153}\)

2. **The EPA consistently interpreted the Clean Air Act to allow citizen suits against states for regulatory violations.**

Not only have multiple jurisdictions interpreted the Clean Air Act citizen suit provision to allow suits against states in their capacities as regulators, but the EPA—the agency with primary responsibility to enforce the statute—itself embraced this position.\(^{154}\) The EPA regularly approves revisions to SIPs on the express assumption that “enforceable commitments” adopted by a state and incorporated into a SIP as part of an emissions reduction proposal can be enforced either by the EPA or through citizen suits.\(^{155}\) Indeed, as referenced by Sierra Club in its motion for reconsideration,\(^{156}\) the EPA published numerous responses to comments in the Federal Register explaining that commitments adopted by states in a SIP “are enforceable by EPA and citizens under, respectively, sections 113 and 304 of the [Clean Air Act].”\(^{157}\)

\(^{152}\). *Id.* (citing *McCarthy v. Thomas*, 27 F.3d 1363, 1365 (9th Cir. 1994); *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976); *Dela. Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 267–68 (3d Cir. 1991)).


\(^{154}\). *See* Brief of the United States as Amicus Curiae at 8–9, *Sierra Club v. Korleski*, 681 F.3d 342 (6th Cir. 2012) (No. 10-3269), 2010 WL 6707957 at *16–17 (“[A] state must demonstrate in a SIP how areas will attain and maintain compliance with ambient air quality standards. To make this demonstration, states frequently include in SIPs both requirements that apply directly to polluters and other requirements that apply directly to state agencies with regulatory responsibilities. . . . And when a state agency fails to comply with a requirement that applies directly to it while performing regulatory duties, the agency ‘violates’ that requirement.”) (internal citations omitted).

\(^{155}\). *See*, *e.g.*, *BCCA Appeal Group v. EPA*, 355 F.3d 817, 838 n.25 (5th Cir. 2003) (finding that the EPA’s approval of a SIP that incorporated enforceable commitments was appropriate because the commitments could be enforced either by the federal government or by citizens (citing 42 U.S.C. §§ 7413, 7604) (2012)).


\(^{157}\). *See*, *e.g.*, *Approval of Air Quality Implementation Plans*; *California*; *San Joaquin Valley*; 1997 8-Hour Ozone Standards, 77 Fed. Reg. 12,652, 12,653 (Mar. 1, 2012); *Approval and Promulgation of Implementation Plans; California*; 2008 San Joaquin Valley PM2.5 Plan and 2007 State Strategy, 76
scholarly interpretation of the 1977 Clean Air Act Amendments concluded that “agency-forcing” suits against states were permissible under section 304.159 Although the legislative history of the Clean Air Act is less than clear, by disallowing citizen suits for violations of SIP provisions, the Sixth Circuit ignored the weight of authority from multiple cases in different jurisdictions and disregarded an agency’s reasonable interpretation of a statute that it administers.160

C. Endangered Species Act Caselaw Does Not Support the Sixth Circuit’s Holding.

The Sixth Circuit concluded that since the citizen suit provision in the Endangered Species Act was “patterned after” the Clean Air Act citizen suit provision, “caselaw for one statute might be relevant in construing the other [statute].”161 Although the court remained cautious about not “[fashioning] a sort of judicial string theory,” which would allow it to “develop universal principles that harmonize different statutes with different language,” the Sixth Circuit failed to take into account differences between the two statutes that might limit application of caselaw relevant to one statute to interpretations of the other. Instead, the court shoehorned an analysis of the Endangered Species Act citizen suit provision into a Clean Air Act case. But even to the extent that Endangered Species Act caselaw is, in fact, applicable to Clean Air Act caselaw, the Sixth Circuit ignored a line of cases decided after Bennett v. Spear which expressly authorize citizen suits against states in their capacities as regulators under the Endangered Species Act, undermining the Sixth Circuit’s interpretation that Endangered Species Act caselaw limits citizen suits against state regulators.

158. This term is used to describe a citizen suit compelling government to undertake a non-discretionary action, and is synonymous with the terms “bureaucracy-forcing” and “action-forcing.” See Robert L. Glicksman, The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties, 10 WIDENER L. REV. 353, 353 n.4 (2004).


160. The United States argued that this agency interpretation warrants deference per Chevron v. NRDC, 467 U.S. 837 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”). Per United States v. Mead, 535 U.S. 218 (2001), the court might give less than full deference if it determines that the EPA did not issue its interpretation with sufficiently formal procedures.

161. Sierra Club v. Korleski, 681 F.3d 342, 346 (6th Cir. 2012) (quoting Hadden v. United States, 661 F.3d 298, 303 (6th Cir. 2011)).

162. Id. (quoting Hadden, 661 F.3d at 303).
Despite appearances and “notwithstanding its strong influence over state and local land-use decisions,” the Endangered Species Act is not an example of an environmental law founded on cooperative federalism principles. The Secretaries of Commerce and the Interior jointly administer the Endangered Species Act—whereas a single federal administrator and the head of a state environmental protection office administer the Clean Air Act. Although the Endangered Species Act authorizes the Secretary of the Interior to enter into cooperative agreements with states that establish “adequate and active programs of protection under section 6(c),” this is hardly done in practice. Scholars conclude that the Endangered Species Act “does not employ anything close” to the program delegation model that is a hallmark of statutes like the Clean Air Act and the Clean Water Act. Accordingly, any effort to cross-apply Endangered Species Act caselaw to the Clean Air Act is suspect.

