

# **ENVIRONMENTAL ENFORCEMENT AND THE LIMITS OF COOPERATIVE FEDERALISM: WILL COURTS ALLOW CITIZEN SUITS TO PICK UP THE SLACK?**

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## INTRODUCTION

Using its expansive power to regulate interstate commerce, Congress has enacted numerous environmental laws since the 1970s.<sup>1</sup> These major statutes include the Clean Water Act (CWA), the Clean Air Act (CAA), and the Surface Mining Control and Reclamation Act (SMCRA), each of which established national standards for environmental protection for the first time ever.<sup>2</sup> These laws establish national requirements for the discharge of pollutants into navigable waterways; set standards for the construction of new coal-fired power plants; and require coal mining companies to properly clean up

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1. The Supreme Court has said that although Congress' authority to regulate comes from the Commerce Clause, environmental statutes "offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 167 (1992).

2. For simplicity, this article will principally reference these three major statutes, although the enforcement mechanisms and citizen suit provisions in most federal environmental laws are similar.

abandoned mine sites.<sup>3</sup> They ensure that uniform standards for pollution control are in place throughout the country.<sup>4</sup>

These statutes were revolutionary not only because they recognized a federal role in environmental protection for the first time ever, but also because of the enforcement mechanisms they established. First, these laws envision a structure of “cooperative federalism” whereby the federal government and the states share in the regulatory and enforcement burden.<sup>5</sup> Under this cooperative approach, states may draft and implement their own programs to comply with the laws and consequently must share enforcement obligations with the federal government.<sup>6</sup>

Second, while Congress intended federal and state agencies to hold primary enforcement responsibilities, legislators also included provisions allowing private citizens to enforce the laws when the government was unwilling or unable to do so. These so-called “citizen suit” provisions, included in every major environmental law, allow “citizen attorneys general” to sue violators in federal court.<sup>7</sup> Congress intended citizen suits to supplement government action, to make up the balance of necessary enforcement at times when underfunded or over-worked agencies could not ensure that all laws are complied with.<sup>8</sup>

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3. Surface Mining Control and Reclamation Act of 1977 (SMCRA) § 102(f), 30 U.S.C. § 1202(f) (2006); Clean Water Act (CWA) § 101(a)(1), 33 U.S.C. § 1251(a) (2006); Clean Air Act (CAA) § 111, 42 U.S.C. § 7401 (2006).

4. *Id.*

5. *See infra* Part I.A.

6. Federal regulations establish national standards, but individual states (or Indian tribes) may implement their own programs and gain the primary authority and responsibility to enforce the law. For example, to date 46 states have CWA implementation programs that have been approved by the federal EPA. *See* U.S. Env'tl. Prot. Agency, NPDES State Program Status, <http://cfpub.epa.gov/npdes/statestats.cfm> (last visited Nov. 8, 2009).

7. All federal environmental statutes, with the exception of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), contain citizen suit provisions. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619 (2006); SMCRA, 30 U.S.C. § 1270 (2006); CWA, 33 U.S.C. § 1365 (2006); Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(1) (2006); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (2006); Noise Control Act of 1972, 42 U.S.C. § 4911 (2006); Energy Policy and Conservation Act, 42 U.S.C. § 6305 (2006); Solid Waste Disposal Act, 42 U.S.C. § 6972 (2006); CAA, 42 U.S.C. § 7604 (2006); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9659 (2006); Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435 (2006); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11046(a)(1) (2006); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (2006).

8. Congress intended citizen suits to supplement agency enforcement, to “protect against the omnipresent danger of a state shirking its enforcement responsibilities.” *Student Pub. Interest Research Group v. AT&T Bell Labs.*, 617 F. Supp. 1190, 1198 (D.N.J. 1985).

Indeed, today is just such a time. The cooperative framework, which presupposes diligent and uniform state regulation, has broken down. State and federal enforcement budgets are being slashed, reducing government oversight and potentially allowing more violations of law to go unpunished.<sup>9</sup> Moreover, political considerations—including interstate competition and pressure from industry to minimize regulation—threaten to further compromise the states' ability to enforce the laws. As government enforcement becomes increasingly less reliable, citizen enforcement of environmental law is more necessary than ever.

But as this article explains, citizen enforcement is increasingly difficult. Citizen litigants face mounting legal obstacles that impede their access to the courts, potentially depriving them of their important role as private attorneys general. For example, recent Eleventh Amendment jurisprudence threatens to prohibit citizens groups from suing state officials for their failure to enforce state environmental implementation plans.<sup>10</sup> The Supreme Court's standing jurisprudence, moreover, restricts many meritorious claims from reaching federal court.<sup>11</sup>

The goal of this article is to answer several questions, the fundamental question being: in an era when state and federal government enforcement of the laws is increasingly unreliable, will citizen suits be able to pick up the slack? That is, will citizen enforcement of environmental law be able to adequately complement and supplement government enforcement, as Congress intended, so that all laws are complied with? And to this end, what legal and legislative changes can be made to ensure that citizen suits can fully compensate for any decreases in government action?

To answer these questions, Part I of this article begins with a brief and unprejudiced overview of cooperative federalism, the enforcement regime envisioned by Congress whereby the federal government, states, and citizens share responsibility to ensure compliance with the laws. This part concludes with a discussion of the structure and legislative history of the Clean Air Act's citizen suit

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9. See Part II for examples of how reductions in agency enforcement funding at the state and federal level are already affecting the enforcement of environmental laws.

10. See *infra* Part III.C.

11. See *infra* Part III.B.

provision as evidence that Congress intended citizen action to form the “essential backbone” of environmental protection.<sup>12</sup>

In Part II, we examine the disadvantages of cooperative federalism, providing a sharp critique of the decentralized regulatory model. A decentralized approach to environmental protection, we argue, cannot fully enforce environmental laws. We discuss the inherent flaws in a decentralized enforcement model and also reference current challenges that inhibit vigorous state and federal enforcement. For example, budget shortfalls and political resistance to regulation in individual states result in disparate enforcement of national environmental standards. The problems we outline in this section reinforce our argument that citizen suits are essential to ensure compliance with environmental laws.

Building on the importance of active and vigilant citizen attorneys general, Part III explains the obstacles standing in the way of these potential public interest litigants. We attempt to “shine the light” on several emerging court-created barriers that currently prevent or discourage citizen enforcement of environmental law. First, this part illustrates how recent Eleventh Amendment and standing jurisprudence has precluded citizen suits and will continue to do so unless addressed. Next this part describes how the judicial interpretation of “diligent prosecution” and fee shifting provisions discourages and impedes citizen action.

Finally, Part IV proposes relatively simple legislative changes as a way to maximize the public’s ability to enforce environmental laws by reducing the court-created barriers and disincentives to citizen action. We suggest a comprehensive legislative solution—the enactment of an “Omnibus Environmental Enforcement Act”—as a means to facilitate public enforcement of environmental laws. The draft legislation that we propose has several goals. Among other things, it 1) addresses citizen standing by creating a new standing paradigm for environmental plaintiffs, one allowing them to act as true “citizen attorneys general”; 2) modifies statutory language to ensure that only plaintiffs, and not defendants, may recover attorneys’ fees following a suit; 3) clarifies the federal nature of state regulations pursuant to federal laws, thus ensuring that the Eleventh Amendment does not immunize state officials from citizen suits; and

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12. George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. 10028, 10028 (1999).

4) reaffirms whom Congress intended to be eligible to recover litigation costs following a citizen suit.

As this article seeks to explain, today it is critically important for citizens to be able to fully exercise their role as private enforcers of environmental law. Congress has the power, and we believe the responsibility, to eliminate the obstacles and disincentives that prevent citizen plaintiffs from supplementing government enforcement. The modest legislative changes we propose could ensure that citizens have easier access to the courts, as Congress originally intended, and that environmental statutes do not go unenforced.

### I. ENFORCING ENVIRONMENTAL LAW

As one senator has stated, without effective enforcement, environmental protection “lacks meaning, lacks truth, lacks reality.”<sup>13</sup> Indeed, environmental statutes are only effective to the extent that they are enforced. Any standard set by statute or regulation, if not enforced, acts merely as a recommendation. To facilitate the massive task of ensuring compliance with environmental laws, Congress created a parallel enforcement regime consisting of both agency and citizen enforcement.<sup>14</sup> Congress hoped that citizen suits would supplement government action at times when a lack of resources or political considerations would prevent agencies from detecting violations or enforcing the law.<sup>15</sup> In fact, citizen suit provisions have been called “sustenance to a starving agency”<sup>16</sup> and the “essential backbone” of environmental regulation.<sup>17</sup>

Congress intended that environmental laws would be enforced through a dual regime consisting of both government and citizen enforcement.<sup>18</sup> This part will explain these two components and the

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13. *Senate Committee on Environment and Public Works, Oversight of the Environmental Protection Agency's Enforcement Program: Hearings before the Subcomm. on Toxic Substances, Environmental Oversight, Research and Development*, 101st Cong. 1<sup>st</sup> Sess. S. Hrg. 101-503, Nov. 15, 1989, at 2 (statement of Sen. Joseph I. Lieberman).

14. *See infra* Part I.A.

15. For a discussion of congressional intent regarding citizen suits, *see infra* Part I.C.

16. Mark Seidenfeld & Janna Satz Nugent, *The Friendship of the People: Citizen Participation in Environmental Enforcement*, 73 GEO. WASH. L. REV. 269, 283 (2005).

17. Van Cleve, *supra* note 12, at 10028.

18. For simplicity, this article classifies the methods of enforcement of environmental laws into broad categories: government enforcement and citizen enforcement. The category of government enforcement includes agency actions such as notices of violations, penalties and fines, and actual criminal prosecution by state agencies and U.S. attorneys. Citizen enforcement simply means powers exercised under citizen suit provisions.

theories supporting each, first by discussing the cooperative federalist approach to regulation and enforcement, and later by examining the structure and purpose of citizen suit provisions.

*A. Government Enforcement: “Cooperative Federalism”*

The major environmental statutes are, of course, federal laws, but the states are primarily responsible for implementing and enforcing them. The goal of the CAA is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare.”<sup>19</sup> The statute gives states the primary responsibility to carry out the act through state implementation plans, while the federal government’s role is to preserve the states’ ability to do so.<sup>20</sup> Federal statutes such as the CAA set minimum requirements, and state agencies are allowed to develop implementation plans—consistent with federal objectives and subject to federal approval—to carry out the goals of the statute.<sup>21</sup> A federal agency, such as the Environmental Protection Agency (EPA), will be in charge of approving state programs and must monitor the programs for continued compliance.<sup>22</sup>

This arrangement is called “cooperative federalism.”<sup>23</sup> Prior to 1970, environmental concerns could only be addressed through private tort actions or individual state laws, which were often weak or non-existent.<sup>24</sup> In the 1970s, Congress decided to try the cooperative approach to environmental enforcement, not only to add enforcement options, but also to remedy the “race to the bottom” in state environmental regulation.<sup>25</sup> The cooperative approach is also

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19. CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1) (2006).

20. *Id.* at § 101(a). In the CWA, moreover, Congress expresses its intent to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.” CWA § 101(b), 33 U.S.C. § 1251(b) (2006).

21. *See, e.g.*, CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1) (2006) (the Administrator to approve state plans that “provid[e] for implementation, maintenance, and enforcement of such primary standard in each air quality control region.”).

22. *Id.*; 42 U.S.C. § 7413(a) (2006).

23. Robert Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L. J., 179, 183 (2006).

24. *See* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 600 (1996) (“Until quite recently, the harms that accrued from air and water pollution were addressed . . . through the most decentralized of control mechanisms: nuisance law.”).

