Bragg v. West Virginia Mining Association: The Eleventh Amendment Challenge to Mountaintop Coal Mining

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BRAGG v. WEST VIRGINIA MINING ASSOCIATION: THE ELEVENTH AMENDMENT CHALLENGE TO MOUNTAINTOP COAL MINING

I. INTRODUCTION

In the early 1990s, coal companies in West Virginia began widespread use of mountaintop coal mining, a practice involving the physical removal of mountain peaks to more effectively extract low sulfur, high-grade coal.1 Using this method, mining companies dig and blast mountaintop rock above horizontal seams of coal layered in mountains, place the removed earth in adjacent valleys, extract the coal, and replace the removed rock in an effort to achieve the original contour of the mountain.2 Given that the rock naturally “swells” after removal, the excess rock not returned to the mountain, overburden, is left in the adjacent valleys, creating “valley fills” that bury intermittent and perennial streams and drainage areas near the mountaintop.3

Local communities and environmental groups, however, condemn the practice of mountaintop removal, pointing to its devastating environmental effects.4 The groups assert that mountaintop removal increases vulnerability to flooding, pollutes streams and rivers, dries up local wells, increases vehicle traffic, provides little benefit to the state economy, and causes significant physical damage to

1. See Penny Loeb, Shear Madness, U.S. NEWS & WORLD REP., Aug. 11, 1997, at 26 (noting proliferation of mountaintop mining practices in West Virginia, southeastern Kentucky, eastern Tennessee, southwestern Virginia, and western Pennsylvania). West Virginia has granted surface mining permits for 512 square miles of that State. See id. Presumably, the majority of those permits allow mountaintop removal. See id. An aerial inspection of the region suggests that this practice has affected fifteen to twenty percent of the mountain peaks in the south-central part of West Virginia. See id.

2. See Bragg v. W. Va. Mining Ass’n, 248 F.3d 275, 286 (4th Cir. 2001) (describing theoretical procedure used for mountaintop coal mining). To remove topsoil, mining companies use a dragline, a $100 million machine that digs out earth with a bucket capable of digging out 110 cubic yards in a single scoop. See Loeb, supra note 1, at 26. Next, miners blast the overburden into large pieces and remove it to adjacent valleys using the dragline and several large dump trucks. See id.

3. See Bragg, 248 F.3d at 286 (stating effect resulting from mountaintop removal process on removed rock and adjacent valleys). The court notes that removed rock swells as much as fifteen to twenty-five percent. See id.

4. See Loeb, supra note 1, at 26 (recognizing damaging environmental effects produced from mountaintop coal mining).
nearby homes and communities. Generally, coal companies defend mountaintop coal mining by citing their effective land restoration of the mountaintop areas and the economic benefit provided to the community and state.

Federal and state governments, through the Surface Mining Control and Reclamation Act (SMCRA), regulate the practice of mountaintop coal mining by limiting the types of mining permits issued. SMCRA sets out a comprehensive list of minimum standards to guard against the potentially adverse environmental impact of a surface mining operation. Congress crafted SMCRA to provide a balance of responsibility between the federal and state agencies, an effort known as cooperative federalism. Through this scheme of cooperative federalism, a state may take over the regula-


A 1994 study by West Virginia’s Department of Water Resources found that nearly seventy-six percent of the State’s streams have been polluted. See Loeb, supra note 1, at 26. “Much of this—no one knows exactly how much—is caused by surface mining.” Id. According to one federal mining expert, “virtually every stream at a mountaintop removal site becomes contaminated with sediment from the mine.” Id.

Regarding the economic impact, state employment records suggest that mountaintop removal accounts for only 4,317 jobs in the state, less than one percent of West Virginia’s workforce. See id. Critics of the mountaintop mining practice also point to the economic damage in terms of tourism on the waterways, “the state’s most valuable tourist attractions.” Id.

Furthermore, mountaintop removal causes other problems. “Trucks full of coal rumble past some people’s front porches at the rate of 20 an hour, 24 hours a day.” Id. Moreover, in terms of local wells, “[m]ining dries up an average of 100 wells a year and contaminates water in others.” Id. In terms of physical damage, dynamite blasts needed to splinter rock strata crack walls and foundations of nearby homes. See id. In 1996, “[h]omeowners filed 287 blasting complaints with the state.” Id. Blasting also launches rocks into the nearby communities, including one local cemetery. See id.

6. See Loeb, supra note 1, at 26. Coal companies contend that they practice adequate reclamation procedures by smoothing the ground and planting grass, shrubs, and small trees. See id. “In the best reclamation, the land is contoured and waterfowl ponds added.” Id. Mining companies also note that mining remains a critical source of revenue for the West Virginia economy and creates many high paying jobs, bringing in $4.4 billion in 1996. See id.


9. For a further discussion of the aspects of cooperative federalism embodied in SMCRA, see infra notes 32-46 and accompanying text.
tory enforcement of SMCRA once the Federal Office of Surface Mining (OSM) approves that state’s proposed plan for enforcement.10

Citizen suit provisions, common to nearly every environmental regulation since the 1970s, allow individual citizens to sue both government and private parties for SMCRA violations.11 The Court of Appeals for the Fourth Circuit’s decision, in Bragg v. West Virginia Mining Association,12 however, threatens to frustrate citizen suit enforcement actions under both SMCRA and various other environmental statutes.13 This decision may upset the delicate balance sought in cooperative federalism schemes and render citizens powerless to hold states accountable under federally-enacted environmental statutes.14

Section II of this Note outlines the factual and procedural background of Bragg v. West Virginia Mining Association.15 Section III sets out general background law, covering the framework of SMCRA, the Eleventh Amendment’s sovereign immunity provision, and the split among the federal circuits regarding the nature of state-approved SMCRA programs.16 Section IV analyzes the Fourth Circuit’s decision and presents possible legal challenges to that holding.17 Section V concludes the Note with an examination of the impact of the Bragg decision on the successful implementation of SMCRA as well as the decision’s impact on related “cooperative federalism” environmental statutes.18

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11. See 30 U.S.C. § 1270(a) (1994) (granting any person with adversely affected interests power to bring civil suit against United States or appropriate state regulatory authority). For a listing of citizen suits in similar environmental statutes, see infra note 43 and accompanying text.

12. 248 F.3d 275 (4th Cir. 2001).


14. See id. (characterizing Eleventh Amendment attacks as emerging threat to effectiveness of environmental protection statutes).

15. For a discussion of the factual background of Bragg, see infra notes 19-31 and accompanying text.

16. For a discussion of the general background law surrounding SMCRA citizen suits, see infra notes 32-115 and accompanying text.

17. For a narrative and critical analysis of the Fourth Circuit’s reasoning in Bragg, see infra notes 116-76 and accompanying text.

18. For a discussion of how the Bragg decision might affect the future of environmental citizen suits, see infra notes 177-94 and accompanying text.
II. Facts

In 1998, Patricia Bragg and a host of other complainants (Bragg) filed a citizen suit in the United States District Court for the Southern District of West Virginia against the State Director of the West Virginia Division of Environmental Protection (State Director or Director) and the U.S. Army Corps of Engineers (Corps). In three counts asserted against the State Director, Bragg alleged that the issuance of permits for mountaintop mining operations by the State Director violated SMCRA and the West Virginia state program approved under that statute. More specifically, Bragg alleged that the State Director "engaged in an ongoing pattern and practice of violating his non-discretionary duties" in granting permits that "authorized valley fills, failed to assure the restoration of original mountain contours, and violated other environmental protection laws." Accordingly, Bragg requested that the court grant an injunction to stop the Director from issuing mountaintop removal permits that "decapitate the State's mountains" and bury "hundreds of miles of headwaters of West Virginia's streams."

In the district court, Chief Judge Charles Haden, II, granted Bragg's motion for summary judgment, determining that the State's approval of mountaintop mining practices within 100 feet of intermittent and perennial streams violated both federal and state law. Accordingly, the district court issued an injunction against the State Director. The district court also entered consent de-

19. See Bragg v. W. Va. Mining Ass'n, 248 F.3d 275, 286 (4th Cir. 2001). Bragg charged that Corps breached its duties imposed by federal law and that the State Director of the West Virginia Division of Environmental Protection [hereinafter Director or State Director] violated both state and federal duties under SMCRA. Id. at 286-87. Several coal companies intervened in the suit to protect their interests. Id.