Even if Endangered Species Act caselaw were analogous to Clean Air Act caselaw, Bennett does not provide guidance as to whether the Clean Air Act citizen suit provision can be used to sue states in their capacities as regulators; Bennett merely establishes that citizen suits may only be brought against the Secretary of the Interior for violations of mandatory administrative duties under the Endangered Species Act. In Bennett, irrigation districts and ranchers receiving water from the Klamath Irrigation Project challenged a determination made by the Secretary of the Interior to restrict water withdrawals from certain lakes. The plaintiffs argued that such a determination was not based on sound commercial or scientific evidence and thus violated section 7 of the Endangered Species Act.

166. See Ruhl, supra note 163, at 41. (“All states have entered into section 6(c) agreements, but . . . the subject matter of, and financial assistance provided under, most section 6(c) cooperative agreements relates to the listing and monitoring of species and to implementation of nonregulatory species conservations efforts. At best, this is a weak example of the conditional financial assistance model of cooperative federalism.”).
167. Id. at 44.
168. Eric R. Glitzenstein, Citizen Suits, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, supra note 164, at 260, 267 (“When the claim is that an agency is taking an action in violation of section 7 [failing to consult with the Secretary or failing to issue a biological opinion when required] . . . that claim is properly pled under the [Endangered Species Act] citizen suit provision. Likewise, a claim that a party—whether a private entity or a government agency—is taking a species in violation of section 9 [engaging in prohibited acts] must be pled as an [Endangered Species Act] citizen suit.”).
170. Id. at 159 (citing 16 U.S.C. § 1536 (2012)).
The Supreme Court determined that although plaintiffs had standing to bring a citizen suit, the Secretary’s determination to restrict water withdrawals could not be challenged under the citizen suit provision. Because the Secretary made a decision under section 1536 of the Endangered Species Act, the plaintiffs could not bring an action under subsection (C) of the citizen suit provision, which only authorizes suits against the Secretary where there is a “failure to perform a non-discretionary duty under section 1533.” The Court further determined that the Secretary’s decision could not be challenged as a “violation” of the Endangered Species Act under the broader language of subsection (A), which authorizes suits against a “government instrumentality or agency . . . who is alleged to be in violation of any provision of [the Endangered Species Act].” The Court reasoned that subsection (A) could not be read to allow a citizen suit to challenge actions by the Secretary where subsection (C) would prevent such a suit, as this would override the limitations of subsection (C) and render the subsection superfluous.

The Bennett court thus limited suits against the Secretary of the Interior to only those suits that challenge a failure to perform a nondiscretionary duty. As the Secretary of the Interior is the head of a federal agency responsible for implementing the Endangered Species Act, the Secretary is analogous to the EPA Administrator, delegated the responsibility of administering the Clean Air Act. Bennett may thus be reasonably read to preclude suits against the Administrator of the Clean Air Act except for actions that challenge a failure to perform a nondiscretionary duty; however, this principle is already enshrined in the text of the Clean Air Act citizen suit provision.

Bennett did not discuss whether its holding extended to citizen suits against state regulators. Although Ohio argued that Bennett applies broadly to limit the extent to which a citizen can sue any government official for regulatory failures or omissions, it does not seem like this is the case, even within Endangered Species Act caselaw.

For example, section 9(a)(1)(B) of the Endangered Species Act declares that it is unlawful for “any person” to “take” an endangered species. The Act defines “take” to mean “harass, harm, pursue, . . . hunt, shoot, wound, kill, trip,

171. Id. at 173–75 (citing 16 U.S.C. § 1540(g)(1)(C)).
172. Id. (citing 16 U.S.C. § 1540(g)(1)(A)).
173. Id. at 173.
174. See Kaush Arha & Barton H. Thompson, Jr., Introduction, in THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT, supra note 163, at 1, 5, 17 n.1 (explaining that national jurisdiction over the Endangered Species Act is split between the Department of the Interior and the Department of Commerce).
175. 42 U.S.C. § 7604(a)(2) (authorizing suits “against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary”).
177. Steven P. Quarles & Thomas R. Lundquist, Land Use Activities and the Section 9 Take Prohibition, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, supra note 164, at 161 (citing 16 U.S.C. § 1538(a)(1)(B)).
An emerging area of lawsuits involves claims against state and local regulatory agencies that grant permits or otherwise “approve” private land use activities that may result in a take. These “vicarious liability” cases allege that the state creates a “take” by enabling private activity that results in harm to species. Courts consistently allow citizen suits against states to enjoin such regulatory activities that violate the Endangered Species Act.

In *Strahan v. Coxe*, the First Circuit determined that a citizen group could bring a suit to enjoin Massachusetts from issuing licenses for gillnet and lobster pot fishing, arguing that such practices resulted in the “take” of whales in violation of the Endangered Species Act. The court concluded that such an action was well within the bounds of the citizen suit provision of the Endangered Species Act, and was not prohibited by the Tenth or Eleventh Amendments. Other courts have upheld citizen suits against states whose regulatory actions result in potential takes under the Endangered Species Act, even after *Bennett v. Spear* purportedly limited suits against government entities. In *United States v. Town of Plymouth*, the court enjoined a county’s ordinance that allowed vehicles to drive on beaches where piping plovers were nesting. In *Animal Protection Inst. v. Holsten*, the court enjoined a state’s trapping permit program that had been shown to result in “takes” of a threatened species of lynx. The court determined that the licensure of trapping was analogous to the commercial fishing operations in *Coxe*, and thus issued an injunction to prohibit the operation of the licensing scheme to prohibit future takes of lynx.