25. A “race to the bottom” refers to competition between states for business, which can lead to weakening environmental regulations. “[M]embers of Congress repeatedly stated their belief that the states had failed to adopt effective air pollution programs because they were engaged in a ‘race-to-the-bottom.’ States that were eager to attract and keep economic development purportedly competed against each other by relaxing environmental regulations

intended to streamline the administrative process, spread the burden of enforcement, and allow states more autonomy to customize their implementation plans—all without compromising the goals of the statute.<sup>26</sup> States with approved programs are generally authorized to issue permits, assess penalties, bring civil actions against violators, and negotiate settlements between parties.<sup>27</sup>

However, cooperative federalism also means that, after it approves a state program, the federal agency with jurisdiction has much less of a role in overseeing compliance. Although the federal government retains the authority to prosecute violations—or “federalize”<sup>28</sup> a program—state agencies are largely responsible for enforcement, usually with little oversight from federal agencies.<sup>29</sup>

As Part II will discuss, the cooperative federalist approach can be described as a “double edged sword.”<sup>30</sup> While a decentralized model that relies on state enforcement may seem efficient, there are significant disadvantages. For example, when states become primarily responsible for carrying out the laws, budget cuts, political considerations, and interstate competition affect the zealotry of regulation and can lead to disparate enforcement of laws. And the federal government has proven unable to fully make up the difference when state enforcement fails.

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below some optimal level.” Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 737 (2006).

26. By allowing states to implement and enforce federal programs, the cooperative approach allows states to draw upon the expertise of state agencies and knowledge of local conditions. However, delegated state programs are always subject to federal oversight to ensure that they comply with federal standards. See e.g., CAA § 124(a), § 7424 “Assurance of adequacy of State plans.”

27. For example, State Implementation Plans (“SIPs”) under the Clean Air Act. CAA § 110.

28. We use the term “federalization” to refer to the federal government’s authority to withdraw approval of a state program and institute a federal program in its place.

29. Three-fourths of environmental regulatory programs have been delegated to state agencies, and states undertake a vast majority of the enforcement. David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 32 (2000) (“State predominance is the norm in the enforcement realm . . . . States conduct roughly ninety percent of the inspections in this country, and, according to leading state officials, they bring approximately eighty to ninety percent of all enforcement actions.”).

30. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authorization Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1574 (1995).

### 1. Cooperative Federalism in Action: Ohio's SMCRA Regulations

The state of Ohio's laws and regulations implementing the Surface Mining Control and Reclamation Act (SMCRA)<sup>31</sup> provide a timely example of the purposes, advantages, and disadvantages of a cooperative approach to environmental regulation and enforcement.<sup>32</sup>

With the passage of SMCRA in 1977, Congress set federal standards for the regulation of surface coal mining operations as well as standards for the reclamation—the cleanup and rehabilitation—of abandoned mine lands.<sup>33</sup> SMCRA prompted the creation of a new federal agency, the Office of Surface Mining and Reclamation Enforcement (OSM), within the Department of the Interior.<sup>34</sup> OSM is charged with enforcing SMCRA and overseeing state approved programs.<sup>35</sup>

### 2. Delegation of Primary Enforcement Obligations

SMCRA allows coal-producing states to draft and submit their own implementation plans for approval by OSM.<sup>36</sup> To gain approval of its program, a coal-producing state must demonstrate that it “has the capability of carrying out the provisions” of SMCRA.<sup>37</sup> Among other requirements, a state program must provide sanctions for violations of surface mining laws; demonstrate sufficient administrative and technical personnel and funding to regulate coal mining; institute a permit system in conformity with federal law; and establish procedures for the designation of certain areas as “unsuitable for surface coal mining.”<sup>38</sup>

Ohio's regulatory program was approved by OSM in 1982 and is codified in section 1513 of the Ohio Revised Code. Ohio's implementation plan thus gained “primacy,” and Ohio's Department of Natural Resources was given jurisdiction over the state's surface mining program. Today, Ohio is one of the many coal-producing

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31. Ohio's implementation SMCRA is found in Ohio Revised Code Chapter 1513.

32. In Part II, we will again use Ohio's SMCRA implementing program to provide evidence of the disadvantages of the cooperative approach to regulation and enforcement.

33. SMCRA(SMCRA) of 1977 § 102, 30 U.S.C. § 1202 (2006).

34. *Id.* at § 201(a), § 1211(a).

35. *Id.* at § 201(c), § 1211(c).

36. *Id.* at § 503(a), § 1253(a).

37. *Id.*

38. *Id.*

states with approved programs implementing the requirements of SMCRA.<sup>39</sup>

### 3. The State-Federal Interface

A key feature of cooperative federalism, however, is the continuing oversight exercised by the federal agency with jurisdiction. OSM reviews various aspects of Ohio's program and its regulation of mining operations, including the adequacy of the state's staff.<sup>40</sup> If any part of a state program fails to meet federal standards, OSM has the authority to propose rulemaking or legislative changes to address the problem.<sup>41</sup> OSM also retains the authority to "federalize"—or retake—Ohio's program at any time if it fails to carry out its statutory obligations.<sup>42</sup> As we describe in Part II, however, federalization of a state program is an option that is rarely used.<sup>43</sup>

#### *B. Citizen Suit Provisions: Structure & Purpose*

To complement the federalist approach to government enforcement, Congress included citizen suit provisions in almost every major environmental law.<sup>44</sup> These provisions allow private plaintiffs to seek injunctions or recover damages from violators of environmental laws.<sup>45</sup> Citizen suits were included—after significant deliberation and debate among legislators—because Congress knew that despite the cooperative federalist regulatory scheme, government would never be fully able to enforce the law. Congress knew that effective enforcement of environmental law would require

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39. Of the 26 coal-producing states, only Tennessee and Washington have federally administered SMCRA programs. These states are called "Federal Program States." Office of Surface Mining and Reclamation Enforcement, Annual Evaluation Reports of States and Tribes, <http://www.osmre.gov/Reports/EvalInfo/EvalInfo.shtm> (last visited Dec. 30, 2009).

40. See Office of Surface Mining and Reclamation Enforcement, OSM Annual Evaluation and Summary Report (2008), <http://www.osmre.gov/Reports/EvalInfo/2008/OH08-aml-reg.pdf> (last visited Dec. 30, 2009).

41. See SMCRA § 504(b), 30 U.S.C. § 1254(b) (2006).

42. "In the event that a State has a State program for surface coal mining, and is not enforcing any part of such program, the Secretary may provide for the Federal enforcement . . . of that part of the State program not being enforced by such State. *Id.*

43. See *infra* Part II.C.1.

44. See *supra* note 7, for a list of laws with citizen suit provisions.

45. Importantly, plaintiffs may not personally recover money damages. "Any benefit from the lawsuit, whether injunctive or monetary, inures to the public or to the United States." *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 449 (D. Md.1985).

government to have, as two scholars have described it, the “friendship of the people.”<sup>46</sup>

### 1. Text & Structure

As the Supreme Court has written, “There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”<sup>47</sup> It is clear from reading the statutes as well as their legislative histories that Congress intended citizens to be active enforcers of the law, with broad powers to sue. Congress’ decision to include liberal attorneys’ fees provisions,<sup>48</sup> for example, and to eliminate procedural barriers such as federal amount in controversy requirements,<sup>49</sup> provides evidence that legislators intended significant public participation.

#### *a. Clean Air Act (CAA) Section 304*

The CAA of 1970 was the first federal law to include a citizen suit provision, and it is a good representation of the general structure of analogous provisions in other environmental statutes.<sup>50</sup> Section 304 of the CAA contains its citizen suit provision:

(a) [A]ny person may commence a civil suit action on his own behalf –

(1) against any person [including a state or government agency] who is alleged to have violated...or be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation [or]

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter with is not discretionary with the Administrator.

(b) No action may be commenced (1) under subsection (a)(1) of this section (A) prior to 60 days after the plaintiff has given notice of the violation (i) to the [EPA] Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator...[No action may be commenced] (B) if the Administrator or State has

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46. Seidenfeld and Nugent quote Niccolo Machiavelli, who once wrote that even powerful governments require “the friendship of the people,” in arguing that government needs citizens to enforce environmental laws. Seidenfeld and Nugent, *supra* note 16, at 269.

47. *United States v. American Trucking Ass’ns*, 310 U.S. 534, 543 (1940).

48. *See infra* Part I.B.d.

49. *See infra* Part I.B.c.

50. The citizen suit provisions in all major environmental statutes are almost identical. *See supra* note 7.

commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance.<sup>51</sup>

*b. Notice Requirements: Preserving the Primacy of Government Enforcement*

Citizen suit provisions such as CAA section 304 require potential plaintiffs to provide the violator with 60 days notice before commencing a suit.<sup>52</sup> CAA section 304(b) also requires plaintiffs to provide notice to the federal agency with jurisdiction—in this case, EPA—and, in some cases, to a state agency with jurisdiction.<sup>53</sup> The notice must generally be in writing and provide a description of the alleged violation of law.<sup>54</sup>

Notice provisions serve several functions. First, in theory, the notice provision will give the violator an opportunity to abate the violation and avoid the need for litigation. More importantly, however, the notice requirement ensures that federal and state government agencies are aware of each alleged violation and are given an opportunity to take enforcement action.<sup>55</sup> This procedure preserves the government's role as the primary enforcer of environmental laws. A citizen suit may proceed only when state and federal agencies are informed of an alleged violation, and choose not to begin an enforcement proceeding.<sup>56</sup>

Finally, the notice provisions also allow government to utilize public vigilance. Citizen suit statutes enable agencies to, in effect, “farm out” much of the fact-finding and initial legal work to citizen activists. One of the drafters of the CAA's citizen suit provision said he envisioned that citizens would be useful “for detecting violations

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51. CAA § 304(a)–(b), 42 U.S.C. § 7604(a)–(b) (2006).

52. *Id.* at § 304(b), § 7604(b).

53. *Id.* at § 304(b)(1)(A), § 7604(b)(1)(A).

54. *Id.*

55. “The notice requirement was intended to ‘further encourage and provide for agency enforcement’ that might obviate the need to resort to the courts.” *Natural Res. Def. Council v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975) (quoting Senator Edmund Muskie).

56. Note that a citizen suit is barred, moreover, if the government “has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance.” This language prevents government and citizens from simultaneously suing the same violator for the same violation of law. *See, e.g.*, CAA § 304(b)(1)(B), 42 U.S.C. § 7604(b)(1)(B) (2006). The definitions of “diligently prosecuting” and “court,” as you might imagine, have been much litigated. *See Hodas, supra* note 30, at 1631 (discussing the so-called “diligent prosecution bar” to the initiation of citizen suits.).

and bringing them to the attention of the enforcement agencies,” who presumably would then take over enforcement proceedings.<sup>57</sup>

*c. Facilitating Citizen Litigation*

While we must recognize that notice provisions indicate that Congress wanted agencies to remain the primary enforcers of the law, citizen suit provisions contain unique features intended to facilitate citizen litigation. Most obviously, the statutes purport to grant universal standing to sue, providing that “any person may commence a civil suit” without any further mention of injury requirements.<sup>58</sup> There can be no more persuasive evidence of Congress’ intent to facilitate access to the courts than its attempted grant of universal standing.