20. See id. at 286-87 (charging that Director violated both federal and state law).

21. Id. (noting Bragg's assertions that State Director violated federal and state law in not "withhold[ing] approval of permit applications that are not complete and accurate and in compliance with all requirements of . . . state program.").

22. Id. at 285 (noting general reasoning behind injunction sought by Bragg).

23. Bragg v. Robertson, 72 F. Supp. 2d 642 (S.D. W. Va. 2000). As to the alleged violation, the West Virginia SMCRA program states that "[n]o land within one hundred feet of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director." Bragg, 248 F.3d at 287 n.2 (citing W. Va. Code St. R. tit. 38 § 2-5.2 (1985)); see also Permanent Program Enforcement Standards - Surface Mining Activities, 30 C.F.R. § 816.57 (2001) (stating federal counterpart to state's buffer zone requirement).

24. See Bragg, 248 F.3d at 285-86.
crees approving settlement of other asserted claims against both Corps and the State Director.25

The State Director appealed both the substantive rulings on the counts not settled and the court’s ruling that the federal court had sufficient jurisdiction over him in light of the Eleventh Amendment.26 Likewise, the coal companies and coal associations appealed the injunction against the State Director, as well as the court’s approval of the consent decree of the settlement, which had not been appealed by the State Director.27 Finally, Corps appealed, challenging the district court’s jurisdiction to hear the case.28

On appeal, a three-judge panel of the Court of Appeals for the Fourth Circuit vacated the district court’s injunction and remanded the matter to the appropriate state court.29 The Fourth Circuit held that the Eleventh Amendment barred any suit by citizens of that state seeking to enjoin the Director from granting mountaintop coal mining permits, pursuant to the grant of exclusive jurisdiction under SMCRA and that mere participation by West Virginia in the SMCRA scheme did not create a waiver of Eleventh Amendment sovereign immunity.30 In addition, the court also held that the district court had appropriate subject matter jurisdiction to approve the consent decrees.31


26. See Bragg, 248 F.3d at 288 (stating basis of State Director’s appeal).

27. See id. at 287 n.1 (asserting that federal district court did not have jurisdiction over State Director on any counts because SMCRA and Eleventh Amendment barred action).

28. See id. at 288 (challenging breadth of district court’s injunction).

29. See id. at 286 (stating general holding of Court of Appeals for Fourth Circuit).

30. See id. at 280 (outlining basis for court’s decision to vacate part of district court’s ruling).

31. See Bragg, 248 F.3d at 288-89 (upholding validity of approved settlement).
III. Background

A. Surface Mining Control and Reclamation Act

In response to the devastating 1972 flood of Buffalo Creek, West Virginia, Congress passed SMCRA in 1977.32 SMCRA sought to balance the interest in maintaining a healthy level of coal production sufficient to satisfy the nation’s energy requirements with the federal interest in protecting the environment and local communities from adverse effects of surface coal mining.33 SMCRA’s legislative history suggests that Congress intended SMCRA to achieve that balance through a “cooperative effort” with power shared between the U.S. Secretary of the Interior and the States.34

To establish this “cooperative effort,” SMCRA calls on the U.S. Secretary of the Interior to develop a federal program setting forth certain minimum national regulatory standards.35 A state has the option to submit its own program, which must include those minimum national standards and a demonstration of the state’s ability to enforce the proposed program.36 Numerous other environmental statutes provide the same general cooperative federalism scheme.37 If the Secretary approves the particular state program, that state shall have “exclusive jurisdiction over the regulation of

32. See Loeb, supra note 1, at 26 (indicating that 1972 Buffalo Creek flood, sparked by dam break of 550-foot-wide coal slurry pond, destroyed homes further than fifteen miles downstream and killed more than 125 people).

33. See 30 U.S.C. § 1201(b) (1994) (noting that coal mining contributes significantly to the Nation’s energy requirements); see also 30 U.S.C. § 1201(c) (1994) (stating that surface mining operations disturb surface areas in ways that adversely affect commerce and public welfare).


35. See 30 U.S.C. § 1265(b) (1994) (stating, in pertinent part, that general performance standards shall operate as minimum standards to prevent and correct environmental harm done to mining areas). For example, surface coal mining operations must “restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining . . . .” 30 U.S.C. § 1265(b)(2) (1994). Mountaintop operations must also take measures to guard against actions that would increase the likelihood of flooding. See 30 U.S.C. § 1265(b)(10) (1994) (stating need to “minimize the disturbances to the prevailing hydrologic balance . . . to the quality and quantity of water in surface and ground water systems both during and after the surface coal mining operations.”).

36. See 30 U.S.C. § 1253(a) (1994) (noting that states desiring exclusive jurisdiction shall submit “a State program which demonstrates that such State has the capability of carrying out the provisions of [SMCRA] and meeting its purposes . . . (1) . . . in accordance with the requirements of this chapter.”).

37. See Federal Clean Air Act, 42 U.S.C. § 7410 (1994) (requiring each state to submit state implementation plan for Administrator’s approval); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9604(d)
surface coal mining and reclamation operations . . . "38 In 1981, the Secretary approved West Virginia’s proposed program, thus granting that state “primacy” status.39 In total, twenty-four states have attained “primacy” status, while federally-implemented programs operate in twelve other states.40

If a state fails to implement, enforce, or maintain its approved state program, the Secretary has the duty to prepare and implement a federal program for that state.41 After adequate public notice, “[i]n the event that a State . . . is not enforcing any part of [its] program, the Secretary may provide for Federal enforcement . . . of that part of the State program not being enforced . . . "42

Under SMCRA, aggrieved parties may file a civil action, a “citizen suit,” to compel compliance with SMCRA.43 In pertinent part, the citizen suit provision grants a state citizen the right to sue either the United States or the appropriate state regulatory authority “to the extent permitted by the [E]leventh [A]mendment of the Constitution” for an alleged failure to perform any non-discretionary

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41. See 30 U.S.C. § 1254(a) (1994) (referring to promulgation and implementation powers of Secretary).

42. 30 U.S.C. § 1254(b)-(c) (1994) (providing federal Secretary conditional authority to commandeer enforcement of SMCRA state program in light of state’s failure to do so).

duty.\textsuperscript{44} The statute further notes that "[t]he district court shall have jurisdiction [over citizen suits], without regard to the amount in controversy or the citizenship of the parties."\textsuperscript{45} Thus, determining whether a party can bring a citizen suit requires the courts to decide the extent of the Eleventh Amendment's application to state programs enacted under SMCRA.\textsuperscript{46}

B. The Eleventh Amendment and Sovereign Immunity

The Eleventh Amendment to the U.S. Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."\textsuperscript{47} Early Supreme Court cases, however, expanded the Amendment's reach beyond its mere text.\textsuperscript{48} In \textit{Hans v. Louisiana},\textsuperscript{49} the United States Supreme Court found that the spirit of the Constitution and intent of the ratifying states add an implied constraint on suits brought by a state's \textit{own} citizens even though not explicitly mentioned in the text.\textsuperscript{50} The purpose behind state sovereign immunity is to create a balance between a state's interest in interpreting and enforcing its own laws and the federal government's interest in uniform application of federal law.\textsuperscript{51}