The regulatory actions at issue in *Coxe, Town of Plymouth*, and *Holsten* are analogous to Ohio’s issuance of permits authorizing pollution in excess of SIP limits; just as courts have enjoined state agencies’ grants of licenses that violate the Endangered Species Act, so too, should courts enjoin grants of permits that violate Clean Air Act regulations. Furthermore, the Endangered Species Act citizen suit provision allows parties to collect both civil and

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178. *Id.* at 162 (citing 16 U.S.C. § 1532(19)).
179. *Id.* at 179.
180. *Id.*
182. *Id.* at 166–70. Moreover, the court construed the citizen suit provision so liberally that it did not find it necessary to provide that whales had, in fact, been killed by the fishing gear; reliance on affidavits showing that whales had become entangled in fishing nets was sufficient proof that the state’s practices caused a “take” of whales. *Id.* at 165.
185. *Id.* at 1080.
criminal penalties, which implies that states can be penalized in their regulatory capacities. As this is something that the Sixth Circuit thinks should be impermissible, Endangered Species Act caselaw, even if relevant, will not support the court’s desired resolution of citizen suits against states under the Clean Air Act.

Ultimately, because the Endangered Species Act does not require the federal government to negotiate with a state before assessing penalties for a regulatory violation like the Clean Air Act does, authorizing citizen suits against state regulators will not disrupt any “deliberate and cooperative” regime; accordingly, Endangered Act Species caselaw might have limited application to Clean Air Act disputes, which frequently involve complicated issues related to state-federal cooperation. But to the extent that Endangered Species Act cases can inform Clean Air Act decisions, the Endangered Species Act does not prohibit suits against states as regulators, contrary to what the Sixth Circuit seems to believe.

IV. WHY SUING STATES MAY LEGITIMIZE COOPERATIVE FEDERALISM

A. The Sixth Circuit and the Realities of Cooperative Federalism

The Sixth Circuit unrealistically assumed that the United States EPA would either successfully negotiate with the Ohio EPA to enforce the terms of the Ohio SIP, or would impose sanctions against the state without any outside assistance. Additionally, the court did not acknowledge exogenous congressional actions that might derail agency-forcing suits against the EPA Administrator—the recommended solution for ensuring that states perform their SIP commitments. The court’s traditional beliefs about cooperative federalism did not take into account the frictions present in the federal-state relationship which routinely prevent dispute resolution altogether. Because citizen suits against states impose a more lenient punishment than mandatory sanctions do, and because they are less likely to trigger adverse congressional reactions, they might be the most effective tool to ensure short-term state enforcement of its SIP. As this would free the EPA to negotiate larger or longer-term compliance issues, allowing citizen suits against states would legitimize the Clean Air Act by improving the variety of enforcement mechanisms that can be used to ensure that states implement the laws they

188. 16 U.S.C. § 1540(a), (b).
189. Korleski, 681 F.3d at 349.
190. Id. at 350.
191. Id. (“The Act envisions a cooperative resolution—a resolution, moreover, worked out between branches of the state and federal governments that are in a meaningful sense democratically accountable.”).
192. See discussion infra Park II.B.
193. Korleski, 681 F.3d at 352 (assuming that the EPA will simply be able to engage in “dialogue” with Ohio to resolve any conflicts about enforcement of the SIP).
pledge to enforce in their SIPs.

1. **In reality, the EPA only has a limited ability to impose sanctions.**

Enforcement failures may arise where the EPA is unwilling or unable to impose punishments on a state for relatively minor infractions; these difficulties thus justify using citizen suits as an alternative enforcement tool. As a preliminary matter, scholars recognize that there are “regulatory gaps”—instances where the federal government does not contemplate particular regulations but allows states to develop laws—in cooperative federalism schemes. States exploit these regulatory gaps to contest federal laws and express dissent and dissatisfaction,194 even by going so far as to refuse to comply with, or otherwise obstruct a national program.195 Some scholars have dubbed this more realistic conceptualization of federalism as “uncooperative federalism.”196 States have an incentive to exploit regulatory gaps to benefit local business interests; as political, economic, and environmental impacts of environmental decisions are felt most acutely at the local level, state legislators who are “locally accountable”197 are under more pressure to deviate from federal programs and become “uncooperative.” The uncooperative federalism framework may explain why the Ohio legislature relaxed permitting requirements through S.B. 265 to favor local industry, in contravention of its SIP.198

However, the only tool available to the EPA to remedy deviations in regulatory gaps is the blunt instrument of sanctions.199 Since this solution is dramatic, and because there are no intermediate rules of engagement,200 it is unclear how smaller disputes—like whether a state may implement a SIP provision that has not yet been approved by the EPA—will be resolved between the two levels of government or whether the federal government will simply tolerate “state intransigence”201 for lack of a more calibrated punishment instrument. Because cooperative federalism schemes do not have a standard method of disposing conflicts that may arise between states and the

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195. *Id.*
196. *Id.* at 1256.
198. See, e.g., Ohio Air Permit Reforms Moving Forward, OHIO CLEANERS ASS’N, http://associationsites.com/article_Display_one2.cfm?RecordID=908&usr=oca (last visited Sept. 21, 2012) (praising S.B. 265 for including reforms that are “very important for Ohio businesses”).
federal government,202 and because nothing about the scheme itself guarantees that the federal and state governments will “play well together,”203 citizen suits may ensure that states do not get away with even those minor deviations from the SIP that the EPA may not wish to punish using heavy sanctions.