Further, citizens are expressly authorized to sue either the federal government agency with jurisdiction—EPA in the case of the CAA—or the appropriate state agency.<sup>59</sup> The provisions also grant the district court’s jurisdiction “to compel. . .agency action [that is] unreasonably delayed.”<sup>60</sup> Congress even scuttles amount in controversy and diversity requirements, which are traditional prerequisites to federal court actions, in order to increase citizen participation.<sup>61</sup>

Finally, the non-restriction language of CAA section 304(e) acts as a final incentive for citizen litigation.<sup>62</sup> The statute provides that bringing a citizen suit “[shall not] restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief.”<sup>63</sup> The non-restriction language makes clear that citizen suit plaintiffs will not forfeit their rights to sue for damages in separate

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57. Senate Debate on S. 4358, Sept. 21, 1970, *reprinted in* Environmental Policy Division of the Congressional Reference Service, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Vol. II at 280.

58. *See, e.g.*, CAA § 304(a), 42 U.S.C. § 7604(a) (2006). The Supreme Court has challenged this grant of universal standing in a long line of cases, which will be discussed in Part III.B., *infra*.

59. Most citizen suit provisions allow an individual to commence a suit against the U.S. or against a state agency “to the extent permitted by the Eleventh Amendment.” *See id.*

60. *Id.*

61. *See Train*, 510 F.2d at 700 (“[C]itizen suits are intended to] facilitate the citizen’s role in the enforcement of the Act, both in renouncing those concepts that make federal jurisdiction dependent on diversity of citizenship and jurisdictional amount, and in removing the barrier, or hindrance, to citizen suits that might be threatened by challenges to plaintiff’s standing.”).

62. *See* CAA § 304(e), 42 U.S.C. § 7604(e) (2006).

63. *Id.*

actions, thus removing a potential disincentive to bring suit. This is an important issue because a plaintiff cannot recover damages in a citizen suit enforcement action.<sup>64</sup> Therefore, a plaintiff who has suffered actual money losses may sue to enforce the statute and also may bring a separate common law tort claim for money damages.

*d. Costs & Attorney's Fees*

The inclusion of novel fee shifting provisions, however, provides perhaps the strongest evidence that Congress wanted to facilitate vigorous citizen participation. Each citizen suit provision contains a cost clause allowing “prevailing” or “substantially prevailing plaintiffs” to recoup litigation expenses.<sup>65</sup> Several environmental statutes, moreover, provide that a court may award costs and attorneys’ fees to any party “whenever the court determines such award is appropriate,” suggesting that even unsuccessful plaintiffs could recover litigation expenses.<sup>66</sup> Costs are normally awarded only to prevailing plaintiffs pursuant to fee-shifting provisions, and not to prevailing defendants.<sup>67</sup>

In effect, these costs provisions in environmental statutes enable successful plaintiffs—and arguably even unsuccessful plaintiffs—to recover attorneys’ fees from losing defendants. Thus, these provisions allow plaintiffs with meritorious claims, and the lawyers representing them, to bring suit with confidence that they will ultimately recover their litigation expenses. The opportunity for cost recovery simultaneously acts as a form of insurance and as an incentive for citizens to bring suit.

i. Breaking from the “American Rule”

Congress’ inclusion of fee shifting provisions for successful plaintiffs was a somewhat revolutionary decision, one that is contrary the general rule in American law. Under the so-called “American rule” of the common law, both parties in any lawsuit bear their own

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64. *See Chesapeake Bay*, 608 F. Supp. at 449.

65. *See, e.g.*, CWA § 304(d), 42 U.S.C. § 1365(d) (2006).

66. CAA § 304(d), 42 U.S.C. § 7604 (2006). *Compare* CWA § 304(d), 42 U.S.C. § 1365(d) (2006), *and* CERCLA, 42 U.S.C. § 9659(f) (2006) (limiting the award of litigation costs to “prevailing or substantially prevailing parties.”).

67. To date, only a handful of courts have awarded attorneys’ fees to a prevailing defendant pursuant to a fee shifting provision. *See, e.g.*, *Sierra Club v. Shell Oil*, 817 F.2d 1169, 1176 (5th Cir. 1987); *see also* Kerry D. Florio, *Attorneys’ Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. ENVTL. AFF. L. REV. 707, 707–08 (2000).

litigation expenses, regardless of the outcome.<sup>68</sup> American courts have consistently upheld this view for two reasons: 1) because less-wealthy plaintiffs should not be discouraged from bringing meritorious lawsuits out of fear that they will lose and have to pay expenses to the winner; and 2) because the calculation of “reasonable fees” is too difficult for courts.<sup>69</sup> The only exceptions to this rule are for “frivolous” claims and citizen suit plaintiffs.<sup>70</sup>

## ii. The “Appropriate” Standard

Further, Congress’ use of an “appropriate” standard for fee recovery indicates that the legislative intent was to allow even unsuccessful plaintiffs to recover fees if deemed appropriate by a court. The statute does not limit fees to winning plaintiffs, but leaves open the possibility that unsuccessful or partially successful plaintiffs could recover when their legal action nonetheless advances the public interest.<sup>71</sup> In *Ruckleshaus v. Sierra Club*, however, the Supreme Court rejected this possibility by holding that unsuccessful plaintiffs may not recover attorneys’ fees, despite the statute’s language.<sup>72</sup> Justice Stevens argued, in dissent, that the use of the “appropriate” standard was a deliberate act by Congress to give courts the discretion to award costs to unsuccessful plaintiffs whose suits advance the public interest.<sup>73</sup>

The notice provisions<sup>74</sup> show that Congress wanted government to be the primary enforcer. Nonetheless, the statutory exception to

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68. See *Fleishman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) (explaining the “English rule,” which by contrast, provides that the loser pays the litigation expenses of the winner, including expert fees, attorney’s fees, and court costs).

69. See *id.* at 718 (“[O]ne should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel.”).

70. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258–59 (1975) (explaining that Courts may still award attorneys’ fees to a party when a complaint is frivolous, because the “bad faith exception” allows a successful party to recover attorneys’ fees from an opponent who acted “in bad faith, vexatiously, wantonly, or for oppressive reasons”).

71. See, e.g., CAA § 304(d).

72. 463 U.S. 680, 693 (1983).

73. See *id.* at 694 (Stevens noting that in other federal statutes with attorneys’ fees provisions, Congress specifically limited recovery to “prevailing” or “partially prevailing” plaintiffs, suggesting that Congress did not intend to limit the class of plaintiffs who could recover under citizen suits by stating that “Congress deliberately used language that differs from the ‘prevailing party’ standard, and it carefully explained in the legislative history that it intended to give the courts of appeals discretionary authority to award fees and costs to a broader category of parties.”).

74. See, e.g., CAA § 304(b)(1)(A).

the American rule created by Congress provides evidence that citizens, too, were intended to play an active role in enforcement of environmental law.

## 2. Legislative History

Parsing the legislative history behind citizen suit provisions reinforces Congress' apparent goal—evident on the face of the statutes themselves—to confer broad enforcement powers to citizens. We examine the legislative history behind sections 304 of the CAA<sup>75</sup> and 505 of the CWA<sup>76</sup> as well as the courts' initial response to citizen suit provisions as evidence of Congress' intent.

### *a. Environmental Protection: A “Fundamental Concern” to Citizens*

The legislative history behind citizen suit provisions indicates that citizens were expected to take action when, for financial or political reasons, agencies failed to act.<sup>77</sup> Citizens were at once intended to serve as watchdogs, inspectors, and prosecutors—and citizen suit provisions were intended to encourage this public vigilance. Senator Edmund Muskie (D-ME) argued on the Senate floor that “citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike.”<sup>78</sup> Legislators such as Muskie hoped that citizens would be able to do much of the necessary information gathering and litigation, reducing the financial burden on government agencies.<sup>79</sup> Thus, citizen litigation allows the government to utilize much of the technical work performed by non-governmental organizations or private citizens.

The nature of the public rights involved was also considered as a justification for the unprecedented power given to citizens. There is evidence that Congress intended the public to have a role in environmental protection in part because clean air and clean water are of fundamental importance to the lives of all citizens. During debate over the passage of the CAA, Sen. John Sherman Cooper (R-KY) argued that “Perhaps more than in any other Federal program, the regulation of environmental quality is of fundamental concern to

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75. See CAA § 304(e).

76. See CWA § 505(a).

77. See Jeannette L. Austin, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220, 246 (1987).

78. Statement of Senator Muskie, *supra* note 57, at 280.

79. See Austin, *supra* note 77, at 245–46, n. 164.

the public. It is appropriate, therefore, that an opportunity be provided for citizen involvement.”<sup>80</sup>

*b. Judicial Interpretation*

The courts have largely acceded to our interpretation, accepting Congress’ intent to promote public action. In *Natural Resources Defense Council v. Train*, for example, the D.C. Circuit stated that “[a]nyone even remotely familiar with the case law of the period will discern that this provision took broad steps to facilitate the citizen’s role in the enforcement of the Act.”<sup>81</sup>

The Supreme Court has also largely accepted that Congress intended to grant citizens broad enforcement power, although the Court’s discussion of citizen suits is often muddled in a debate over standing and Congress’ power to grant citizen standing.<sup>82</sup> It would be fair to say, though, that the Court has always recognized the *intent* of Congress to empower citizen attorneys general; but the justices have not always recognized its *ability* to do so.<sup>83</sup>

## II. THE FAILURE OF COOPERATIVE FEDERALISM & DECLINING AGENCY ENFORCEMENT OF ENVIRONMENTAL LAW

In Part II, we expand on our discussion of cooperative federalism. This part outlines the major reasons why a cooperative approach is unable to enforce all environmental laws and includes a discussion of several emerging challenges which will inhibit agency enforcement of these laws in the future. Most importantly, this part argues that the current political and economic climate undermines the theories supporting the cooperative federalist enforcement model. We argue that the fundamental enforcement challenges inherent in a decentralized model will be exacerbated by what appears to be a multi-year economic recession.<sup>84</sup>

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80. 117 CONG. REC. 38,821 (1971) (statement of Sen. John Sherman Cooper).

81. See *Train*, 510 F.2d at 700 (referring to the CWA’s citizen suit provision); see also *Alyeska Pipeline*, 421 U.S. at 263 (noting that with citizen suits, “[c]ongress has opted to rely heavily on private enforcement to implement public policy”).

82. See discussion *infra* Part III.

83. See generally *Lujan v. Def. of Wildlife*, 504 U.S. 555 (1992) (Justice Scalia recognizing Congress’s intent to convey broad citizen standing under the Endangered Species Act’s citizen suit provision).

84. See Barack Obama, Editorial, *The Action Americans Need*, WASH. POST, Feb. 5, 2009, at A17 (calling the current U.S. economic crisis one that is “as deep and dire as any since the days of the Great Depression” and stating that the recovery of the economy, “will be measured in years, not months”).

The enforcement of environmental law can be described using the metaphor of a three-legged stool consisting of state, federal, and citizen legs.<sup>85</sup> Following this metaphor, we see that the first two legs of the stool are increasingly unreliable and unsteady—making a strong “citizen leg” all the more necessary to support the weight of resource protection.

#### *A. The Decentralized Enforcement Model*

The primary goal of federal environmental statutes was to empower states to enforce national standards. With the passage of the CWA, for example, Congress’ intent was to “recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution.”<sup>86</sup> Each of the other environmental statutes envisions a similar state function.<sup>87</sup> The theory was that, by outsourcing federal programs to state agencies, national laws could be carried out without bankrupting the federal government, while at the same time allowing states the autonomy to implement their own plans.<sup>88</sup> Consequently, the decentralized enforcement model places a great deal of power and trust in state governments.

Unfortunately, there are fundamental flaws with the cooperative approach that hamper regulation and enforcement. At the same time that states have taken on more responsibility, their own regulatory agencies have been simultaneously hindered by political resistance to increased regulation and fewer dollars for enforcement. Furthermore, in cases where state regulation has failed, the federal backup enforcement has been lacking. When combined, these complicating factors create the potential for a “perfect storm” that threatens the effectiveness of every major environmental program.