Since the adoption of the Eleventh Amendment, the Supreme Court has recognized several exceptions to the idea of state sovereign immunity.\textsuperscript{52} Among those exceptions, \textit{Ex parte Young}\textsuperscript{53} established that the Eleventh Amendment does not cover suits for

\begin{itemize}
  \item \textsuperscript{44} See 30 U.S.C. § 1270(a) (1994) (asserting extent of citizen suit provision).
  \item \textsuperscript{45} Id. (stating location of appropriate jurisdiction).
  \item \textsuperscript{46} See id. (using Eleventh Amendment as limit to citizen suit).
  \item \textsuperscript{47} U.S. CONST. amend. XI.
  \item \textsuperscript{48} See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (upholding view that Supreme Court has "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.").
  \item \textsuperscript{49} 134 U.S. 1 (1890).
  \item \textsuperscript{50} See id. at 15 (barring federal action by state citizen against own state due to absence of express textual language).
  \item \textsuperscript{51} See id. (noting that suits against individual states were not contemplated when judicial power was established under Constitution).
  \item \textsuperscript{52} See, e.g., McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) (finding that Eleventh Amendment immunity does not apply to Supreme Court's authority to review federal questions); see also Toll v. Moreno, 458 U.S. 1 (1982) (noting state can waive Eleventh Amendment protection); Lincoln County v. Luning, 133 U.S. 529 (1890) (finding that independent agencies or political subdivisions within state, such as municipalities, do not enjoy such Eleventh Amendment protection).
  \item \textsuperscript{53} 209 U.S. 123 (1908).
\end{itemize}
prospective injunctive relief by a state citizen against state officials to enforce constitutional or federal law. The *Ex parte Young* exception focuses on the idea that when a state officer violates federal law, that officer is stripped of official character and becomes subject to the consequences of individual conduct, thus losing the cloak of sovereign immunity. *Almond Hill School v. United States Department of Agriculture* affirms that the *Ex parte Young* "stripping doctrine" applies to violations of both federal statutory law and federal constitutional law. Aside from enforcement of federal law, the Supreme Court, in *Pennhurst State School & Hospital v. Halderman*, held that the Eleventh Amendment prohibits a federal district court from ordering state officials to conform their conduct to state law. This limitation applies regardless of the remedy sought when the state is the real, substantial party in interest.

A state may waive its sovereign immunity privilege either explicitly or implicitly. For example, a state that voluntarily enters into federal litigation to seek the benefits of a potential judgment waives sovereign immunity. The general rule of construction, as

54. *See id.* at 143-44 (stating basis for jurisdiction rested in presence of federal question despite absence of diversity of citizenship); *see also* *Edelman v. Jordan*, 415 U.S. 651 (1974) (upholding prospective injunction for relief against state official while barring action for monetary damages based on supremacy of federal law). Suits for prospective relief are deemed to be suits against the individual official, while suits that seek retroactive relief are found to be suits against the state. *See Edelman*, 415 U.S. at 664-66.

55. *See Ex parte Young*, 209 U.S. at 159-60 (holding that State has no power to grant state official any immunity from responsibility to supreme authority of United States).

56. 768 F.2d 1030 (9th Cir. 1985).

57. *See id.* at 1034 (stating that "underlying purpose of Ex parte Young seems to require its application of claims against state officials for violations of federal statutes.").


59. *See id.* at 101 (holding states retain exclusive interest in enforcing state law against state officials).

60. *See id.* (citing Ford Motor Co. v. Dep’t of Treasury of Ind., 323 U.S. 459, 464 (1945)).

61. *See Litman v. George Mason Univ.*, 186 F.3d 544, 550 (4th Cir. 1999). In *Litman*, the court found that a state can waive its sovereign immunity by either "directly and affirmatively waiving" its Eleventh Amendment immunity in a state statute or constitutional provision, as long as the provision explicitly 'specifies the state's intention to subject itself to suit in federal court' or by "voluntarily participating in federal spending programs when Congress expresses a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity." *Id.* (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241, 247 (1985)); *see also* Idaho v. Coeur D'Alene, 521 U.S. 261, 267 (1997).

62. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883) (stating that Supreme Court is "relieved from its consideration by the voluntary appearance of the State in intervening as the claimant of the fund in court."); *but see* *Edelman v. Jordan*, 415...
set forth in *Bell Atlantic Maryland v. MCI Worldcom, Inc.*, holds that "[i]f Congress is not unmistakably clear and unequivocal in its intent to condition a gift or gratuity on a State's waiver of its sovereign immunity, [the courts] cannot presume that a State . . . knowingly and voluntarily assented to such a condition." On the other hand, other cases suggest that a state's voluntary participation in a federal regulatory program may implicitly authorize suit in federal court. Thus, absent unambiguous state consent to suit in federal court or unequivocal expression of Congressional intent to abrogate that state's immunity by virtue of its participation in a federal regulatory program, federal courts lack sufficient jurisdiction to order a state official to conform his or her conduct to state law.

C. The Role of SMCRA in Primacy States: Federal Law, State Law, or Both?

The current dispute in enforcing SMCRA centers in part on whether the Act constitutes state or federal law for primacy states. The determination of this question decides the proper jurisdiction for citizen suits and constitutional validity of section 1270(a) citizen suit provisions under state approved SMCRA programs.

Supreme Court decisions provide no direct precedent regarding the application of the Eleventh Amendment to SMCRA. The Supreme Court, however, provided some guidance when it upheld

U.S. 651, 651-52 (1974) (noting, however, that state may not have waived sovereign immunity if state had not conferred authority to waive on official defending its interests).

63. 240 F.3d 279 (4th Cir. 2001).

64. *Id.* at 292; *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55-56 (1996) (stating Congress may abrogate state's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in language of statute).

65. *See Natural Res. Def. Council v. Cal. Dep't of Transp.*, 96 F.3d 420, 424 (9th Cir. 1996) [hereinafter NRDC] (holding that Clean Water Act did not prescribe limits on citizen suits in federal court against state officer for violation of CWA, thereby implicitly authorizing federal jurisdiction over claims against Director for prospective injunctive relief for violations of CWA). The *Seminole Tribe* case suggests, however, that receipt of federal funds by a state does not by itself suffice to show that a state has consented to suit in federal court. *See Seminole Tribe*, 517 U.S. at 59 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985)).


68. *See id.* at 295-96 (alleging that primacy states act through state law, therefore, Eleventh Amendment exempts officials from citizen suits in federal court).
SMCRA against a Tenth Amendment constitutional challenge. In Hodel v. Virginia Surface Mining and Reclamation Ass'n, various coal interests brought a pre-enforcement action to challenge the enactment of SMCRA. In Hodel, the Court held that Congress did not exceed its powers under the Commerce Clause or transgress limitations on the exercise of that power set out in the Fifth and Tenth Amendments in legislating the Act.

Yet, recently in Seminole Tribe of Florida v. Florida, the Supreme Court applied Eleventh Amendment sovereign immunity to strike down part of another federal regulation. The Seminole Tribe Court addressed the Indian Gaming Regulatory Act (IGRA), authorizing an Indian tribe to bring suit in federal court to compel state compliance with that Act. The Court held that the Ex parte Young exception would not apply to enforce IGRA against a state official because of the detailed remedial scheme for the enforcement of the statutorily created right set forth in that Act. Thus, the Seminole Tribe Court added another hurdle for surviving an Eleventh Amendment challenge under a federal regulatory program: the lack of a detailed remedial scheme for enforcement of the statutorily-created right.

Subsequent to the Seminole Tribe case, the United States Court of Appeals for the Ninth Circuit, in Natural Resources Defense Council

69. See Hodel v. Va. Surface Mining and Reclamation Ass'n, 452 U.S. 264, 292 (1981) (remarking that SMCRA "resembles a number of other federal statutes that have survived Tenth Amendment challenges in the lower federal courts.").
71. See id. at 268 (challenging SMCRA based on commerce clause, Tenth Amendment, and Just Compensation and Due Process Clauses of Fifth Amendment).
72. See id. (declaring SMCRA "does not suffer from any of [the] alleged constitutional defects.").
74. See id. at 47, 52-54.
76. See Seminole Tribe, 517 U.S. at 73-74 (stating that where Congress has created detailed remedial scheme courts should be hesitant to supplement that scheme with one created by judiciary). Under IGRA, Congress intended that the remedy for a state's failure to negotiate in good faith be an order directing the state and tribe to conclude the compact within sixty days. See id. at 74. Failure to do so would result in a sanction requiring each party to select a mediator, who is to select the compact best embodied by the terms of IGRA. See id. Further, neglect by the state to accept the mediator's compact would result in notice to the Secretary of the Interior, who then prescribes regulations governing gaming on the lands at issue. See id. at 74-75.
77. See id. at 73-75 (warning that courts should hesitate before casting aside detailed remedial scheme set forth by Congress).
v. California Department of Transportation (NRDC), 78 affirmed a judgment for prospective injunctive relief under the Clean Water Act (CWA) citizen suit provision, despite the defendant’s position as a California state official. 79 There, the Ninth Circuit held that Ex parte Young strips the state official of his sovereign immunity because of CWA’s role as federal law. 80 The NRDC court distinguished the Seminole Tribe case by finding that Congress implicitly intended the CWA citizen suit provision to authorize private citizens to bring an action against a state official in federal court “to the extent permitted by the Eleventh Amendment.” 81 Therefore, the Ninth Circuit posits that the inclusion of the citizen suit “to the extent permitted by the Eleventh Amendment” allows suits for prospective injunctive relief from a state official’s future conduct. 82