Allowing citizen suits to curb these violations is particularly helpful given that the federal government’s attitude toward state autonomy also “ebbs and flows” in response to “administrative and political needs and goals.”204 These changes are not necessarily due to any shifts in the conceptualization of the federal-state relationship, but may instead be explained by the federal government’s periodic desire for more or less cooperation and political support from states.205 Although this “informal federalism” is beneficial because it allows different administrations to remain sensitive to state needs and concerns,206 it may result in lax enforcement of environmental laws if, for example, the EPA chooses not to invest resources in securing state compliance with SIP provisions, even when it would be environmentally beneficial to do so.207

Where the magnitude of sanctions might affect the EPA’s willingness to impose such measures against states, economic realities additionally limit the EPA’s ability to punish uncooperative states altogether.208 It is well-known that the EPA does not have sufficient resources to effectively implement air quality control measures in a state;209 since the 1970s, even legislators and officials have acknowledged that the federal government probably will never have the resources to unilaterally implement pollution control laws.210 As a result of this budget constraint, the federal government has historically proven reluctant to revoke a state’s permitting authority by promulgating a FIP.211 Since substantial participation by state officials and state bureaucracies is essential if the federal government is to achieve its environmental goals, “[t]he states’

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202. Schapiro, supra note 200, at 285 (“The cooperative federalism theory . . . has little to say about refereeing conflicts that may arise [in a federal-state partnership].”).
203. Id. at 284.
204. See Dwyer, supra note 197, at 1199.
205. Id.
206. Id.
207. Id. at 1218 (suggesting also that federal regulators who ignore state and local concerns are more likely “to encounter political resistance, delay, and possibly failure”).
208. See Will Reisinger, Trent A. Dougherty & Nolan Moser, Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick up the Slack?, 20 DUKE ENVTL. L. & POL’Y F. 1, 3 (2010) (“State and federal enforcement budgets are being slashed, reducing government oversight and potentially allowing more violations of law to go unpunished.”).
209. See Dwyer, supra note 197, at 1216; see also Bulman-Pozen & Gerken, supra note 196, at 1267.
210. Dwyer, supra note 197, at 1216.
211. LAZARUS, supra note 41, at 191. See also Wedeking, supra note 36, at 124 (determining that although the EPA could plausibly characterize Texas as not adequately administering pollution reduction requirements in the state, it is “unlikely” that the EPA will rescind the state’s permitting authority).
trump card is their indispensability,” 212 which they can use to avoid sanctions for noncompliance with federal laws. The ultimate futility of threatening a state with sanctions may explain why, despite its knowledge that Ohio was not implementing its SIP, the EPA did not assess sanctions within the requisite eighteen-month period. In this circumstance, a citizen suit would likely be the only available mechanism to promote state compliance with environmental laws.

2. Political barriers prevent EPA from bringing enforcement actions against states.

The threat of sanctions under section 179 is less powerful in practice than envisioned in the Clean Air Act because imposing sanctions is a “politically difficult” action. 213 The EPA may understandably be unwilling to roil an already-strained dynamic with states, especially given that it must sustain a long-term working relationship with these sovereigns. 214

Although some argue that the EPA does not levy sanctions because the powerful threat of sanctions commands state compliance with federal law, thus obviating the need for punishment, 215 this is not likely the case. For example, although the EPA made formal findings of nonsubmittal or incompleteness of SIPs through letters to state governors, or disapproved SIPs through Federal Register notices 858 times from 1990 to 1999, the EPA only imposed sanctions eighteen times during that period, of which only two involved highway fund sanctions. 216 Moreover, the EPA often itself passes rules to stay or defer sanctions; for example, the EPA disapproved a SIP to control ozone in the San Francisco Bay Area in 2001. 217 However, the agency lifted the sanctions based on a proposed approval of revisions to the SIP. 218 Presently, only two highway sanctions are in effect in the nation. 219 Besides these two regions, the EPA issued highway sanctions in only one other area under the 1990 Clean Air

212. Dwyer, supra note 197, at 1216.
Amendments,\textsuperscript{220} and only once under the 1977 Clean Air Amendments.\textsuperscript{221}

Congress, too, has shown its distaste for sanctions by introducing multiple bills to eliminate the sanctions component of the Clean Air Act.\textsuperscript{222} This dislike became apparent when states refused to implement vehicle inspection and maintenance programs to control emissions from cars in the state, as mandated by the EPA.\textsuperscript{223} In response to states openly flouting mandates to develop these laws, Congress “provided appropriations riders prohibiting the EPA from imposing the threatened sanctions.”\textsuperscript{224} Additionally, when the EPA nevertheless disapproved California’s first SIP submission and promulgated an unpopular FIP,\textsuperscript{225} the EPA soon abandoned its effort in response to Congressional displeasure.\textsuperscript{226} The EPA remained reluctant to promulgate a FIP when portions of California subsequently failed to submit a complete SIP to ensure that the NAAQS would be met by the new 1987 deadline imposed by the 1977 Clean Air Act Amendments.\textsuperscript{227} Ultimately, even though the EPA was once again compelled to create a FIP by a court order resulting from a citizen suit,\textsuperscript{228} Congress rescinded the pending FIP through legislation.\textsuperscript{229}

Under these circumstances, the threat of federalizing a SIP is nearly empty, and so a citizen suit may be the only way to curtail state noncompliance with federal laws. Given that Congress has been willing to override the EPA’s