##### 1. Increasing State Oversight

Today, states oversee almost every delegable environmental program, and state agencies account for the vast majority of

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85. See Hodas, *supra* note 30, at 1617 (describing this cooperative model as a “triangular federal system,” consisting of state, federal, and citizen enforcement).

86. CWA § 304(b), 33 U.S.C. § 1251(b) (2006).

87. See, e.g., CAA § 110(a), 42 U.S.C. § 7410(a) (2006) (describing requirements for “state implementation plans for national . . . ambient air quality standards”).

88. See Howard A. Learner, *Restraining Federal Preemption When There is an “Emerging Consensus” of State Environmental Laws and Policies*, 102 NW. U. L. REV. 649, 655 (2008).

inspections and enforcement actions.<sup>89</sup> Over the last two decades, states have taken on an increasingly large role in enforcement. In 1994, only forty percent of delegable environmental programs had been delegated to state agencies.<sup>90</sup> In 2000, states were in charge of implementing seventy percent of delegable programs.<sup>91</sup> By 2007, the percentage had risen to over ninety.<sup>92</sup>

As states have gradually taken on more responsibility for environmental programs, there has been a corresponding decrease in federal funding for state agency programs. In 1986, federal EPA funds accounted for fifty-eight percent of state budgets for the enforcement of federal laws.<sup>93</sup> By 2008, federal appropriations had been reduced to twenty-three percent of state environmental budgets.<sup>94</sup>

On one hand, the decrease in federal funding makes sense in a decentralized system. One purpose of a federalist approach is, in fact, to reduce the financial burden on the federal government by delegating programs. At the same time, however, the loss of federal funding removes one of the incentives, or “carrots,” used to encourage state enforcement of national standards.<sup>95</sup> And when the federal government reduces spending on oversight and enforcement, states must increase their own spending to make up the balance of enforcement funding.

### *B. Disadvantages to State Administration—The “Unlevel Playing Field”*

States now have the authority to implement federal programs as well as the financial responsibility to fund them. The gradual delegation of environmental programs over the last two decades has increased the importance of states and made environmental

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89. See R. Steven Brown, Environmental Council of the States (ECOS), *State Environmental Expenditures 2005 – 2008*, 1 (2008), [http://www.ecos.org/files/3057\\_file\\_March\\_2008\\_Green\\_Report.pdf](http://www.ecos.org/files/3057_file_March_2008_Green_Report.pdf).

90. *Id.* at 3 (quantifying delegable environmental programs such as the CWA, CAA, and SMCRA programs, as well as programs implementing numerous other environmental laws).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 5.

95. See CWA § 106(e), 33 U.S.C. 1256(e) (2006) (explaining how EPA can condition grants to help implement federal programs on states’ compliance with CWA’s water quality monitoring procedures.); see also Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 191 (2005).

enforcement vulnerable to the several inherent flaws of a decentralized model. At least one scholar has described the fundamental disadvantage of cooperative federalism as the problem of “the unlevel playing field.”<sup>96</sup> That is, the cooperative model makes the enforcement of federal laws dependant on individual states, each with its own unique financial and political circumstances.

### 1. Political Considerations & “Competitive Business Advantage”

The major challenge for states is that they must balance the environmental benefits of vigorous enforcement of environmental programs with the economic consequences of stringent regulation. Not surprisingly, each state wants to foster a competitive business advantage to attract and keep jobs within its borders. No governor or state administrator wants to implement policies that could dissuade industry from expanding or relocating in his or her state, and no state wants to risk losing jobs because a company perceives that a neighboring state’s regulations are more business-friendly.<sup>97</sup> For these reasons, many states feel pressure to deregulate and reduce enforcement actions in an effort to attract and keep jobs in-state. These pressures create what has been called a “perverse incentive” for state administrators to weaken regulations and ignore violations.<sup>98</sup>

#### *a. Ohio’s Regulatory Reform Task Force*

The competitive advantage challenge has manifested itself in an increased “regulatory reform” effort in Ohio, an effort which is designed to promote business growth in the state. In 2008, a bipartisan group of state lawmakers created a Regulatory Reform Task Force with the express purpose of reducing the “red tape and bureaucracy. . .to ensure [that Ohio is] competitive with other states and countries that are competing for the same jobs and economic investment.”<sup>99</sup>

The task force traveled the state listening to testimony from business owners, many of whom complained about excessive

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96. See Hodas, *supra* note 30, at 1574.

97. See *id.* at 1575 (“States with strong environmental programs feel intense local political pressure to slacken enforcement, while states with weak programs are loath to abandon the economic advantage that lax environmental enforcement provides.”).

98. Glicksman, *supra* note 25.

99. Ohio General Assembly Task Force, *Ohio Regulatory Reform Task Force Rep. 1* (2008).

regulation from Ohio EPA.<sup>100</sup> A major theme of the public fora was the threat that environmental regulations pose to job creation.<sup>101</sup> The final recommendations of Ohio's task force, and subsequent legislation introduced by its chairman, aim to "streamline" agency administration of the laws, including many of the procedures designed to ensure effective environmental regulation.<sup>102</sup> The proposed legislation requires, among other things, that agencies provide an analysis of how the adverse impacts of a regulation on small businesses can be lessened through methods such as alternative compliance methods, small-business-specific performance standards, and even exemptions from environmental regulation for small businesses.<sup>103</sup> This type of legislation sets the stage for a renewed "race to the bottom."<sup>104</sup>

*b. The Governor's "Common Sense Business Regulations"*

In February of 2008, Governor Ted Strickland of Ohio signed Executive Order 2008-04S, entitled "Implementing Common Sense Business Regulations."<sup>105</sup> In many ways, the Order mirrors the goals of Ohio Regulatory Reform Task Force. For example, the Order mandates that "[a]gencies should consider whether proposed rules, and the cumulative effect of proposed rules, make Ohio a more or less attractive place to do business."<sup>106</sup>

Regulatory reform efforts such as those in Ohio illustrate the political challenges that can stand in the way of increased, or even status quo, state regulation. In a state such as Ohio, which is losing

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100. *Id.* (illustrating how one business owner testified that his wind turbine company ultimately decided not to locate its business in Ohio because the state's environmental permitting process was "so cumbersome, costly and time-consuming" and "[could] not match the 30-45 day permitting process of Alabama and South Dakota").

101. *See id.* at 1-2 (testimony of Dan Lake and Mark Wilson regarding Ohio EPA's permitting requirements.).

102. *See id.* at 5 (committee making recommendations that all new regulations be subject to an "economic impact and/or cost benefit analysis that consider all of the relevant factors to business and interested parties in implementing and complying with the rules"). Legislation recently introduced in the Ohio legislature contains similar cost-benefit requirements for all agency rule-making. *Id.*

103. 128th Ohio General Assembly, Am. S. B. No. 3, 128th Gen. Assem., Reg. Sess. (Ohio 2009).

104. *See* Glicksman, *supra* note 25 (quoting John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 Md. L. Rev. 1183, 1221-22 (1995)).

105. Executive Order 2008-04S (2008), <http://www.governor.ohio.gov/Portals/0/Executive%20Orders/Executive%20Order%202008-04S.pdf>.

106. *See id.* at 3 (Gov. Strickland, a Democrat, illustrating that regulatory reform efforts are not limited to "small-government" conservatives).

jobs at an especially high rate,<sup>107</sup> policies aimed at business growth may trump environmental protection.<sup>108</sup> State executives and agencies will continue to hesitate to increase oversight and enforcement proceedings out of fear that these actions could sacrifice the state's competitive business advantage. There is a default political resistance to increased environmental protection in states such as Ohio. Lawmakers and officials from both political parties face the same pressures to deregulate and reform.

Importantly, while state officials are proposing ways to reduce the regulatory burden on business, there is no corresponding effort to increase environmental oversight. In this way, the political deck is stacked against increased environmental enforcement. An economic recession, such as today's, will only add to the institutional opposition to regulation, making environmental enforcement by state agencies all the more difficult.

## 2. State Budget Cuts

The cooperative model also makes the enforcement of national environmental objectives subject to budget cuts and shortfalls in each individual state, which further threatens the effectiveness of cooperative federalism. Unlike the federal government, most states are bound by balanced budget laws and are unable to run deficits during economic recessions.<sup>109</sup> Therefore, states must balance their budgets each year and are more susceptible to economic cycles.

In fiscal year 2009, twenty-nine states are expected to face budget gaps of a combined \$48 billion.<sup>110</sup> In an economic recession, states lose revenue from sales taxes and property taxes,<sup>111</sup> which forces state governors to make difficult choices: either cut spending, raise taxes,

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107. See generally Charles W. McMillion, OHIO'S JOB LOSSES: 2000 TO 2007 WORST LOSSES SINCE THE DEPRESSION, MBG Information Services 3 (2008), available at [http://www.amtacdc.org/SiteCollectionDocuments/Ohio-jobs-AMTAC%20\(2\).pdf](http://www.amtacdc.org/SiteCollectionDocuments/Ohio-jobs-AMTAC%20(2).pdf) (showing that Ohio's job losses since 2000 – approximately 213,000 – are exceeded only by Michigan's).

108. See Ohio General Assembly Task Force, *supra* note 99.

109. See William Branigin and Lori Montgomery, *Obama's Budget Proposal Would Push Budget Deficit to \$1.75T*, WASH POST, Feb. 26., 2009 (explaining how the 2009 federal budget, recently proposed by the Obama administration, allows an estimated \$1.75 trillion deficit). Compare OHIO. CONST. art. VIII § 8, XII, § 4 (Ohio's constitutional requirement of a balanced budget), and NY CLS LEGIS LAW. § 54(2)(a) (New York's constitutional requirement of a balanced budget).

110. Erica C. McNichol & Iris J. Lav, *29 States Faced Total Budget Shortfalls of at Least \$48 Billion in 2009*, Center on Budget and Policy Priorities 1 (2008), <http://www.cbpp.org/1-15-08sfp.pdf>.

111. See *id.* at 2.

or borrow money to meet annual budgets. Many states are choosing the first option, cutting services, to make up for lost revenue. As we explain below, decreases in enforcement funding at the state level compound each of the inherent shortcomings of the decentralized model such as the competitive advantage challenge.

*a. California's Agency Funding Cuts*

California provides the most prominent example of how a state budget shortfall can translate into less stringent enforcement of national environmental standards. No state's budget has been harder hit by the recent economic downturn than California's.<sup>112</sup> The state's budget shortfall, estimated at over \$40 billion through 2010, is already affecting government services.<sup>113</sup> At no point in recent history has the state reacted to fiscal issues with such deep cuts in services. In the Spring of 2009, the state began a round of multibillion-dollar budget cuts, including \$30 billion in cuts over two fiscal years to schools, colleges, health care, welfare, corrections, recreation, and other programs.<sup>114</sup>

To meet its 2009 budget, California has proposed cutting the enforcement budgets of numerous agencies charged with carrying out federal environmental laws.<sup>115</sup> For example, California's Departments of Forestry, Fish and Game, Toxic Substances, and California's air and water boards each stand to lose millions.<sup>116</sup> The California Environmental Protection Agency as a whole will lose \$480 million from 2008, a cut of twenty percent of its annual budget.<sup>117</sup> These agencies are charged with implementing almost every delegable federal environmental program.<sup>118</sup> The state will also layoff 20,000 state employees, with the layoffs spread across all state agencies.<sup>119</sup>

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112. *See id.* at 3.

113. Jean Ross, *Strangling California's Budget*, L.A. TIMES, January 27, 2009, available at <http://www.latimes.com/news/opinion/la-oe-ross27-2009jan27,0,2053416.story>.