The circuit courts appear split on the issue of proper jurisdiction under the citizen suit provision and SMCRA’s general character as a state or federal law. In Haydo v. Amerikohl Mining, 83 the United States Court of Appeals for the Third Circuit followed the lead of Seminole Tribe and found that an action for damages against a private defendant under SMCRA lacked federal subject matter jurisdiction. 84 Instead, the Third Circuit ruled that affording SMCRA federal jurisdiction “would render meaningless the Congressional offer in [SMCRA] of ‘exclusive’ jurisdiction to states obtaining approval of a regulatory plan.” 85 Thus, under Haydo, state plans ap-

78. 96 F.3d 420 (9th Cir. 1996).
80. See NRDC, 96 F.3d at 422-23 (stating that “a plaintiff may bring suit against a state official accused of violating federal law.”).
81. Id. at 424 (relying on Seminole Tribe’s contrast of IGRA from “those statutes ‘where lower courts have found that Congress implicitly authorized suit under Ex parte Young,’ such as the [CWA]”); see also 33 U.S.C. § 1365(a) (1994) (stating citizen suit provision of CWA).
82. See NRDC, 96 F.3d at 422-24 (noting Mancuso decision permitting action).
83. 830 F.2d 494 (3d Cir. 1987).
84. See id. at 498-99 (stating holding of Third Circuit Court of Appeals).
85. Id. at 497-98 (noting obvious, ordinary meaning of “exclusive” and intent of Congress to recognize unique geography in each state). The Haydo decision places heavy reliance on 30 U.S.C. § 1254(a), which “vests the Secretary with exclusive jurisdiction for the regulation and control of surface coal mining and reclamation operations.” Id. (quoting 30 U.S.C. § 1254(a) (2001)).
proved under SMCRA operate as state law and do not provide federal question jurisdiction.\textsuperscript{86}

Likewise, the Court of Appeals for the D.C. Circuit provides support for evaluating SMCRA primacy state programs as state law in *National Wildlife Federation v. Lujan*.\textsuperscript{87} In *Lujan*, the National Wildlife Federation brought suit to challenge certain regulation modifications set forth by the Secretary of the Interior.\textsuperscript{88} The Secretary modified those regulations to require correction of material subsidence damage "only to the extent of state law."\textsuperscript{89} The court held in favor of the Secretary, finding the modifications were based on a reasonable interpretation of SMCRA.\textsuperscript{90} More importantly, the concurring opinion emphasized that the federal SMCRA provision does not technically apply in primacy states.\textsuperscript{91} Instead, state law determines an operator's obligations in a primacy state.\textsuperscript{92} Accordingly, "the person's cause of action will be in state court under the state law equivalent of [the federal subsidence control regulation]."\textsuperscript{93} Here, the concurrence conflicts with an earlier D.C. Circuit case, *In re Permanent Surface Mining Regulation Litigation*.\textsuperscript{94}

Conversely, West Virginia state courts and the Fourth Circuit both recognize the supremacy of the federal SMCRA law over state

\textsuperscript{86} See *Haydo*, 830 F.2d at 498-99 (holding operator's violation of permit condition does not violate SMCRA itself, even though SMCRA mandates that condition be imposed).

\textsuperscript{87} 928 F.2d 453 (D.C. Cir. 1991).

\textsuperscript{88} Id. at 455. The National Wildlife Federation challenged the subsidence control regulations and those regulations establishing the effective date of the regulation of off-site physical processing plants. See id. at 455 n.1. "Subsidence occurs when a patch of land over an underground mine sinks, shifts, or otherwise changes its configuration." Id. at 455.

\textsuperscript{89} Id. at 456. The original subsidence control regulation "required an underground coal operator to restore land materially damaged by subsidence and to repair each damaged structure, to purchase the damaged structure at fair market value, or to compensate the owner for the diminution in value." Id. at 455-56. The modified regulation limited the correction of material subsidence damage to structures "only to the extent required by state law." Id. at 456.

\textsuperscript{90} See id. at 463 (stating court's holding).

\textsuperscript{91} See id. at 464 n.1 (Wald, J., concurring) (placing remedy for violation of § 520(f) under state court's jurisdiction).

\textsuperscript{92} See *Lujan*, 928 F.2d at 464 (relying on language of § 1253 to grant "exclusive jurisdiction over the regulation of surface coal mining and reclamation operations . . . ").


\textsuperscript{94} 653 F.2d 514, 516 (D.C. Cir. 1981) (affirming judgment of district court in that SMCRA "gives the Secretary rulemaking power to prescribe minimum information requirements for permit applications submitted to state regulatory agencies.").
95. In Canestraro v. Faerber, the West Virginia Supreme Court of Appeals struck down a provision in the state regulatory program, setting forth an application filing requirement less stringent than the federal provisions. The Canestraro court recognized that Congress clearly intended state provisions to be at least as stringent as those in the federal SMCRA provisions. The court thus held that "[t]he state program need not be identical to the federal program, as long as its provisions are at least as stringent as those provided for in the federal act." When a conflict arises between a state and federal provision, the less restrictive state provision yields to the more stringent federal provision "notwithstanding the administrative approval of the state law by OSM." Counter to the Haydo decision, the Fourth Circuit, in Molinary v. Powell Mountain Coal Co., held that SMCRA section 1270(f) provides a federal cause of action to private citizens for the recovery of damages that had arisen from a private coal company's violation of state regulations under Virginia's adopted SMCRA program. In upholding the district court's rejection of Powell Mountain's mo

95. See generally Canestraro v. Faerber, 374 S.E.2d 319 (W. Va. 1998) (holding that federal filing provision remained applicable to extent that it is more stringent than parallel state provision); Molinary v. Powell Mountain Coal Co., 125 F.3d 231 (4th Cir. 1997) (allowing SMCRA citizen suit in federal court).


97. Id. at 319-20. In Canestraro, West Virginia's SMCRA program required an operator to file a copy of a permit application to enlarge a coal waste dam "in the nearest office of the department of energy" to allow for public comment. Id. at 320 (quoting W. Va. Code § 22A-5-9(c) (1985)). On the other hand, the federal act mandates that an operator file such a permit "with the recorder at the courthouse of the county or an appropriate public office approved by the regulatory authority where the mining is proposed to occur." Id. (citing 30 U.S.C. § 1257(e) (1994) and Surface Coal Mining Requirements for Permits and Permitting Process, 30 C.F.R. § 773.13(a)(2) (1994)).

98. See Canestraro, 374 S.E.2d at 320-21 (referencing language in 30 U.S.C. § 1253, which states in pertinent part that state law must be "in accordance with" and "consistent with regulations issued by the Secretary pursuant to this Act.").

99. Id. at 320 n.2 (noting supremacy and preemption of federal SMCRA provisions of state provision that fall short of federal standard).

100. Id. at 321 (stating that "[n]othing in the Act or these regulations shall be interpreted to preclude a State from exercising its authority to enforce State law . . . unless compliance with the State law . . . will preclude compliance with these regulations.").

101. 125 F.3d 231 (4th Cir. 1997).