\begin{itemize}
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id. (referring to S. 495, 106th Cong. (1999) and H.R. 1626, 106th Cong. (1999)).
\item \textsuperscript{223} Thomas O. McGarity, Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program, 27 PAC. L.J. 1521, 1626 (1996) ("Perhaps the clearest lesson of the history of state implementation of [vehicle inspection and maintenance] programs is that there are generally no adverse consequences for states that thumb their noses at EPA and refuse to take the appropriate implementation steps. One California legislator noted during the collapse of the 1977 regulatory regime that EPA’s sanctions lacked credibility because EPA almost never invoked them.").
\item \textsuperscript{224} Id.
\item \textsuperscript{226} See Revocation of Gasoline Rationing Regulations, 41 Fed. Reg. 45,565 (1976) (Statement of John Quarles, Acting Administrator of the EPA) ("[S]ince EPA has no intention of implementing the regulations, I believe that EPA should revoke them now. I realized that this revocation will render the affected SIP’s defective as a legal matter, since such SIP’s will no longer contain regulations which provide for NAAQS attainment. I am convinced, however, that whatever benefits may be gained from keeping a technically legal SIP on the books . . . are outweighed by the seriously disruptive social and economic consequences of [gasoline rationing] regulations . . . . EPA’s action today is . . . a special case. It is being taken only because of the extraordinarily disruptive nature of the gasoline rationing regulations and because both Houses of Congress have affirmatively expressed their desire that such regulations not be implemented.").
\item \textsuperscript{227} Waltner, supra note 225, at 249.
\item \textsuperscript{228} Id. citing Coal. for Clean Air v. EPA, 762 F. Supp. 1399 (C.D. Cal. 1991), aff’d sub nom. Coal. for Clean Air v. S. Cal. Edison Co., 971 F.2d 219, 221 (9th Cir. 1992)).
\item \textsuperscript{229} See Notice, 66 Fed. Reg. 43,468, 43,469 (1995) (acknowledging that PUB. L. NO. 104-6, Defense Supplemental Appropriation, H.R. 889, effectively rescinded and voided the FIP prepared by the EPA).
\end{itemize}
authority to impose sanctions and penalties in the past, and because unlike Congress, private citizen suits are immune to the political pressures that might hinder EPA enforcement, allowing citizen suits against states directly instead of waiting for the conflict to develop into an unwieldy political affair may be the simplest way to curb state noncompliance with SIP provisions.

Notably, there is no evidence to date that citizen groups have ever successfully brought an action under section 304(a)(2) to compel the EPA Administrator to impose sanctions against a state. Some even question the continued ability of citizen groups to launch an effective agency-forcing suit against the EPA, suggesting that courts seem increasingly ambivalent toward such suits notwithstanding their justification of making agencies more accountable and effective, and that perhaps courts are biased against citizen plaintiffs. However, data reveals that the number of suits brought annually against the EPA did not change between 1995 and 2010, which tends to discredit the theory that the judiciary has stymied citizen suits. Nevertheless, the potential threat of congressional action overriding the EPA’s execution of its nondiscretionary duties looms over citizen suits brought against the EPA to compel state conformity to SIP provisions; for this reason, the Clean Air Act would be best enforced by citizen suits against states as regulators, instead of through suits brought against a more politically sensitive administrative agency.

3. Citizen suits are not free of their own drawbacks.

Although citizen suits have the power to jolt weak government enforcement efforts, there are concerns that these suits “over-enforce” regulated parties. These fears persisted since Senator Edmund Muskie proposed the first citizen suit provision in the 1970 Clean Air Act. However, the threat of overenforcement may be exaggerated: economic analysis suggests that private plaintiffs are subject to financial constraints and must therefore judiciously

230. McGarity, supra note 223, at 1653 (arguing that citizen suits under the Clean Water Act are valuable because private groups are not subject to the political pressures that might hinder state enforcement). Of course, the citizen suit provision may always be repealed or amended by Congress and is thus indirectly at the mercy of political pressures; however, there do not seem to be any concerted efforts presently to excise citizen suit provisions from environmental laws.

231. See May, supra note 2, at 10,714 (finding a decline in the number of suits brought by citizens against the EPA between 1995 and 2003).

232. Id. at 10,715. May also suggests that environmental organizations made a conscious effort to reduce pressure on the federal government in the wake of the September 11, 2001 terrorist attacks, to allow agencies to dedicate more resources to national security issues. Id.


234. See Waltner, supra note 225, at 249.

235. See Greve, supra note 21, at 376.

236. 116 CONG. REC. 32,925 (1970) (statement of Sen. Roman Hruska) (suggesting that citizen suits would interfere with government enforcement efforts, would overwhelm courts, and would be used to “harass” regulated parties).
select only the highest-payoff cases to litigate. Furthermore, the Clean Air Act contains notice provisions which give government officials a chance to enforce its own laws before a plaintiff commences a suit; this theoretically allows public agencies to displace any “inefficient” private enforcement endeavors. Additionally, caselaw limits plaintiffs’ enforcement opportunities to a narrow set of continuing violations, further limiting opportunities for overenforcement.

Although scholars have conceptualized the role of citizen plaintiffs primarily in three paradigms—substitute attorneys general, supplemental attorneys general, or as stimulants of attorneys general—and in each of these traditional paradigms, the effectiveness of the citizen suit is measured primarily based on the environmental benefits secured as a result of citizen participation in environmental lawsuits, commentators increasingly recognize citizen suits as a necessary element of a “triangulated federalist enforcement program.” These scholars view the utility of citizen suits not solely based on their effect on reducing pollution, but rather also on their impact on government entities. Authorizing citizen suits against states will function as a safety net to ensure that states face a realistic threat of sanctions, and thus reach agreements in a timely manner. This will also reaffirm the views of scholars who see the citizen suit as not just a “mere occasional prod used to goad agencies into action,” but rather as an instrument essential for preserving the structure and operation of the cooperative federalism scheme itself.

V. CONSTITUTIONAL HURDLES TO CITIZEN SUITS AGAINST STATES

Even if the Sixth Circuit had, in fact, determined that citizen suits could be used to directly compel state compliance with the SIP, there might still exist uncertainty about the constitutionality of such a practice. A minority of scholars maintain that citizen suits are unconstitutional because they represent excessive congressional intrusion on the Executive’s power to enforce the

242. Id.
laws. However, this might not be relevant because the Korleski court would have authorized a citizen suit against a state for an injunction, rather than civil penalties to the Treasury; it is the collection of penalties that these scholars criticize as what unlawfully transforms private citizens into officers of the United States requiring federal appointment. Furthermore, other courts have previously held that authorizing citizen suits in general does not run afoul of the Constitution; these findings have remained good law for multiple decades. Notwithstanding any separation-of-powers concerns, allowing citizen suits to remedy state violations resulting from failures to comply with SIP provisions may trigger other constitutional concerns by implicating both the Tenth Amendment and the Eleventh Amendment.