114. *California Budget Crisis (2008-09)*, N.Y. TIMES, Sept. 25, 2009, [http://topics.nytimes.com/topics/news/national/usstatesterritoriesandpossessions/california/budget\\_crisis\\_2008\\_09/index.html](http://topics.nytimes.com/topics/news/national/usstatesterritoriesandpossessions/california/budget_crisis_2008_09/index.html).

115. Jordan Rau, *Pain of Budget Plan is Widely Spread*, L.A. TIMES, Jan. 12, 2008, at B7.

116. *Id.*

117. FISCAL YEAR 2008-09 BUDGET BRIEFING, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, [http://www.calepa.ca.gov/Budget/2008\\_2009/Briefing.pdf](http://www.calepa.ca.gov/Budget/2008_2009/Briefing.pdf) (last visited Dec. 27, 2009).

118. *See generally id.* (illustrating how these agencies enforce California's implementation of the CAA, CWA, and Toxic Substances Control Act).

119. Nichola Groom, *With No Budget, California to Cut 20,000 State Jobs*, Feb. 17, 2009, <http://www.reuters.com/article/politicsNews/idUSTRE51G0J420090217>.

Fewer agency dollars and employees will undoubtedly result in fewer inspections and penalties, less rigorous review of permit applications, and fewer enforcement proceedings. Budget cuts to state agencies that enforce California's delegated programs will have a direct impact on the enforcement of those federal laws. "You can pass all the environmental protection laws you want," says one California agency official, "but someone has to be there to enforce them."<sup>120</sup>

California's struggles also provide an extreme example of how cooperative federalism can allow one problematic state to impede national standards. Because of its size, the state has a massive impact on the achievement of the objectives of national laws. If California, the nation's most populous state<sup>121</sup> and one of its largest polluters, is unable to meet CAA standards, it would have a great effect on the nation's ability to meet national standards. Under the decentralized model, therefore, the nation's environmental quality is dependant on the unlikely result that each state is able to fully enforce its delegated programs.

### *C. Inadequate Federal Backup*

Cooperative federalism, in theory, is supposed to provide the federal backup, remedying the "unlevel playing field" and disparate state regulation, to ensure that enforcement is not compromised by political considerations or scarce resources. Federal oversight is intended to recognize and remove the "competitive advantage enjoyed by under-regulated entities in under-enforcing states."<sup>122</sup> However, if the federal government was once able to encourage or coerce compliance as a "gorilla in the closet,"<sup>123</sup> this is no longer true today. Although the federal government is not bound by the balanced budget rules of the states, it is still not exercising sufficient oversight. Federal agencies have not proven that they have the capacity or inclination to backup state enforcement, and the warnings of "federalization" of state programs are largely empty threats. William Cohen, Chief of the General Litigation Section of the Land

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120. Rau, *supra* note 115, at B7 ("Want to pollute? Want to destroy habitats? Want to poach commercially? Have at it . . . we can't stop you, says the California official.").

121. UNITED STATES CENSUS BUREAU POPULATION ESTIMATES FOR JULY 1, 2008, <http://www.census.gov/popest/states/NST-ann-est.html> (last visited Dec. 30, 2009).

122. Hodas, *supra* note 30, at 1575.

123. DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP* 3 (2003).

and Natural Resources Division of the Department of Justice “stated that ‘frankly’ there are just too many enforcement cases ‘out there’ for the federal and state governments to handle and that citizen suits should be applauded as a ‘natural adjunct’ to government enforcement.”<sup>124</sup>

### 1. Ohio’s SMCRA Program

Ohio’s surface mining program, again, provides a real-life example of cooperative federalism’s flaws and highlights the inadequacy of backup federal enforcement. The SMCRA states that the OSM must “assure that appropriate procedures are provided for . . . [state] enforcement.”<sup>125</sup> The statute provides that OSM must withdraw approval of a state program if “the State program is not in compliance” with the requirements of SMCRA.<sup>126</sup> Further, OSM is required to “federalize” the state’s surface mining program in the event that a state does not enforce its own program or if a state program fails to comply with federal standards.<sup>127</sup>

In 1982, the Secretary of the Interior approved Ohio’s regulatory and abandoned mine lands programs, pursuant to section 405 of SMCRA.<sup>128</sup> Ohio’s program created a Division of Mineral Resources Management, within the state’s Department of Natural Resources, which has had the primary enforcement responsibility for carrying out SMCRA since 1982.<sup>129</sup> Unfortunately, however, Ohio’s surface mining regulations have never been in full compliance with SMCRA, and thus state agencies have never been fully enforcing the federal statute.

Ohio’s implementation of SMCRA’s reclamation bonding requirements is one example of the state’s non-compliance. SMCRA requires all coal mining companies, as a prerequisite to mining, to develop plans to “reclaim” mine sites once operations have ceased.<sup>130</sup> Reclamation—or rehabilitation—operations are necessary to prevent

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124. Hodas, *supra* note 30, at 1560 n.36 (quoting William M. Cohen, Remarks at the ALI-ABA Environmental Law Course of Study (Feb. 19, 1994)).

125. SMCRA § 102(i), 30 U.S.C. § 1202(i) (2006).

126. *Id.* at § 405(d), 30 U.S.C. § 1235(d).

127. *Id.* at § 504(a)(3), 30 U.S.C. § 1253(a)(3).

128. Ohio Rev. Code Ann. § 1513 (West 2009).

129. See generally Ohio Department of Natural Resources, *A Citizen’s Guide to Mining and Reclamation in Ohio* 12, available at [http://www.ohiodnr.com/Portals/11/publications/pdf/citizens\\_guide.pdf](http://www.ohiodnr.com/Portals/11/publications/pdf/citizens_guide.pdf) (showing that the Division of Mineral Resources Management was previously referred to as the Division of Mines and Reclamation).

130. SMCRA § 507(d), 30 U.S.C § 1257(d).

acid mine drainage, erosion, and subsidence and to rehabilitate the aesthetic characteristics of Ohio's hill county.<sup>131</sup> Further, as part of the reclamation requirements, SMCRA mandates that mining operators must post a performance bond covering the land on which mining will be conducted.<sup>132</sup> This performance bond must be "sufficient to assure the completion of the reclamation plan" in the case the reclamation had to be completed by the state or federal government.<sup>133</sup>

## 2. Non-compliance with SMCRA

Ohio's laws do not comply with SMCRA's bonding requirements in several respects. Ohio's surface mining regulations, for example, make the state's adjustment of reclamation bond amounts discretionary instead of mandatory as required by SMCRA.<sup>134</sup> Ohio's regulations also fail to require post-mining discharges to be included in the reclamation plan, as required by federal regulations under SMCRA.<sup>135</sup> Finally, Ohio omits the requirement that performance bond releases be conditioned upon "faithful performance" of the terms of the bond.<sup>136</sup>

Although these inconsistencies may seem minor, the terms of Ohio's bonding laws are critically important. SMCRA's reclamation bonding program is the heart of the statute's purpose—to ensure proper rehabilitation of mine lands—and Ohio's lax bonding requirements inhibit the objectives of the federal statute.

## 3. Federal Inaction

These and other parts of Ohio's surface mining program have been out of compliance since its inception in 1982, despite SMCRA's statutory requirement that OSM ensure that all state programs comply with the law.<sup>137</sup> In May 2005, OSM did initiate proceedings, pursuant to 30 C.F.R. Part 733, in an attempt to force Ohio to update

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131. Ohio Department of Natural Resources, *A Citizen's Guide to Mining and Reclamation in Ohio* 12, available at [http://www.ohiodnr.com/Portals/11/publications/pdf/citizens\\_guide.pdf](http://www.ohiodnr.com/Portals/11/publications/pdf/citizens_guide.pdf).

132. SMCRA § 509(a), 30 U.S.C. § 1259(a).

133. *Id.*

134. See generally SMCRA § 509(e), 30 U.S.C. 1259(e); Ohio Rev. Code Ann. § 1513.08(E) (showing that bonds should be adjusted whenever affected land area increases or decreases).

135. 30 C.F.R. § 780.21(h); Ohio Rev. Code Ann. § 1513.16(F)(8)(a).

136. 30 C.F.R. § 800.11; Ohio Rev. Code Ann. § 1531.08(A).

137. See OFFICE OF SURFACE MINING ANNUAL SUMMARY OF REGULATORY AND AML PROGRAMS, 29 (2009), available at <http://www.osmre.gov/Reports/EvalInfo/2009/OH09-aml-reg.pdf>.

its bonding program to comply with SMCRA.<sup>138</sup> A 733 action requires OSM to take corrective action to resolve any inconsistencies with federal law, including the federalization of a state program if necessary.<sup>139</sup> OSM's 2005 733 action, however, did not mandate compliance and did not lead to federalization of the program.<sup>140</sup> In other words, the 733 process took over 20 years to initiate and has not fixed Ohio's program.

Ohio's surface mining program illustrates just one real-life example of the inadequacy of cooperative federalism. Cooperative federalism, as a theory of environmental protection, depends on strict federal oversight of state programs. The federal backup enforcement that Congress envisioned would ensure compliance has rarely materialized in recent years, which has undermined the theories behind cooperative federalism. Although federal agencies retain the authority to federalize, or revoke, state programs, they have seldom done so. EPA has the authority to revoke state NPDES programs under the CWA, for example, but it has never done so.<sup>141</sup> Likewise, OSM has only once federalized a state SMCRA implementation plan.<sup>142</sup> Further, because Congress does not appropriate money in the EPA budget for federalizing state programs, EPA would not have resources to federalize and enforce a state program, even if it wanted to do so.<sup>143</sup>

#### 4. Courts Interpret Federal Obligations as Non-mandatory

One additional challenge inherent in relying on state agency and federal backup enforcement of environmental law is the discretionary nature of federal obligations. Several courts have held that federal agencies might not be required to initiate enforcement procedures, even when provided with evidence of a violation of law.

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138. *See id.*

139. 30 C.F.R. Part 733.12.

140. OSM 2009 Annual Report, *supra* note 137, at 7.

141. Whenever a state "is not administering a program approved under [section 402], the [EPA] Administrator shall withdraw approval for such program." CWA § 402(c)(3), 33 U.S.C. 1342(c)(3).

142. *See generally* 49 Fed. Reg. 27325 (July 3, 1984) (showing that Tennessee's SMCRA program was federalized by OSM in 1984).

143. *See* Kenneth M. Murchison, *Learning from More Than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 594-95 (2005) ("EPA can revoke a state's authority to administer the [NPDES program] but Congress has not funded or staffed the federal agency to administer the programs when states fail. As a result, EPA never has revoked a state's authority to administer the [NPDES] program when a state has failed to perform its obligations.").

The CWA contains language requiring agencies to investigate and remedy violations of its terms. The statute states that “whenever, on the basis of any information available to him, the Administrator finds that any person is in violation . . . he shall issue an order requiring such person to comply.”<sup>144</sup> This language clearly appears to require agency investigation and enforcement.

Some courts, however, have held that agency enforcement actions are discretionary, even when shown evidence of non-compliance. For example, the U.S. Court of Appeals for the Eighth Circuit, in *Dubois v. Thomas*, held that the Director of EPA does not have a duty to investigate violations of the CWA when shown evidence of a violation.<sup>145</sup> The court reached this holding after applying a *Chevron* analysis<sup>146</sup> and determining that it would be unfeasible for an agency to investigate all alleged violations.<sup>147</sup> The Court of Appeals for the Second Circuit, moreover, has held that the Director only has this duty when a finding of a violation is made.<sup>148</sup>

#### *D. The Failure of Cooperative Federalism & The Necessity of Citizen Enforcement*

Cooperative federalism inherently allows a “race to the bottom” with regard to lax enforcement,<sup>149</sup> setting up what has been called a “perverse” regulatory scheme.<sup>150</sup> States do not have incentives, in the form of federal dollars, to enforce the laws, and, at the same time they face economic and political pressure to weaken regulations. Meanwhile, the federal government is unable or unwilling to exercise its backup enforcement power. Therefore, the cooperative federalist

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144. CWA § 309(a), 33 U.S.C. § 1319(a) (2006).