102. Id. at 232 (affirming, in part, holding of appellate court). In Molinary, the Virginia Department of Mined Land Reclamation [hereinafter DMRL] had improperly granted Powell a permit for auger mining operations, leading plaintiffs to file an action under 30 U.S.C. § 1270(f) for the recovery of damages against Powell Mountain Coal. See id. at 233. DMRL subsequently revoked the permit, finding that the permit did not comply with state law in failing to list all record holders and to evidence that they had authority to extract the coal by surface mining. See id. After the plaintiff filed a class action suit, Powell moved to dismiss for
tion to dismiss for lack of subject matter jurisdiction, the court of appeals relied on the idea that the state-promulgated regulations were "issued pursuant to" SMCRA and that Congress intended section 1270(f) to provide for federal citizen suits. 103

Notably, the court dismissed the notion that the federal grant of exclusive jurisdiction mandates that claims be brought in state court because "[e]xclusive regulatory jurisdiction simply does not encompass exclusive adjudicatory jurisdiction. Common sense dictates that a government's acts in regulating a subject are distinctly different than its acts in adjudicating a party's rights related to the subject." 104 Yet, similar to the decisions in Bragg and in West Virginia Highlands Conservancy v. Norton, 105 the Fourth Circuit will no longer allow citizen suits to be brought in federal court. 106

The Tenth Circuit has also addressed the issue of whether a state's Eleventh Amendment sovereign immunity bars suits for prospective injunctive relief under SMCRA. 107 In Powder River Basin Resources Council v. Babbitt, 108 the Tenth Circuit Court of Appeals overturned the district court's finding that the Eleventh Amendment barred an action by Wyoming residents under SMCRA to recover expenses incurred during the case and to obtain injunctive relief. 109 In so holding, the court relied on the distinction between the prospective and retrospective nature of relief sought, rather than any challenge that the approved state program constituted state law. 110 Thus, the Powder River Basin court implicitly recognized SMCRA as federal law and differentiated those actions per-

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103. See id. at 236, 237 (basing its decision on interpretation of text of § 1270(f) and "Congress' [sic] goal of establishing 'a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.").

104. Id. The court also attributed the major shortcoming in the Haydo v. Amerikohl Mining decision to the Third Circuit ignoring that "the word 'exclusive' in § 503(a) modifies the phrase 'regulatory jurisdiction' and nothing more." Id. at 236 n.5, 237.


106. See id. at 475 (following Bragg decision reluctantly in barring citizen suit based on Eleventh Amendment).


108. 54 F.3d 1477 (10th Cir. 1995).

109. Id. at 1482. The court, however, decided the case against the plaintiffs because the case against the federal defendants was not ripe in light of Wyoming's ongoing attempt to comply with federal directives and because the state had subsequently amended its rule-making procedures. See id. at 1482.

110. See id. at 1483 (finding that plaintiff's claim was not barred by Eleventh Amendment).
possible under the Eleventh Amendment, using a traditional retrospective-prospective distinction.\textsuperscript{111}

A number of other courts have addressed the issue of whether under cooperative federalism schemes, environmental statutes with citizen suit provisions similar to SMCRA act as state or federal law. For example, in Ashoff v. City of Ukiah,\textsuperscript{112} the Ninth Circuit held that the Resource Conservation and Recovery Act (RCRA) authorizes citizen suits for violations of the federal minimum standards of the Act, while not providing such citizen suits based on state standards more stringent than federal regulations.\textsuperscript{113} The court reasoned that the text of RCRA requires a state's adopted program to "assure each solid waste management facility within such State . . . will comply with the [revised] criteria."\textsuperscript{114} Further, those federal criteria give the state standards legal effect under federal law.\textsuperscript{115}

\textsuperscript{111} See id. at 1482-83. Courts have traditionally recognized that the Eleventh Amendment bars an action if the state is the real, substantial party in interest. See id. at 1483 (citing Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945)). The Powder River Basin court evaded this concept by determining that the real, substantial party in interest depends on the type of relief plaintiffs sought. See Powder River Basin, 54 F.3d at 1483. "Suits that seek prospective relief are deemed to be suits against the official, while suits that seek retroactive relief are deemed to be suits against the state." Id. (citing Edelman v. Jordan, 415 U.S. 651, 664-66 (1964)). Thus, "[b]ecause plaintiff's request sought prospective, as opposed to retroactive, relief, the claim was not barred by the Eleventh Amendment." Id.

112. 130 F.3d 409 (9th Cir. 1997).

113. See id. at 411-12. Resource Conservation and Recovery Act [hereinafter RCRA] governs the management of hazardous and non-hazardous solid wastes. See id. at 410. In RCRA, Congress provided each state the opportunity to "adopt and implement a permit program or other system [that ensures compliance with the federal criteria.]" Id. (citing 42 U.S.C. § 6945(c)(1)(B) (2001)).

114. 42 U.S.C. § 6945(c)(1)(B) (1994); see also 42 U.S.C. § 6903(14) (1994) (providing additional example where federal regulations provide citizen suit even after EPA has approved state program).

115. See Powder River Basin, 130 F.3d at 411. EPA also notes its position that "the citizen suit provision of RCRA is available to all citizens whether or not a state is authorized" and that "any person, whether in an authorized or unauthorized State, may sue to enforce compliance with statutory and regulatory standards." Id. at 412 (citing 49 Fed. Reg. 48,300, 48,304 (Dec. 12, 1984) and 45 Fed. Reg. 85,016, 85,021 (Dec. 24, 1980)). There is considerable controversy as to whether RCRA citizen suits may be brought to enforce the provisions of state approved programs. See Glaser v. Am. Ecology Envtl. Serv. Corp., 894 F. Supp. 1029 (E.D. Tex. 1995) (finding that plaintiffs could enforce Texas' hazardous waste program by bringing citizen suit under RCRA); see also Murray v. Bath Iron Works Corp., 867 F. Supp. 33 (D. Me. 1994) (allowing citizen suit for violation of closure and post closure requirements of RCRA as violation of state authorized program); Sierra Club v. Chem. Handling Corp., 824 F. Supp. 195 (D. Colo. 1993) (holding citizen suit provision of RCRA could be used to enforce regulations promulgated under state's hazardous waste program); but see Clorox v. Chromium Corp., 158 F.R.D. 120 (N.D. Ill. 1994) (holding Illinois hazardous waste program superseded RCRA section providing for citizen suit against person alleged to be in violation of permit).
IV. Analysis

A. Narrative Analysis

In Bragg, the Court of Appeals for the Fourth Circuit found that under SMCRA's citizen suit provision, the Ex parte Young exception did not strip the state of Eleventh Amendment sovereign immunity and that actions by West Virginia did not constitute any waiver of such immunity. The court initially noted that the Supreme Court has strictly limited the application of the Ex parte Young doctrine and that proposed exceptions must entail more than "a reflexive reliance on an obvious fiction." To determine whether Ex parte Young applied in the present case, the Fourth Circuit analyzed the character of SMCRA and its status as either state or federal law.

The court began with an evaluation of the state and federal interests at stake, primarily relying on the legislative history, text, and construction of SMCRA. The court posited that Congress crafted SMCRA to advance state interests by creating the potential for exclusive regulatory jurisdiction. The court stated that "the federal interest would be better served by encouraging private citizens to enforce their claims relating to the State enforcement efforts in state, rather than federal, court."

The crux of the Fourth Circuit's argument rests on the notion that, in primacy states, SMCRA applies as state, not federal, law. In support of this motion, the court looked to the text and legislative intent behind the Act. "SMCRA was expressly designed to hand over to the States the task of enforcing minimum national standards for surface coal mining, providing only limited federal

117. Id. at 292-93 (citing Idaho v. Coeur D'Alene, 521 U.S. 261, 270 (1997)).
118. See id. at 293 (analyzing character of SMCRA).
119. See id. (noting that court must "evaluate the degree to which a State's sovereign interest would be adversely affected...as well as the extent to which federal, rather than State, law must be enforced to vindicate the federal interest.").
120. See id.
121. See Bragg, 248 F.3d at 295; see also 30 U.S.C. § 1201(f) (1994) (noting grant of primary responsibility for enforcing state program in light of "diversity in terrain, climate, biologic, chemical and other physical conditions.").
122. See Bragg, 248 F.3d at 295-96 (stating that injunction against state official to enforce § 1260 provisions involves state law given that state has exclusive regulatory jurisdiction).
123. See id. at 293-96 (reviewing statutory text and legislative history).
mechanisms to oversee State enforcement."\textsuperscript{124} In this respect, the court held that SMCRA cannot be accurately characterized as "cooperative federalism" analogous to the cooperative federalism scheme in the Clean Water Act.\textsuperscript{125}

Instead, SMCRA established a system of mutually exclusive jurisdictions where either federal or state law regulates surface coal mining activity, "but not both simultaneously."\textsuperscript{126} Once a state gains "primacy" status, that state acquires jurisdiction mutually exclusive of the federal government.\textsuperscript{127} Yet, the state does not automatically forfeit that mutually exclusive jurisdiction when failing to enforce the minimum national standards set forth by the federal SMCRA.\textsuperscript{128} Instead, the federal government maintains limited oversight in being able to review and revoke "primacy" status through an ordered procedure.\textsuperscript{129} Thus, SMCRA conditionally divests the federal government of direct regulatory and enforcement authority.\textsuperscript{130} Notably, the court found that, with the grant of exclusive jurisdiction, "Congress intended that the federal law establishing minimum national standards would 'drop out' as operative law," allowing state law to fill the gap.\textsuperscript{131}

Therefore, given its finding that SMCRA constitutes state law in primacy states, the Fourth Circuit found that the district court's injunction "was so abhorrent to the values underlying our federal structure as to fall outside the bounds of \textit{Ex parte Young}, and thus,

\textsuperscript{124} Id. at 293 (concluding federal interest better served through state enforcement).