A. Tenth Amendment Concerns

Although both parties’ briefs addressed whether using a citizen suit provision to compel compliance by a state would violate the Tenth Amendment, the Sixth Circuit did not reach this issue in its opinion. The Tenth Amendment provides that the powers “not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” Under Supreme Court caselaw, the federal government may not require a state to implement a federal program by fiat; instead, the federal government may operate a cooperative federalism program whereby it gives states a choice between adopting federal regulations or allowing the federal government to directly regulate individuals within the state’s boundaries. The federal government may use financial incentives through its spending power to incentivize states to implement a federal scheme; money given to states conditioned on the proper implementation of a federal scheme may induce states to adopt policies the federal government

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246. See U.S. Const. art. II § 3 (“[the President] shall take care that the laws be faithfully executed”).


250. U.S. Const. amend. X.

251. See U.S. Const. art. I § 8.

could not impose on its own. An order for a state to conform to federal law in the absence of such incentives thus violates the anti-commandeering and anti-conscription principles developed in Tenth Amendment jurisprudence.

Sierra Club argued in its briefs that Ohio’s adoption of its BAT program was not a result of “commandeering” or “conscription” by federal officials; rather, the Director of the Ohio EPA chose that policy freely in order to comply with the NAAQS. Indeed, Ohio even received $50,000,000 over the past ten years for its air programs. The State of Ohio did not dispute that it freely entered into the cooperative federalism agreement. Instead, it argued that it should be allowed to exit the cooperative federalism scheme at will. The State argued that allowing a citizen suit to enjoin its maladministration would effectively coerce it to remain—involuntarily—in a cooperative federalism system. In its amicus brief, the United States pointed to regulations that specify the procedures that a state must follow to withdraw from the Clean Air Act scheme. The regulations allow a state to withdraw from the SIP by submitting a revision, and thus merely prohibit states from abruptly refusing to implement a law after committing to doing so in an earlier SIP revision, as this would frustrate the proper functioning of the Clean Air Act.

Because the United States did not compel Ohio to develop a SIP or undertake other air pollution control obligations within its boundaries, and because the Clean Air Act provides for an orderly mechanism by which the state can disengage from the cooperative federalism scheme, the Tenth Amendment cannot bar a suit to enforce a state’s performance of those voluntary obligations. Since the Clean Air Act gives states the “freedom to promulgate and enforce SIPs, which the states themselves . . . submit to the

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254. New York, 505 U.S. at 177 (1992) (determining that allowing states to choose between implementing a scheme to dispose radioactive waste or take title to the waste violated the Tenth Amendment as the federal government cannot “commandeer” states to adopt particular policies); see also Printz v. United States, 521 U.S. 898 (1997) (determining that federal government could not direct state officers to conduct background checks to comply with federal law in the absence of funding incentives).


256. Id.


258. Id. at 22.

259. Id.


261. See 42 U.S.C. § 7410(k)(1)(C) (“Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria . . . the State shall be treated as not having made the submission.”).

EPA for approval,\textsuperscript{263} and because the Supreme Court has upheld comparable environmental statutes which employ cooperative federalism,\textsuperscript{264} the underlying scheme will not likely be found unconstitutional.

The Supreme Court has, however, placed limits on the type and amount of funds that may be used to induce state cooperation in a federal program; in \textit{South Dakota v. Dole}, the Court determined that the condition on federal funds must not be "unrelated to the federal interest in particular national projects or programs."\textsuperscript{265} Additionally, the Court acknowledged that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion,"\textsuperscript{266} but did not elaborate as to when those circumstances may exist. At least one case challenging Clean Air Act sanctions as "coercive" under the Tenth Amendment failed.\textsuperscript{267} Allowing citizen suits against states for a failure to comply with SIP requirements may impose additional penalties against the state. But this may not be material; the Spending Clause was historically read broadly enough by the Supreme Court to allow the federal government to condition receipt of federal funds on a state's consent to be sued by citizen plaintiffs without amounting to coercion.\textsuperscript{268}

Although the Court has generally approved all conditions on federal monies granted to the states under a broad reading of the Necessary and Proper Clause,\textsuperscript{269} this permissive approval may change in light of the Supreme Court's decision in \textit{National Federation of Independent Business v. Sebelius}.\textsuperscript{270} In that decision, the Court determined that a provision in the Patient Protection and Affordable Care Act of 2012 withdrawing existing Medicare funding from states that did not elect to participate in the Medicaid expansion violated the Tenth Amendment.\textsuperscript{271} The court concluded that a withholding of Medicaid funds—equivalent to a loss of ten percent of a state's overall budget—amounted to "economic dragooning" that would leave states with "no real option" but to implement a federal program.\textsuperscript{272}