145. *Dubois v. Thomas*, 820 F.2d 943, 948 (1987).

146. A “*Chevron* analysis” refers to the Supreme Court’s doctrine of deference given to administrative agencies when interpreting and implementing statutes. See *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

147. In *Dubois*, the court held that the administrator’s decision is “entitled to a high degree of judicial deference.” *Dubois*, 820 F.2d at 948. In its holding, the court noted that EPA should not be required to investigate each allegation because it does not have the resources to do so: EPA should not “be compelled to expend its limited resources investigating multitudinous complaints irrespective of the magnitude of their environmental significance. As a result, EPA would be unable to investigate efficiently and effectively those complaints that EPA, in its expertise, considers to be the most egregious violations of the [CWA].” *Id.*

148. *Council of Commuter Orgs. v. Metro. Transp. Auth.*, 683 F.2d 663, 671–72 (2d Cir. 1982).

149. See Glickman, *supra* note 25, at 737.

150. *Id.* at 719.

model relies on states to enforce the laws, with no federal “carrots” or “sticks” to encourage or compel them to do so.

Congress intended that citizen litigation would take up the slack in times such as these when economic and political obstacles made government enforcement ineffective, and unable to enforce the laws. Today provides just such a situation, and citizens must be allowed and encouraged to participate in the enforcement of the laws that protect their health and natural resources. Recent history supports—and the nation’s deepening economic crisis reinforces—our argument that we cannot rely on the cooperative federalist enforcement model to ensure compliance with environmental laws.

### III. COURT-CREATED BARRIERS TO CITIZEN ENFORCEMENT OF ENVIRONMENTAL LAW

Part I of this article analyzed the text, structure, and legislative history of federal environmental statutes to argue that Congress intended citizen litigation to be a meaningful supplement to government enforcement of the laws. Indeed, it showed that legislators understood the vulnerabilities of the cooperative federalist model and included citizen suit provisions to allow citizens the opportunity to ensure that environmental laws were followed. Part II then explained how these vulnerabilities have manifested themselves, resulting in a failure of cooperative federalism. By referencing current challenges that inhibit agency enforcement, Part II highlighted the need for effective citizen litigation to supplement a failed federalist enforcement regime.

Now, in Part III, we seek to expose the fundamental challenges standing in the way of necessary public enforcement of environmental law. This part examines the legal doctrines and court decisions which prevent citizen access to the courts. Specifically, we address the four major court-created issues that act as either disincentives or outright barriers to citizen litigation. This part begins with a discussion of courts’ interpretation of fee-shifting clauses in environmental statutes. Next, we examine the Supreme Court’s standing jurisprudence and recent federal court interpretation of the Eleventh Amendment, two issues that act as fundamental barriers to citizen enforcement of environmental laws pursuant to citizen suit provisions. Finally, this part examines the “diligent prosecution” bar to citizen litigation.

The first legal issue we address—judicial interpretation of fee-shifting clauses—currently acts as a deterrent to public participation. The final three legal issues we analyze—standing, the Eleventh

Amendment bar, and the diligent prosecution preemption—serve as direct barriers to citizen litigation. Each of these issues acts as court-created barrier that must be resolved to allow meaningful citizen participation in environmental enforcement.

#### *A. Fees & Costs: Which Parties May Recover?*

The first court-created barrier to effective citizen litigation is the judicial interpretation of the fee-shifting provisions in environmental statutes.<sup>151</sup> All citizen suit provisions contain litigation expenses clauses, which allow one party to recover its litigation expenses from the other “whenever the court determines such award is appropriate.”<sup>152</sup> However, the interpretation of this phrase—“whenever . . . appropriate”—has been the subject of much debate, the outcome of which affects the role citizens are able to play in environmental enforcement.

As we discussed in Part I, Congress included these costs provisions in environmental statutes as a novel device to encourage citizen action, and their interpretation can provide either an incentive or a disincentive to citizen litigation.<sup>153</sup> Fee-shifting clauses allow non-profit organizations and private citizens to commence legal actions with some assurance that they will recover their expenses if they prevail. One commentator has written that without attorneys’ fees provisions, citizens would likely be “unable to enforce environmental legislation because the costs of litigation are too high.”<sup>154</sup> The clauses provide a positive incentive to bring meritorious claims, while at the same time dissuading frivolous lawsuits, for which no court would grant cost recovery to a plaintiff.

##### 1. The “Appropriate Standard”

When drafting the attorneys’ fees clauses in citizen suit provisions, Congress broke with the legal tradition in this country. The general rule in American law is that both parties bear their own litigation expenses, regardless of the outcome.<sup>155</sup> Most citizen suit

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151. We use the terms “costs,” “litigation expenses” and “attorneys’ fees” interchangeably. See *infra* Part I.C., for additional discussion of the fee-shifting clauses in citizen suit provisions.

152. See, e.g., CAA § 304(d), 42 U.S.C. 7604(d) (2006).

153. See *infra* Part I.B.1.d.

154. Florio, *supra* note 67, at 707–08.

155. See *infra* Part I.B.1.d (describing the American rule of the common law under which both parties pay their own litigation costs); see also *Runyon v. McCrary*, 427 U.S. 160, 185 (1976) (“Absent explicit congressional authorization, attorneys’ fees are not a recoverable cost of litigation.”).

provisions, however, allow plaintiffs (and arguably defendants) to recover their litigation costs when deemed “appropriate” by a court.<sup>156</sup> These are some of the few statutory exceptions to the American rule, and Congress was aware of both the novelty and the effects of its decision to use the appropriate standard for fee-shifting.<sup>157</sup>

Congress’ use of the “appropriate standard” in fee-shifting clauses was not accidental. While some environmental statutes limit the awards to “prevailing” or “partially prevailing” parties, many do not.<sup>158</sup> In the former category of clauses, Congress’ intent to limit awards to prevailing or partially prevailing plaintiffs is unmistakable. By allowing courts even broader discretion to award attorneys’ fees in other statutes, Congress intended to encourage public interest litigation that would advance the interests of the environmental statutes.<sup>159</sup> Thus, Congress believed that even unsuccessful plaintiffs might, in some circumstances, advance the goals of the statute to the extent that a costs award would be appropriate.<sup>160</sup>

## 2. Judicial Interpretation of the “Appropriate Standard”

### *a. The Ruckelshaus Majority*

The Supreme Court, however, has narrowly interpreted the text of fee-shifting clauses as allowing recovery only by prevailing parties. In *Ruckelshaus v. Sierra Club*, the Supreme Court’s conservative wing read well beyond the text of the CAA to effectively end the possibility that unsuccessful plaintiffs would ever be able to recover

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156. The fee-shifting clauses in about half of the major environmental statutes limit recovery to “prevailing or substantially prevailing” parties. *See, e.g.*, CWA § 505(d), 33 U.S.C. § 1365(d) (2006); CERCLA § 310(f), 42 U.S.C. § 9659(f) (2006); Solid Waste Disposal Act § 7002(e), 42 U.S.C. § 6973 (2006). The other half, however, provide only that courts have discretion to award attorneys’ fees “where appropriate.” *See, e.g.*, CAA § 304(d), 42 U.S.C. § 7604(d) (2006); SMCRA § 520(d), 30 U.S.C. § 1270(d) (2006); Safe Drinking Water Act § 300j-8(d), 42 U.S.C. § 1449(d) (2006).

157. *See infra* Part I.B.1.d (arguing that Congress’ novel use of fee-shifting provides evidence of its intent to facilitate citizen litigation).

158. *See, e.g.*, CAA § 304(d) and SMCRA § 520(d) (stating that costs of litigation may be awarded “to any party, whenever the court determines such award is appropriate.”).

159. The legislative history of the CAA’s fee-shifting clause shows that its purpose was “to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the court’s discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the ‘prevailing party.’” H.R. Rep. No. 95-294, at 337 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1416.

160. The original version of CAA § 304(d), in fact, provided that fee awards would be available “whenever the court determines such action is in the public interest.” 116 Cong. Rec. 32925 (1970).

fees.<sup>161</sup> The Court determined that “success on the merits must be obtained before a party becomes eligible for a fee award,” despite Congress’ use of the phrase “whenever . . . appropriate.”<sup>162</sup> The majority reached this conclusion by allowing more deference to the American rule of the common law than to the clear language of the statute.

The Court’s extra-textual reading of the CAA’s fee-shifting clause overturned an award of litigation costs to Sierra Club and the Environmental Defense Fund (EDF), which had not prevailed in the action but had, according to the court of appeals, nonetheless advanced the interests of the statute.<sup>163</sup> Sierra Club and EDF filed a petition for review of an EPA rule regulating the discharge of sulfur dioxide by new power plants.<sup>164</sup> In a highly technical argument, the plaintiffs alleged that the rule violated the CAA.<sup>165</sup> The court of appeals, in finding that the plaintiffs were entitled to recover attorneys’ fees, determined that the case “turns not on whether they have prevailed in whole or in part, but on whether they have served the goals of the Clean Air Act.”<sup>166</sup>

*b. Stevens’ Dissent*

Justice Stevens’ dissent in *Ruckelshaus* is in part a reaffirmation of the D.C. Circuit’s argument that the case presented the type of unique situation in which an attorneys’ fee award to an unsuccessful plaintiff would be appropriate.<sup>167</sup> Stevens also argued that the Court’s interpretation was illogical and contrary to Congress’ evident intent to allow cost recover for a broader class of plaintiffs.<sup>168</sup> Stevens wrote that the Court chose to make the specious argument “that a statute which does not refer to ‘prevailing parties’ actually *does* refer to ‘prevailing parties.’”<sup>169</sup>

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161. In *Ruckelshaus*, the Court was interpreting the fee-shifting clause of CAA § 307(f), 42 U.S.C. § 7606(f), but its reasoning is applicable to § 304(d) and other environmental statutes with “appropriate” clauses. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 (1983).

162. *Id.*

163. The Court of Appeals for the D.C. Circuit held that, even though Sierra Club was not successful on the merits, “this is an ‘appropriate’ case for the court to award attorneys’ fees.” *Sierra Club v. Gorsuch*, 672 F.2d 33, 34 (D.C. Cir. 1982).

164. *Id.*

165. *Id.*

166. *Id.* at 38.

167. *Ruckelshaus*, 463 U.S. at 702.

168. *Id.*

169. *Id.*

### 3. The Effects of a Narrow Interpretation of “Appropriate”

The Court’s strict adherence to the American rule will decrease the effectiveness of environmental statutes by upsetting the incentives to litigate that Congress intended and drafted. It is important for courts to interpret “appropriate”<sup>170</sup> broadly, as allowing recovery for non-prevailing plaintiffs who nonetheless advance the public interest.

#### *a. Discouraging Necessary Citizen Action*

Most significantly, the *Ruckelshaus* ruling may have the effect of dissuading essential public activism. Even when an environmental group is unsuccessful in its litigation, courts nonetheless rely on its scientific research and legal work to reach a decision. Without the work of environmental organizations to analyze the law and science, and condense and package that information, courts would often be unable to make informed decisions in environmental cases.