\textsuperscript{125} See \textit{Bragg}, 248 F.3d at 293-94 (distinguishing SMCRA from CWA); \textit{but see Bragg}, 248 F.3d at 297 (citing United States Dep't of Energy v. Ohio, 503 U.S. 607, 625 (1992)) (noting that state law penalties under CWA did not "arise under federal law.").

\textsuperscript{126} See \textit{id}. at 293-94 (asserting character of implementation proposed by SMCRA).

\textsuperscript{127} See \textit{id}. (citing 30 U.S.C. § 1258(a) (1994)) (characterizing § 1283(a) as granting primacy states "exclusive jurisdiction over the regulation of surface coal mining . . . ").

\textsuperscript{128} See \textit{id}. at 289 (asserting that federal standards do not reengage until commencement of § 1271 proceeding).

\textsuperscript{129} See 30 U.S.C. § 1254(b)-(d) (1994) (setting out statutory procedure for revoking primacy status and federal agency's capability to review and revoke).

\textsuperscript{130} See \textit{Bragg}, 248 F.3d at 294-95 (stating that SMCRA only remains applicable on matters relating to good standing of state program).

\textsuperscript{131} Id. (citing \textit{Nat'l Wildlife Fed'n v. Lujan}, 928 F.2d 453, 464 n.1 (D.C. Cir. 1991) and \textit{Haydo v. Amerikohl Mining, Inc.}, 494, 498 (3d Cir. 1987) as authority). The court notes, however, that not all SMCRA provisions drop out. See \textit{id}. at 295-96. "The Act's structural provisions creating the facility through which the State can attain and can lose its primacy status remain directly operative." \textit{Id.}; \textit{see also} 30 U.S.C. § 1254(b)-(d) (1994) (setting out procedure by which federal agency can review and revoke state's implementation, regulation, and enforcement of minimum national standards).
that exception does not apply."\textsuperscript{132} Instead, the court found that \textit{Pennhurst} dictates that Eleventh Amendment sovereign immunity shields the state from suit in federal court.\textsuperscript{133} Having found dispositive the concept that state-approved SMCRA programs operate as state law, the \textit{Bragg} court did not address the argument raised under \textit{Seminole Tribe} regarding the possibility of a detailed remedial scheme as a further bar to the Eleventh Amendment.\textsuperscript{134}

The Fourth Circuit further concluded that West Virginia’s mere participation in SMCRA did not constitute a waiver of sovereign immunity.\textsuperscript{135} The court reiterated that any waiver of sovereign immunity must be “unmistakably clear and unequivocal.”\textsuperscript{136} Under SMCRA, Congress issued no “unequivocal” warning of any waiver.\textsuperscript{137} Instead, the citizen suit provision appears to preserve state sovereignty in limiting such suits “to the extent permitted by the [E]leventh [A]mendment to the Constitution.”\textsuperscript{138} Thus, West Virginia did not waive its Eleventh Amendment protection.\textsuperscript{139}

In conclusion, the Fourth Circuit held that the Eleventh Amendment bars SMCRA citizen suits in federal court given that SMCRA should be characterized as state law, that \textit{Pennhurst} dictates that a federal court lacks sufficient jurisdiction to enjoin a state officer to conform his or her conduct to state law, and that West Virginia did not waive that immunity.\textsuperscript{140}

\begin{enumerate}
\item \textsuperscript{132} \textit{Bragg}, 248 F.3d at 296-97 (finding \textit{Ex parte Young} exception simply unnecessary to “vindicate the supreme authority of federal law” in this context).
\item \textsuperscript{133} \textit{See id.} (finding that states maintain unique interest in enforcing state law against state officers as per \textit{Pennhurst} decision).
\item \textsuperscript{134} \textit{See id.} at 290 n.3 (stating “[b]ecause we dispose of this case on other grounds, we do not address this argument.”).
\item \textsuperscript{135} \textit{See id.} at 298 (addressing Bragg’s contention that participation in federal SMCRA constituted waiver of sovereign immunity).
\item \textsuperscript{136} \textit{Id.} at 298. “If Congress is not unmistakably clear and unequivocal in its intent to condition a gift or gratuity on a State’s waiver of its sovereign immunity, we cannot presume that a State, by accepting Congress’ [sic] proffer, knowingly and voluntarily assented to such condition.” \textit{Id.} (citing \textit{Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.}, 240 F.3d 279, 292 (4th Cir. 2001)).
\item \textsuperscript{137} \textit{See Bragg}, 248 F.3d at 298 (finding no clear indicia to put state on notice that participation in SMCRA would waive Eleventh Amendment protection).
\item \textsuperscript{138} \textit{Id.} at 298; \textit{see also} \textit{Burnette v. Carothers}, 192 F.3d 52, 57 (2d Cir. 1999) (noting similar intent to preserve state immunity under CWA, RCRA, and CERCLA).
\item \textsuperscript{139} \textit{See id.} at 298 (rejecting Bragg’s argument that West Virginia waived its sovereign immunity privilege).
\item \textsuperscript{140} \textit{See id.} at 293, 296, 298 (summarizing conclusions of court).
\end{enumerate}
B. Critical Analysis: Is SMCRA Federal or State Law?

The Fourth Circuit’s decision in Bragg contravenes a long list of precedent and the express language of SMCRA, characterizing the Act’s primary program as a mutually exclusive state, rather than federal, law.141 Instead, the language and cases suggest that a citizen suit against West Virginia’s approved program escapes sovereign immunity challenges through Ex parte Young and can be brought in federal court under section 1270(a)(2).142

To begin, the express language and legislative history of SMCRA confirm that federally-approved provisions of state programs arise under federal law.143 Section 1270(a)(2) authorizes citizen suits “against the Secretary or the appropriate State regulatory authority” in the event of a failure to enforce “any act or duty under this chapter.”144 If the Fourth Circuit was correct in that the federal minimum standards “drop out” and that SMCRA is a mutually exclusive state law, then section 1270(a)(2) would only apply against OSM.145 Under the court’s interpretation of SMCRA as state law, state regulators could never be sued in a federal citizen suit after program approval.146 “If Congress had intended this result, it would have referred only to the ‘Secretary’ in [section] 1270(a)(2), rather than to the ‘Secretary or the appropriate State regulatory authority.’”147 Furthermore, the Bragg court provided no basis for discerning state actions that constitute a violation of section 1270(a)(2) under an approved state program from those actions that do not.148

Additionally, section 1260(b) requires permits to comply with “all the requirements of this chapter and the State or Federal pro-

142. See id. (reviewing precedent).
145. See Brief of Amici Curiae, supra note 142, at 98.
146. See id. (noting impact of allowing Eleventh Amendment to bar federal citizen suits).
147. Id. (citing inconsistency between express language of § 1270(a)(2) and Fourth Circuit’s finding that citizen suits against West Virginia may not be brought in federal court).
148. See id. (highlighting inconsistency).
gram.”149 To obtain state program approval, section 1253(a) requires state programs to have state law and state rules and regulations consistent with the requirements of the federal SMCRA.150 Further, section 1255(a) provides that the state law shall not be superseded “except insofar as such State law or regulation is inconsistent with the provisions of this chapter.”151 Thus, SMCRA’s plain language suggests that the West Virginia state program must, at a minimum, comply with the provisions of the federal Act.152 This language directly challenges the Fourth Circuit’s finding that the federal minimum standards “drop out” upon the OSM’s adoption of the state program.153

The legislative history also challenges this notion that the federal minimum standards “drop out.”154 Indeed, during Congressional consideration of SMCRA, “Congress twice rejected a states’ rights amendment that would have allowed states with comparable laws to ‘opt out and run their own program.’”155