\begin{itemize}
\item \textsuperscript{264} \textit{See} Hodel v. Va. Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981); \textit{see also} \textit{New York v. United States}, 505 U.S. 144, 167 (1992) (mentioning the Clean Water Act as a cooperative federalism scheme that does not violate the Tenth Amendment).
\item \textsuperscript{265} \textit{South Dakota v. Dole}, 483 U.S. 203, 208 (1987).
\item \textsuperscript{266} \textit{Id.} at 211 (internal quotations omitted).
\item \textsuperscript{267} Virginia v. Browner, 80 F.3d 869, 881–82 (4th Cir. 1996) (determining that the exceptions to highway sanctions lessened any coercive impact on states).
\item \textsuperscript{268} McAllister & Glicksman, \textit{supra} note 214, at 10,673.
\item \textsuperscript{269} \textit{U.S. CONST.} Art. I \S 8 (Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof").
\item \textsuperscript{270} 132 S. Ct. 2566 (2012).
\item \textsuperscript{271} \textit{Id.} at 2574.
\item \textsuperscript{272} \textit{Id.} at 2575 (noting that the expansion of the program was not merely a shift in degree, but rather a shift in kind because the program now provides insurance for all elderly citizens living under 133 percent of the poverty line, not merely a few categories of vulnerable populations).
\end{itemize}
Some scholars have hypothesized that this decision may jeopardize the sanction provisions of the Clean Air Act, since federal highway funds constitute the “lion’s share” of many states’ transportation budgets. However, sanctioning states under the Clean Air Act by withholding transportation funds might not give rise to the same constitutional concerns that arise with Medicare funds, because transportation funds form a smaller portion of a state’s overall budget when compared to Medicaid funds, and because transportation funds, unlike Medicaid funds, are not considered “entitlement” benefits for which federal funding flows automatically and does not have to be renewed every year. Furthermore, the Court in National Federation of Independent Business expressed concern about the dramatic expansion of the programmatic scope of the new Medicare obligations. The court reasoned that states would not reasonably be able to anticipate such a dramatic change to the program, and as such, a penalty for noncompliance with this shift would be unconstitutional; however, this is not at issue in the Clean Air Act. Authorizing penalties against states for noncompliance with an act, particularly where there is statutory language and caselaw in support of such penalties, does not seem to raise the same concerns about fairness to the state that would trigger constitutional concerns because states’ obligations under the Clean Air Act remain unchanged.

Although the National Association of Independent Business decision may not impact the ability of the EPA to levy discretionary penalties against states for administrative failures, there remains a question of whether levying penalties against state officials for violations of federal law violates the Tenth Amendment by enabling the government to “commandeer” such state actors. The Sixth Circuit hinted that imposition of fines on state officials by allowing the term “violation” to encompass regulatory failures is impermissible. The court expressed concern about the magnitude of the penalties that the EPA could impose on a state official who “violated” federal law by failing to implement a SIP, but did not determine whether any size of financial penalty

276. Id.
277. See Part III.A.2 supra for a discussion of cases authorizing penalties against states for noncompliance with SIP provisions.
278. See New York v. United States, 505 U.S. 144, 161 (1992) (describing the phenomenon of “commandeering” as when the federal government directly compels states to “enact and enforce a federal regulatory program”).
280. Id. (finding significant the $25,000 per day penalty that could be imposed on a state official for each violation of the Clean Air Act).
would avoid this “commandeering” concern. Early scholarship interpreting the 1977 Clean Air Act Amendments concluded that federal suits assessing penalties against state officials to enforce compliance with an existing SIP under section 113 did not unconstitutionally commandeer those states. However, these conclusions were made under an older version of the Clean Air Act; to date, no court has expressly addressed whether imposing penalties on state officials under the 1990 Clean Air Act Amendments may constitute impermissible conscription.

In Virginia v. Browner, the Fourth Circuit avoided this issue altogether; in a footnote, the court stated that because the EPA “has expressed no intention to seek § 113 [penalties] against Virginia officials in the future,” and Virginia’s claim that the Clean Air Act commandeered states through penalizing their officials for not implementing the SIP was unripe. In its petition for certiorari for the same case, the state argued that the “layering of sanctions” against the state would create pressures “far more coercive than any of these measures considered alone” such that the “coordinated and cumulative effect” of sanctions against a state and its officials amounted to commandeering under the Tenth Amendment.

Although this argument was never adjudicated, it may be resolved by the Court’s decision in Printz v. United States. In that case, the contested law imposed mandatory penalties on state officers who knowingly refused to verify the legality of a gun sale in their jurisdiction, pursuant to the Brady Handgun Violence Prevention Act. The law at issue in Printz was held unlawful for its imposition of mandatory duties on state officers without any incentives to participate; the majority, however, determined that “federal statutes . . . that require the participation of state or local officials in implementing federal regulatory schemes [that are] connected to federal funding measures . . . can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States.” The Clean Air Act is an example of such a scheme connected to funding measures. Thus, penalties under section

286. Id. at 904 (noting that the proposed regulations provided that "any person who knowingly violates [the section of the GCA amended by the Brady Act] shall be fined . . . imprisoned for not more than 1 year, or both") (citations omitted).
287. Id. at 917–18.
288. See, e.g., Brief of Plaintiff/Appellee Sierra Club at 54, Sierra Club v. Korleski, 681 F.3d 342 (6th Cir. 2012) (No. 10-3269), 2010 WL 6707956 at *54 (noting that the state has received about $50,000,000 over the past ten years to implement air pollution control programs).
113 may be considered “conditions” attached to federal funding and may thus be found lawful, unless their cumulative effect amounts to the type of coercion a state would experience with a ten percent reduction in Medicare grants.