For example, Sierra Club, an organization with massive resources and technical staff, spends millions of dollars on research and technical analysis to support its litigation each year.<sup>171</sup> Courts often rely on environmental plaintiffs to provide the analysis necessary for a decision.<sup>172</sup> Even if an environmental group such as Sierra Club is unsuccessful in its litigation, courts may nonetheless rely on its scientific research and legal work to reach a decision. For example, due to the complex nature of the CAA case that engendered the *Ruckelshaus* decision, the court was “totally dependent upon Sierra Club to brief and advocate” its position.<sup>173</sup>

#### *b. Encouraging Evasive Settlements: “Strategic Capitulation”*

The ambiguity surrounding the “appropriate” standard also encourages defendants to settle cases with the government prematurely so as to preempt attorneys’ fees awards to plaintiffs. Defendants who believe they are on the losing end of a citizen suit, for example, may attempt to “moot” the case—and avoid paying the

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170. See *infra* Part I.B.1.ii.

171. Sierra Club’s annual budget is approximately \$100 million. Traci Watson, *Sierra Club Could Add Immigration to Green Agenda*, USA TODAY, Mar. 7, 2004, at 3A.

172. For example, “Public officials and agencies such as the EPA are prevented from closely policing the environmental regulation system due to inadequate funding, staff, or expertise.” Further, “the agencies may be under political pressure which prevents it from aggressively regulating those agencies it oversees, and the violator may be the government itself.” Nathan A. Steimel, *Congress Should Define “Prevailing Party” to Ensure Citizen Suits Remain Effective*, 11 MO. ENVTL. L. & POL’Y REV. 282, 285 (2004).

173. *Gorsuch*, 672 F.2d at 41.

plaintiff's costs—by agreeing to some sort of a settlement. Such a settlement may even come in the form of actually providing the requested relief. Catherine Albiston and Laura Nielson refer to this type of maneuver by defendants as “strategic capitulation.”<sup>174</sup> This kind of maneuvering, or gamesmanship, allows defendants to “toy with” plaintiffs and drain the litigation funds of public interest organizations.

## 2. The Specter of Attorneys' Fees for Defendants

The uncertain status of the interpretation of fee-shifting clauses and the “appropriate” rule also leaves open the possibility for defendants' cost recovery. The legislative history makes clear that Congress intended courts to have the discretion to award fees to a broad class of plaintiffs, and some have suggested that defendants should also be able to recover.

Defendants often argue that the “appropriate” standard allows them to recover when determined by a court to be appropriate. The prevailing defendants in *Citizens for a Better Environment v. Chicago Steel*, for example, argued that they were entitled to litigation costs because their litigation advanced the public interest.<sup>175</sup> The steel company argued that courts should look to whether a particular defendant increased the court's understanding of the statute in question to determine whether defendants may recover.<sup>176</sup>

Defendant cost recovery, however, was not intended by the drafters and would serve little public purpose. It is not necessary to prevent frivolous environmental litigation because two deterrents already serve this function. First, it is unlikely that any plaintiff bringing a frivolous lawsuit will prevail or be granted attorneys' fees by the court.<sup>177</sup> Second, the “frivolous” standard, under which a party can recover attorneys' fees when the other brings a frivolous lawsuit, acts as an adequate deterrent to prevent frivolous litigation.<sup>178</sup> Any

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174. Catherine R. Albiston and Laura B. Nielson, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 4 (CTR. FOR THE STUDY OF LAW & SOC'Y JURISPRUDENCE & SOC. POLICY PROGRAM, Working Paper No. 45, 2006), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1077&context=csls> (defining “strategic capitulation” as “situations where defendants faced with likely adverse judgments provide the requested relief in order to moot the case and defeat the plaintiff's fee petition.”).

175. See Reply Brief for the Petitioner, *The Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, (1998) (No. 96-643).

176. *Id.*

177. Costs provisions allow recovery only in the court's discretion “whenever the court determines such award is appropriate.” CAA § 304(d), 42 U.S.C. § 7604(d) (2006).

178. See *supra* note 70, for a reference to the “frivolous” standard.

individual or organization who brings a groundless suit for dilatory or other nefarious reasons is subject to the Court's fee shifting standard.<sup>179</sup> Defendant cost recovery, if achieved, would create a devastating disincentive for public interest environmental litigation. Defendant cost recovery would only succeed in placing more fear in the minds of prospective plaintiffs, decreasing the likelihood that they will choose to litigate.

### 3. Congress Can Resolve Ambiguities

Congress recognized and intended the fee-shifting provisions in the CAA and other environmental statutes to act as a statutory exception to the American rule.<sup>180</sup> But the intention was always to provide an incentive for *plaintiffs* to bring meritorious suits that advanced the interests of the statute and the cause of environmental protection. To allow citizen plaintiffs to be successful, the uncertain judicial interpretation of these critically important provisions must be resolved. Congress can resolve the ambiguity created by *Ruckelshaus* by clearly defining the phrase "whenever appropriate."<sup>181</sup>

### *B. Standing*

The express congressional intent of environmental protection statutes that contain citizen suit provisions is clearly predicated on the "citizen attorney general" principle, as discussed earlier in this article. Justice Scalia's opinion in the landmark 1992 case *Lujan v. Defenders of Wildlife*, however, significantly undermined the real world operation of this principle by placing strict limits on citizen standing.<sup>182</sup> Soon after the decision, Cass Sunstein ranked the *Lujan* case as "among the most important in history in terms of the sheer number" of citizen suits it would invalidate.<sup>183</sup>

Since *Lujan*, the court has redefined its standing requirements, to a large degree expanding what might qualify as a sufficient injury. But although the Court has expanded the types of "injuries in fact"

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179. *See id.*

180. "Congress meant something more by the provision in the Clean Air Act: it intended to encourage the participation of 'public interest' groups in resolving complex technical questions and important and difficult questions of statutory interpretation, and in monitoring the prompt implementation of the Act." *Gorsuch*, 672 F.2d at 38.

181. *See infra* Part IV, which provides a legislative solution to clarify the phrase "where . . . appropriate."

182. *See Lujan*, 504 U.S. 555.

183. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992).

that will pass constitutional muster,<sup>184</sup> it has not challenged *Lujan*'s fundamental holding: that Congress cannot confer an individualized cause of action for a generalized grievance.<sup>185</sup> Therefore, as long as *Lujan*'s fundamental holding is intact, the utility of citizen suits hangs in the balance.

This section begins by examining the standing test established by *Lujan* and the Court's subsequent liberalization of *Lujan*'s rigorous standing requirements. Finally, we argue that Congress must act to reaffirm its power and intent to confer an individualized cause of action to all citizens who wish to enforce environmental laws as citizen attorneys general.

### 1. *Lujan*'s High Bar to Citizen Standing

*Lujan* involved a citizen suit under the Endangered Species Act<sup>186</sup> in which an environmental group sought to compel the Secretary of the Interior to take certain actions to protect endangered species abroad.<sup>187</sup> The only injury alleged by the environmentalists was that the Secretary's lack of action would cause certain animals, which the plaintiffs hoped to view in the future, to become extinct.<sup>188</sup>

*Lujan* established the Court's familiar three part standing test. A plaintiff must demonstrate: (1) an injury in fact that is concrete and actual or imminent; (2) that the injury is fairly traceable to the acts of the defendant; and (3) a showing that it is likely that the injury will be redressed by a decision favorable to the plaintiff.<sup>189</sup> After applying this test to the environmental plaintiffs, the Court found that they lacked standing.<sup>190</sup>

The most important standing requirement is the "injury in fact" prong, which in the severity with which it is expressed in *Lujan* directly conflicts with the "citizen attorney general" concept. This concept anticipates that citizens will sue to enforce a statute when government has failed to act due to limited resources, a lack of will, or a contravening policy perspective—even when plaintiffs have not

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184. As Professor Chemerinsky explains, a generalized grievance occurs when "a citizen or a taxpayer [is] concerned with having the government follow the law" not merely for his own benefit, but for the benefit of society at large. ERWIN CHEMERINKSY, *FEDERAL JURISDICTION* 91 (5th ed. 2007).

185. *Lujan*, 504 U.S. at 576–77.

186. Endangered Species Act § 11(g), 16 U.S.C. § 1540(g) (2006).

187. *Lujan*, 504 U.S. at 559.

188. *Id.* at 562.

189. *Id.* at 560.

190. *Id.* at 578.

suffered a unique definitive injury. But *Lujan* requires a plaintiff to make a showing of injury that is rigorous.<sup>191</sup> After *Lujan*, citizens bringing suit challenging administrative action cannot enforce the terms of the underlying legislation in question unless they have suffered a concrete and particularized injury.

*a. Scalia's Separation of Powers Argument*

Because a citizen suit challenge is often a generalized grievance, *Lujan* effectively destroyed the core of the citizen suit provisions in congressional actions: the concept that a citizen can be authorized by congress to enforce the terms of a regulation for the sake of enforcement and to resolve a generalized grievance.

According to the *Lujan* court, the inherent conflict between the “citizen attorney general” concept and the court’s conception of basic constitutional standing demands is a result of clearly visible Article II independence.<sup>192</sup> The Court rejected a challenge regarding the role of the Endangered Species Act in foreign countries based on the injury in fact test for standing.<sup>193</sup> The Court found that “the affiants’ profession of an ‘intent’ to return to the places they had visited before – where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species was simply not enough” to meet the three part test.<sup>194</sup> Such “some day’ intentions – without any description of concrete plans, or indeed even any speculation of when some day will be – do not support a finding of the ‘actual or imminent’ injury that our cases require.”<sup>195</sup> At its core, *Lujan* relies on the basic separation of powers to justify the extent of

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191. The Court asserts that when the plaintiff is not “an object” of the violation, standing will be “substantially more difficult to establish.” *Id.* at 561–62. This requirement precludes most citizen suit challenges, which seek to remedy harms to the environment, but not necessarily to the individual plaintiff.

192. When Congress confers citizen standing, Scalia writes, they “transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed,’ Art. II, § 3. It would enable the courts, with the permission of Congress, ‘to assume a position of authority over the governmental acts of another and co equal department.’ and to become ‘virtually continuing monitors of the wisdom and soundness of Executive action.’” *Id.* at 577 (quoting *Massachusetts v. Mellon*, 262 U. S. 447, 489 (1923)).

193. A plaintiff must suffer 1) “an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized and (b) ‘actual or imminent’; 2) “there must be a causal connection between the injury and the conduct complained of” and 3) “it must be ‘likely,’ as opposed to merely speculative, that the injury will be ‘redressed by a favorable decision.’” *Lujan*, 504 U.S. 560–61.

194. *Id.* at 564.

195. *Id.*

the “injury in fact” requirement. For the *Lujan* majority, Article III courts can resolve only those controversies appropriately resolved in the judicial process, those controversies which are commensurate with the doctrine of standing.<sup>196</sup>

*b. No Generalized Right for an Individualized Grievance*

*Lujan* makes an important distinction regarding the character of a potential plaintiff, and the burden that that plaintiff must carry to establish standing. According to the Court, if a plaintiff asserts an injury due to the regulation of (or failure to regulate) another, more is needed than might be needed to establish standing when a plaintiff is directly regulated.<sup>197</sup> The plaintiffs fail, according to the Court, to successfully assert standing for a number of reasons. First among them is the failure to assert an “imminent” injury. Although the plaintiffs clearly demonstrated an interest in the areas potentially affected by the federal action, citing previous visits, the Court found that without express or concrete plans to return, any injury was too speculative.<sup>198</sup> The Court defends the “imminence” requirement by stating that it is a necessity where no actual harm has been created and where harm is merely anticipatory.<sup>199</sup> The “imminence” of an injury therefore assures at least in part that it can properly be resolved by the courts.