Furthermore, the Fourth Circuit’s decision ignored a wealth of judicial precedent supporting the contention that those explicit SMCRA provisions require the state regulatory authority to adhere to the federal minimum standards, rather than “drop out.”156 In Canestraro, the West Virginia Supreme Court of Appeals held that a

151. 30 U.S.C. § 1255(a) (1994) (providing evidence that federal guidelines remain operative as minimum level of acceptable state enforcement).
152. For additional examples of SMCRA provisions that suggest a requirement of compliance with minimum federal standards, see 30 U.S.C. § 1265(b) (1994) (stating that “[g]eneral performance standards shall . . . require the operation as a minimum.”) (emphasis added). See also 30 U.S.C. § 1291(26) (1994) (defining “State regulatory authority” as “the department or agency in each state which has primary responsibility at the State level for administering this chapter”) (emphasis added); 30 U.S.C. § 1291(22) (1994) (defining “regulatory authority” to mean “the State regulatory authority where the State is administering the chapter under an approved state program”) (emphasis added); 30 U.S.C. § 1291(25) (1994) (defining “state program” as “program established . . . in accord with the requirements of this chapter and regulations issued by the Secretary pursuant to this Act.”) (emphasis added).
153. See Bragg v. W. Va. Mining Ass’n, 248 F.3d 275, 295 (4th Cir. 2001) (stating that “Congress intended that [ ] federal law establishing minimum national standards would ‘drop out’ as operative law . . . .”).
154. See Brief of Amici Curiae, supra note 142, at 89. The very reason for the enactment of federal surface mining law was inadequate state regulation in this area. See id.
155. Id. at 90 (citing 123 Cong. Rec. 15581-90 (1977) (Sen. Danforth) and 121 Cong. Rec. 6185-87 (1975)).
156. See Bragg, 248 F.3d at 295 (relying on Lujan and Haydo for support).
“less restrictive state provision must yield to the more stringent federal provision notwithstanding the administrative approval of the state law by OSM.”\(^{157}\) The court further noted that “[t]he state program need not be identical to the federal program, as long as its provisions are at least as stringent as those provided for in the federal act.”\(^{158}\) Thus, \textit{Canestraro} indicates that West Virginia recognizes the supremacy and preemption of federal SMCRA provisions over state-approved program provisions.

Similarly, in \textit{Hodel}, the Supreme Court upheld SMCRA as constitutional, noting that the Act “prescribes federal minimum standards governing surface coal mining, which a State may either implement itself or else yield to a federally administered program.”\(^{159}\) The Court also found that SMCRA establishes a cooperative federalism scheme with the states as regulatory enforcers, within the limits established by those federal minimum standards.\(^{160}\) In addition, the \textit{Hodel} Court noted that it “fail[s] to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.”\(^{161}\) Thus, the Supreme Court, in \textit{Hodel}, endorsed the notion that federal minimum standards remain operative despite a state’s primacy status.\(^{162}\)

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157. \textit{Canestraro} \textit{v. Faerber}, 374 S.E.2d 319, 321 (W. Va. 1988); \textit{see also} Trustee for Alaska \textit{v. Comm'r}, 835 P.2d 1239 (Alaska 1992) (holding that Alaska SMCRA statute is superseded only where inconsistent with federal statute); DK Excavating \textit{v. Miano}, 549 S.E.2d 280, 284 (W. Va. 2001) (noting that Congress made clear from date of SMCRA’s enactment, any state regulation in effect or subsequently enacted would be preempted where state laws are inconsistent with provisions of SMCRA, unless state laws provide for regulation more stringent than that required by SMCRA).

158. \textit{Canestraro}, 374 S.E.2d at 320. The \textit{Canestraro} case pointed to a conflict between the state and federal acts as to the required location for filing a permit. \textit{See id.} The federal SMCRA requires that the permit application be filed “with the recorder at the courthouse of the county where the mining is proposed to occur.” 30 U.S.C. § 1257(e) (1994). Conversely, the state SMCRA only requires that a copy of the permit application be filed “in the nearest office” of the department of energy. W. Va. Code § 22-3-9(c) (1985).


160. \textit{See id.} at 289 (finding that SMCRA’s cooperative federalism character resembles other environmental statutes that have survived Tenth Amendment challenge).

161. \textit{Id.} at 290 (emphasis added) (stating that Congress could have enacted statute that preempts state surface law).

162. \textit{See Brief of Amici Curiae, supra} note 142, at 87; \textit{see also} \textit{Powder River Basin Res. Council} \textit{v. Babbitt}, 54 F.3d 1477, 1483 (10th Cir. 1995) (holding that Eleventh Amendment does not bar citizen suit against state official of Wyoming under SMCRA); United States \textit{v. MacDonald} & \textit{Watson Waste Oil Co.}, 933 F.2d 35, 43-45 (1st
Further, the Fourth Circuit in *Bragg* inappropriately relied on *Lujan* and *Haydo* in support of its determination that those federal minimum standards “drop out.”\(^{163}\) *Lujan*, however, lacks persuasive authority because that view comes from the sole concurrence, not endorsed by the other circuit judges.\(^{164}\) Instead, the *Lujan* majority reversed the invalidation of the challenged regulations because the state law limitation promulgated by the Secretary of the Interior was based on a reasonable interpretation of SMCRA and was neither arbitrary nor capricious.\(^{165}\)

Also, the Fourth Circuit, in *Bragg*, inappropriately relied on the *Haydo* decision in light of the Fourth Circuit’s *Molinary* decision.\(^{166}\) Similar to the fact scenario presented in *Molinary*, the plaintiffs in *Haydo* sued to recover damages from a private defendant.\(^{167}\) The Fourth Circuit’s *Molinary* decision is directly at odds with *Haydo* in its interpretation of an individual’s ability to bring a citizen suit recovery action against a private individual.\(^{168}\) Indeed, *Molinary* ex-

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164. *See Lujan*, 928 F.2d at 455. Circuit Judges Wald, Buckley and Sentelle joined for the opinion of the court, while only Judge Wald filed the partial concurrence. *See id.* None of the judges filed a dissent and Judge Wald’s concurrence was not crucial in deciding the court’s ultimate holding. *See id.*

165. *See id.* at 456 (citing *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)) (relying on standards Supreme Court imposed in *Chevron* and deferring to Secretary’s judgment unless unreasonable or arbitrary and capricious).

166. *See Bragg*, 248 F.3d at 295 (discussing how, under *Haydo*, West Virginia’s status as primary state prevents federal provisions establishing minimum national standards from directly operating on state). For further discussion of the *Molinary* decision, *see supra* notes 101-04 and accompanying text.

167. *See Haydo*, 830 F.2d at 495. In *Haydo*, property owners brought suit against Amerikohl Mining under § 1270(f) to recover for damage caused to their well. *See id.* Likewise, in *Molinary*, the plaintiffs brought suit under § 1270(f) to recover damages caused by the Powell Mountain Coal Company’s failure to comply with Virginia permit regulations. *See Molinary v. Powell Mountain Coal Co.*, 125 F.3d 231, 233 (4th Cir. 1997). Section 1270(f) provides that “[a]ny person who is injured in his person or property through violation by any operator of any rule, regulation, order, or permit issued pursuant to [SMCRA] may bring an action for damages . . . .” 30 U.S.C. § 1270(f) (1994).

168. *See Haydo*, 830 F.2d at 496. The *Haydo* court determined that § 1270(f) “does not provide for an action against individual defendants for violations of the act itself.” *Id.* In contrast, *Molinary* concluded that § 1270(f) provides a federal cause of action for recovery of damages resulting from violation of state regulations. *See Molinary*, 125 F.3d at 232.
plicitly rejected the *Haydo* decision, stating that "*Haydo* ignores the fact that the word 'exclusive' . . . modifies the phrase 'regulatory jurisdiction,' and nothing more."\(^{169}\) The *Bragg* court, however, found that exclusive regulatory jurisdiction fails to encompass exclusive adjudicatory jurisdiction.\(^{170}\) Thus, the *Bragg* decision departs from the earlier Fourth Circuit ruling as well as the wealth of other precedent.