B. Eleventh Amendment Concerns

The Eleventh Amendment prohibits federal courts from hearing suits against states by citizens of foreign states.289 Caselaw expanded the amendment’s reach to also prohibit suits against states by its own citizens.290 However, citizens can bring a suit against a state officer to prospectively enjoin actions by state officials that violate federal law, under an exception to the Eleventh Amendment known as the Ex Parte Young fiction.291 A citizen suit may not, however, be brought against an official when the state is the real, substantial party in interest.292 Because the Sierra Club sought only prospective injunctive relief against the Director of the Ohio EPA and not civil penalties293 for violating the Ohio SIP, its suit did not contravene the Eleventh Amendment, due to the Ex Parte Young doctrine. Furthermore, because the federally-approved SIP is considered federal law,294 and because the suit was specifically brought against a state official and not against the state, Sierra Club’s suit is permissible under the Eleventh Amendment. Thus, the Eleventh Amendment does not prevent citizens from enjoining state officials to comply with the regulations in a SIP.295

Indeed, several other courts have adopted this reasoning and have determined that private parties may bring a citizen against the head of a state environmental agency for maladministration of the Clean Air Act without implicating Eleventh Amendment concerns.296 In Kentucky Resources Council v. EPA, the district court found that the Secretary of the Kentucky National Resources and Environmental Protection Cabinet was liable for a state’s

289. U.S. CONST. amend. XI (“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.”).
290. See Reisinger, Dougherty & Moser, supra note 208, at 1.
291. McAllister & Glicksman, supra note 214, at 10,677.
294. State Implementation of Federal Standards: Hearing before the Subcomm. on Intergovernmental Relations of the S. Comm. on Governmental Affairs, 97th Cong. 49 (1981) (statement of Daniel J. Goodwin, Vice President, State and Territorial Air Pollution Program Administrators) (“Once a SIP (or a revision to a SIP) has been adopted into state law, it must then be approved by USEPA. This approval takes the form of federal rulemaking, and the federally-approved SIP becomes a federal regulation. This arrangement assures that state air pollution requirements are backed up by strong enforcement capability, and provides opportunity for citizen suits to enforce state requirements.”).
noncompliance with its SIP provisions, because the Cabinet had “the power to enforce all applicable regulations and standards even where it has delegated some of its authority,” per a Kentucky statute.\textsuperscript{297} The court balanced equity concerns, including the gravity of the violation, potential unfair collateral consequences of issuing an injunction, costs to the government, and whether an order would be in the public interest before concluding that the Secretary had a clear obligation to enforce the terms of the approved SIP.\textsuperscript{298}

Similarly, in \textit{Sweat v. Hull}, the court determined that the director of the Arizona Department of Environmental Quality could be enjoined from violating the SIP because she was responsible, by statute, for enforcing its terms.\textsuperscript{299} As other jurisdictions have not found the Eleventh Amendment to bar citizen suits against states under the Clean Air Act, Sierra Club’s suit would likely have been constitutional on these grounds.

Recently, however, Eleventh Amendment caselaw evolved to prevent citizens from bringing a suit for injunctive relief where Congress has created a “detailed remedial scheme for the enforcement against a state of a statutorily created right.”\textsuperscript{300} Although the Sixth Circuit held that the sanctions regime proposed under section 179 was Congress’s intended remedy for a state official’s violation of a SIP,\textsuperscript{301} the court did not support its proposition with any evidence from the legislative history of the statute or argue that the sanctions regime was a “detailed remedial scheme” that would bar a suit under the Eleventh Amendment.\textsuperscript{302} Regardless, it is unlikely that the Clean Air Act remedial scheme is sufficiently comprehensive to prevent citizens from seeking relief. In a footnote, the majority in \textit{Seminole Tribe of Florida v. Florida} clarified that it limited its holding to the Indian Gaming Act and pointed to the citizen suit provision of the Clean Water Act as an example of how Congress could authorize a suit against a state under \textit{Ex Parte Young}.

\textsuperscript{303} Given the similarities between the citizen suit provisions of the Clean Air Act and the Clean Water Act, it is likely that \textit{Seminole Tribe} did not curtail suits against states under the Clean Air Act for injunctive relief.

**CONCLUSION**

Not only did the Sixth Circuit disregard established caselaw and longstanding EPA policy in its decision in \textit{Sierra Club v. Korleski}, but more troublingly, the court wholly ignored the very real frictions latent in the federal-state dynamic in the context of the Clean Air Act. The court used its narrow


\textsuperscript{298} \textit{Id.} at 933 (holding that an affirmative injunction is “necessary and appropriate to uphold the Act’s mandates”).

\textsuperscript{299} \textit{Sweat}, 200 F. Supp. 2d at 1173.


\textsuperscript{301} \textit{Sierra Club v. Korleski}, 681 F.3d 342, 349 (6th Cir. 2012).

\textsuperscript{302} \textit{Id.}

\textsuperscript{303} \textit{Seminole Tribe}, 517 U.S. at 75 n.17.
perspective to justify its prohibition of citizen suits against states, although these suits might have allowed Ohio citizens to experience clean air for as long as their state pledged to deliver as much through its SIP commitments. But the Sixth Circuit’s refusal to adopt a judicial realist perspective did not simply result in negative environmental outcomes. Fundamentally, the court’s disregard of the difficulties of managing states in a cooperative federalism program led it to suggest an empty, formalistic remedy for citizens dissatisfied with states flouting federal law—a lawsuit against the EPA Administrator. Given the challenging history of compelling action from the EPA Administrator through citizen suits because of the threat of adverse congressional action, this remedy is a hollow recourse. Requiring citizens to rely only on such suits against the EPA Administrator to demand state compliance with SIP provisions thus negatively affects the legitimacy of the entire cooperative federalism enterprise, and may encourage states to continue to misbehave by refusing to implement burdensome SIP provisions. Although the Sixth Circuit could have allowed the citizen provision to further goad lackadaisical agencies charged with implementing federal laws, its decision likely pushed the Clean Air Act towards becoming a “model” of uncooperative federalism.

305. Ellis v. Gallatin Steel Co., 390 F.3d 461, 467 (6th Cir. 2004) (referring to the Clean Air Act as a “model of cooperative federalism”).

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