Moreover, despite dismissing the claimant's citizen suit against a private individual, the language in *Haydo* supports bringing citizen suits in federal court against state and federal officials.\(^{171}\) Notably, *Haydo* recognizes that "citizen suits against state and federal governmental defendants may be predicated directly upon violations of the provisions of [ ] SMCRA."\(^{172}\) The court further noted that "[t]he principal purpose of the citizen suit provision was to provide 'a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the act.'"\(^{173}\)

Critics argue that previous precedent suggests a more reasonable interpretation of SMCRA's cooperative federalism - the state enacting and enforcing the federal law.\(^{174}\) *In re Permanent Surface Mining Regulation Litigation* suggests that the Secretary and the public, "which is given the right to sue in federal court," share oversight function to compel compliance with the state program.\(^{175}\) This wording supports the role of states under SMCRA as "'deputized' federal regulators."\(^{176}\)

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170. See id. at 236 (stating "[c]ommon sense dictates that a government's acts in regulating a subject are distinctly different than its acts in adjudicating a party's rights related to the subject.").

171. See *Haydo*, 830 F.2d at 496-97 (finding SMCRA does not provide for concurrent jurisdiction shared between state and federal agencies).

172. Id. at 496. "[SMCRA §] 520 does not provide for an action against individual defendants for violations of the act itself." *Id.*

173. *Id.* at 497 (citing legislative history).

174. See Brief of Amici Curiae, *supra* note 142, at 88 (arguing that if state elects to participate as "state regulatory authority," SMCRA requires state officials to comply with both minimum requirements of Act and provisions of federally-approved state program).

175. *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 516, 518-19 (D.C. Cir. 1981) (finding that SMCRA gives Secretary power to enact minimum information requirements for permit applications submitted to state regulatory agencies).

176. See MCI Telecomm. Corp. v. Illinois Bell Tel. Co., 222 F.3d 329, 344 (7th Cir. 2000) (stating that, under Telecommunications Act, Congress offered states role as "deputized" federal regulator in exchange for submission to federal jurisdiction to review their actions).
In conclusion, the express language of SMCRA, the relevant legislative history and a dearth of precedent all suggest that federal minimum standards do not "drop out" as suggested by the Fourth Circuit and that the federal district court can be the proper jurisdiction for a citizen suit action. Finally, the Fourth Circuit, in Bragg, inappropriately relied on judicial precedent suggesting that those federal minimum standards "drop out." Thus, rather than the Pennhurst doctrine, the Ex parte Young exception applies, allowing state citizens to sue their own state for prospective injunctive relief.

V. IMPACT

The recent Bragg decision threatens to level the effectiveness of citizen suit provisions in SMCRA as well as many other environmental statutes.177 As previously mentioned, most environmental statutes enacted by Congress since the 1970s follow a scheme similar to that under SMCRA.178 Congress designed SMCRA as a cooperative federalism enterprise that allows states the option to enact and enforce a state program pursuant to the federal environmental regulation, yet reserves individual citizens the opportunity to seek to enjoin a state official from taking any future actions incongruent with the federal program.179 The Bragg decision would allow regulations under those state programs to operate solely as state law given that the federal regulations "drop out."180 Thus, state courts would serve as the appropriate and exclusive jurisdiction.181 In this manner, Bragg goes beyond Seminole Tribe in preventing citizen suits in federal court.182

The National Resources Defense Council (NRDC) charges that this decision and others like it will lead to a "race to the bottom" by states to relax environmental standards to attract business.183

177. See Buccino et al., supra note 13, at 15-17. The Bragg decision leaves citizens "powerless to hold states accountable for violating federal statutory rights . . . ." Id. at 15.
178. See Reynolds, supra note 43, at 78.
179. For a further discussion on cooperative federalism aspects of SMCRA, see supra notes 32-46 and accompanying text.
180. See Bragg v. W. Va. Mining Ass'n, 248 F.3d 275, 295 (4th Cir. 2001) (asserting that Congress intended federal law establishing minimum standards would "drop out" as operative law).
181. See id.
182. See id. Indeed, under the Bragg decision, the court did not need to consider the possibility of a detailed remedial scheme as per Seminole Tribe because of its determination that regulations of state approved SMCRA programs constitute state law. See id.
NRDC makes this assertion in light of past state failures at environmental protection.\textsuperscript{184} The group notes that “[i]t was the failure of the states to deliver clean air and water to their citizens that led to the passage of federal environmental legislation in the 1970’s.”\textsuperscript{185} Thus, this “activist ruling” will undoubtedly lead to innumerable victims and a degradation of national environmental policy.\textsuperscript{186}

Indeed, the Bragg decision has already affected suits against West Virginia’s bonding program under SMCRA in West Virginia Highlands Conservancy \textit{v.} Norton, even though plaintiffs and defendants both agreed that the bonding program violated federal law for over a decade.\textsuperscript{187} Even the Secretary of West Virginia’s Department of Environmental Protection, Michael Callaghan, testified that the bond program is “absolutely insufficient,” “woefully underfunded” and “woefully inadequate.”\textsuperscript{188} The impact on the effectiveness of West Virginia’s SMCRA program has been devastating.\textsuperscript{189} Nonetheless, the district court was bound by the Fourth Circuit’s \textit{Bragg} decision and must accept the conclusion that the Eleventh Amendment bars the suit because the West Virginia program operates as state law.\textsuperscript{190} Thus, \textit{Bragg} has already begun to preclude citizens from en-

\textsuperscript{184} See \textit{id.} (noting reliance on state authority for protection of environment has failed).

\textsuperscript{185} \textit{Id.} (alleging ineffectiveness of state courts in past to remedy environmental problems).

\textsuperscript{186} See \textit{id.} NRDC posits that such degradation of federal statutory rights has already caused problems for the Fair Labor Standards Act and the Americans with Disabilities Act. See \textit{id.} at 15 nn.85 \& 86 (citing Alden \textit{v.} Maine, 527 U.S. 706 (1999) and Univ. of Ala. \textit{v.} Garrett, 531 U.S. 356 (2001)).

\textsuperscript{187} W. Va. Highlands Conservancy \textit{v.} Norton, 147 F. Supp. 2d 474, 477-78 (S.D. W. Va. 2001) (holding that Eleventh Amendment barred SMCRA citizen suit, alleging that West Virginia’s alternative bonding program for surface mine reclamation bonds was inadequate to meet minimum requirements of SMCRA).

\textsuperscript{188} \textit{Id.} at 476 (noting DEP Secretary’s agreement that state bonding requirement operates as “system set up to fail.”). According to Callaghan, current costs for unclaimed mine sites falling under SMCRA amount to approximately $60,000,000 per year, while the special reclamation fund only has $12,000,000. See \textit{id.} The fund is basically insolvent. See \textit{id.}

\textsuperscript{189} \textit{Id.}

DEP figures show [245] past bond forfeitures in the state. Eighty-eight of those forfeiture sites require water treatment, forty are ‘urgent.’ Currently, DEP is able to treat five of them. Due to inadequate funding, the remaining eighty-three mine sites are in continuous violation of effluent water pollution limits.

\textit{Id.}

\textsuperscript{190} \textit{See id.} at 480-81 (noting district court’s reluctance in following \textit{Bragg} decision given text of SMCRA and other precedent). Chief Judge Haden, who also presided over the \textit{Bragg} case at the district level, submits that “as a faithful servant
forcing federal environmental law even in light of a state’s complete failure to enforce its own program.\textsuperscript{191}

In conclusion, the \textit{Bragg} decision contravenes a long list of precedent, a plain reading of the text and the legislative intent of Congress.\textsuperscript{192} The impact of the decision may threaten to degrade the effectiveness of SMCRA and other environmental statutes.\textsuperscript{193} Such a result will upset the delicate balance between federal and state authorities sought under SMCRA and lead to a "race to the bottom" by states to relax environmental standards.\textsuperscript{194}

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\textsuperscript{191} of the law, [he] must apply strictly the law as proclaimed by the superior tribunal." See \textit{id.} at 481 n.9.

191. \textit{See id.} at 481 (finding that West Virginia clearly violated SMCRA bond requirement).

192. For a further discussion on the legislative history and precedent surrounding SMCRA citizen suits, \textit{see supra} notes 141-76 and accompanying text.

193. For a further discussion on the impact of this decision, \textit{see supra} notes 177-94 and accompanying text.

194. For a further discussion on the potential "race to the bottom," \textit{see supra} note 182 and accompanying text.