The Court also makes clear that Congress may not create a general right of citizen enforcement.<sup>200</sup> To construct this central argument, the court in *Lujan* relies on a series of decisions that involved dismissal of taxpayer suits directed at state and federal expenditures and Congressional actions.<sup>201</sup> It is easy to distinguish the taxpayer suits from the nature of the *Lujan* inquiry, however. *Lujan* involves a congressionally bestowed Article III option for the

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196. *Id.* at 560.

197. “When, however, as in this case, a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed...when the plaintiff is not himself the object of the government action of inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.” *Id.* at 562.

198. *Id.* at 564.

199. *Lujan*, 504 U.S. at 565.

200. “We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.” *Id.* at 573–574.

201. *Id.* at 575–576.

resolution of generalized grievances, while the cases referenced by the Court largely involve challenges to Congressional actions.<sup>202</sup> To the Court in *Lujan*, this distinction is irrelevant. Scalia writes that “Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those ‘Cases’ and ‘Controversies’ that are the business of the courts rather than of the political branches.”<sup>203</sup>

According to the Court, then, the Constitution does not permit Congress to restrain the actions of the executive by creating a universal citizen interest in executive officers’ compliance with the law.<sup>204</sup> Therefore, *Lujan* stands for the basic proposition that Congress cannot create an individualized right for a generalized grievance and that a concrete individualized injury is always required.

## 2. Expanding *Lujan*: *Laidlaw* & “Perception-Based” Injuries

In *Friends of the Earth v. Laidlaw Environmental Services*, Justice Ginsburg, writing for the Court, conducted a standing analysis which expanded the range of injuries that would give rise to standing in a citizen suit context.<sup>205</sup> In *Laidlaw*, an environmental group brought suit, pursuant to section 505(a) of the CWA, challenging the legality of discharges from a wastewater treatment facility in South Carolina.<sup>206</sup> The plaintiffs did not allege that the defendant’s activities created any health risk or environmental harm, only that they feared such harm.<sup>207</sup> For example, one member was found to have had standing because she no longer recreated or picnicked in the area of the facility because she feared its harmful environmental effects.<sup>208</sup>

The Court allowed “perception-based” injuries to provide citizen standing. For the majority of justices, the lack of demonstrable environmental or health related harm did not negate standing: “The relevant showing for purposes of Article III standing. . . is not injury

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202. In *Lujan*, Congress had essentially deputized citizens as agents who could enforce the Endangered Species Act. Litigants in the line of taxpayer suits, however, were not conferred standing by Congress.

203. *Id.* at 576.

204. *Id.* at 577.

205. *Friends of the Earth v. Laidlaw Envntl. Services*, 528 U.S. 167 (2000).

206. *Id.*

207. *Id.* at 181–82.

208. *Id.* at 182.

to the environment but injury to the plaintiff.”<sup>209</sup> In effect, it was enough that the plaintiffs merely perceived or feared injury.

*Laidlaw* represents an important departure from *Lujan* because it made Scalia’s particularized injury test definitively less concrete. *Laidlaw* allows a citizen plaintiff’s mere concern or fear, if reasonable, to create a sufficient injury in fact for satisfaction of the standing requirement.

### 3. *Massachusetts v. EPA*

In 2007, *Massachusetts v. EPA* further reinforced *Laidlaw*’s core concept, thus moving the Court’s standing doctrine farther from the rigor of *Lujan*’s particularized injury requirement.<sup>210</sup> The plaintiffs, including the state of Massachusetts, sought to compel EPA to regulate carbon dioxide and other greenhouse gases under the CAA.<sup>211</sup> EPA first challenged the plaintiffs’ standing to sue, arguing that the plaintiffs lacked standing because the harm alleged—global warming and its effects—was too widespread for resolution in an Article III court.<sup>212</sup> To deal with this thorny question, the court looked to *Lujan*: “To ensure the proper adversarial presentation, *Lujan* holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.”<sup>213</sup>

The Court also discusses the unique nature of the named plaintiff, the state of Massachusetts.<sup>214</sup> The Court contends that the state of Massachusetts is unique because of its intent and sovereign duty to protect all of its citizens.<sup>215</sup> As a member of the Union, the state of Massachusetts has given up some of the basic state functions that the federal government now enjoys; but it still must work to ensure that the federal government follows through on those basic

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209. *Id.* at 181.

210. *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497 (2007).

211. *Id.*

212. *Id.* at 517.

213. *Id.*

214. “Only one of the petitioners needs to have standing to permit us to consider the petition for review . . . We stress here, as did Judge Tatel below, the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.” *Id.* at 518.

215. *Id.*

state functions, including the protection of its citizens from global and international external threats.<sup>216</sup>

The Court first deals with the causation problem. In its brief, EPA did not try to discredit the causal connection between greenhouse gas emissions and global warming.<sup>217</sup> But EPA did argue that global warming is a harm that is too large to be addressed by regulation, or by suit.<sup>218</sup> Refusing to justify this argument, the Court says that EPA overstates its case: “Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.”<sup>219</sup> It is easy for the Court to accept the fact that even if EPA regulated carbon dioxide emissions in the transportation sector, full relief for the injuries of Massachusetts would not be created. The Court states that the relief would be small but nonetheless incremental. Incomplete, incremental relief, to the Court, is still relief which can be granted by Article III courts.<sup>220</sup>

*Massachusetts v. EPA* presented the Court with an unprecedented challenge: climate change.<sup>221</sup> Global climate change, aside from presenting a redressibility problem, creates another inherent standing problem under *Lujan*. If an injury must be concrete and particular, it would be difficult for any citizen or state to claim that climate change affects them in a “particular” or “personal and individual way.”<sup>222</sup> Although the Court does note that Massachusetts had filed affidavits alleging current and prospective injury, it does not go into a detailed analysis of the particular nature of Massachusetts’ injury.<sup>223</sup> The Court nonetheless concludes that

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216. *Massachusetts*, 549 U.S. at 519.

217. See Brief for the Federal Respondent in Opposition, *Massachusetts v. Env’tl Protection Agency*, 594 U.S. 497 (2007) (No. 05-1120).

218. EPA’s argument was that because climate change is a global phenomenon, and the litigation centers on the regulation of only one sector (transportation), it is clear then that the regulation of that one sector cannot possibly resolve the potential harm faced by Massachusetts. See *id.*

219. *Massachusetts*, 549 U.S. at 524.

220. “A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.” *Id.* at 526.

221. For the first time, the Supreme Court was asked to judge the reliability and sufficiency of the evidence that greenhouse cases cause or contribute to climate change.

222. *Id.* at 540.

223. *Id.* at 522.

Massachusetts “has alleged a particularized injury in its capacity as a landowner.”<sup>224</sup>

#### 4. Roberts’ Dissent & Lujan’s Separation of Powers Analysis

Justice Roberts’ dissent in *Massachusetts* challenged the majority’s easy dismissal of the analysis around the “particularized injury” inquiry. To Roberts, the very concept of global warming is inconsistent with the particularized injury standing requirement.<sup>225</sup> Additionally, the dissent takes issue with the Court’s discussion of “imminence,” finding that: “accepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless.”<sup>226</sup> This, combined with disappointed appraisals of the court’s causation and redressability analysis, leads to the core of the dissent’s objection with the decision, an objection built upon a principle most wholly articulated in *Lujan*:

When dealing with legal doctrine phrased in terms of what is ‘fairly’ traceable or ‘likely’ to be redressed, it is perhaps not surprising that the matter is subject to some debate. But in considering how loosely or rigorously to define those adverbs, it is vital to keep in mind the purpose of the inquiry. The limitation of the judicial power to cases and controversies ‘is crucial in maintaining the tripartite allocation of power set forth in the Constitution.’<sup>227</sup>

This objection is further clarified by Roberts: “the Court’s self-professed relaxation of those Article III requirements has caused us to transgress ‘the proper – and properly limited – role of the courts in a democratic society.’”<sup>228</sup>

For the dissent, then, the core concern is one of constitutional law and the separation of powers. It is a question of the competency of an Article III institution to resolve a question that should be born solely by the executive. This clearly echoes the conclusion in *Lujan*: that Congress cannot create an individualized right for a generalized grievance, that a concrete individualized injury is required. In his dissent, Roberts indicates why this important: it is a matter of democratic accountability.

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224. *Id.*

225. *Id.* at 541.

226. *Massachusetts*, 549 U.S. at 542.

227. *Id.* at 547.

228. *Id.* at 548–549.

### 5. The Precarious Position of Citizen Suits

*Lujan* stands for the idea that Congress cannot create an individualized right for a generalized grievance, that a concrete individualized injury is required. The line of cases since *Lujan* has clearly eroded the essential injury-in-fact inquiry, which has in turn undermined the fundamental conclusion of the case: that a concrete individualized injury is required. Since *Lujan*, however, the standing debate has taken place on Scalia's terms. The Court has expanded standing opportunities through strained interpretations of the injury in fact prong, but it has not reexamined *Lujan*'s central conclusion: that Congress cannot create an individualized right for a generalized grievance. If citizen suits are to be reinvigorated and rehabilitated in the still-turbulent wake of *Lujan*, the individualized injury problem must be solved. Unless the Court changes the frame of the debate—moving from examinations of the injury in fact parameters to a fundamental reevaluation of the constitutional competency argument—then citizens will continue to face standing challenges, impeding their role as citizen attorneys general.

Additionally, the Court's more liberal standing rules established after *Lujan*, which effectively enable citizen plaintiffs to enforce environmental laws, are by no means secure. *Massachusetts v. EPA* was decided in a 5-4 decision by the justices. Further, two members of the *Laidlaw* majority, O'Connor and Rehnquist, have since retired. These two cases softened the effect of *Lujan*'s standing requirements to the benefit of public interest litigation.<sup>229</sup> But the Court's conservative bloc—Justices Scalia, Roberts, Alito, and Thomas—now appears just one vote shy of overturning the liberal reforms made since *Lujan*. As we describe in Part IV, Congress is not powerless to address the precarious state of citizen standing. Congress has the ability to pass legislation that reaffirms its power and intent to confer a cause of action to all citizens.

#### *C. Eleventh Amendment*

Despite all of the budget cuts facing state agencies, and the increasing difficulty of enforcing environmental laws, states—unsurprisingly—do not like to be compelled to enforce those laws. States act as not only regulators and enforcers of federal environmental laws, but also play the role of regulated community

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229. *Massachusetts v. EPA* allowed the state to assert a future injury based only on the threat of climate change, while *Laidlaw* allowed for a "perception-based" standing. See *supra* note 210.

participants when they own, operate, and construct potentially polluting facilities like hazardous waste landfills, hospitals, prisons, airports, roads, and sewage treatment plants on state property that may violate federal laws. In both capacities, states are often targets of citizen suits.<sup>230</sup>

The three major environmental citizen suit provisions that are the focus of this article (and for that matter most environmental citizen suits) contain language invoking the limits of the Eleventh Amendment when suing state officials.<sup>231</sup> The application of these limits to the CAA, CWA, and SMCRA case law, however, has been disparate. And in the case of SMCRA, the judicial interpretation of the Eleventh Amendment bar has shut many citizens out of the enforcement equation.<sup>232</sup>

### 1. Sovereign Immunity and its Exceptions

In the landmark case of *Chisholm v. Georgia*, the Supreme Court held that Article III courts had jurisdiction to hear suits against states; states, therefore, were denied complete sovereign immunity from suit.<sup>233</sup> *Chisholm* created such an angry reaction from those in Georgia and other states that Congress felt it had to act to protect states from suit.<sup>234</sup> Congress quickly proposed the Eleventh Amendment, directed specifically toward overturning the result in *Chisholm* and preventing suits against states by citizens of other states. But the amendment does not altogether prohibit all suits against states.<sup>235</sup> The text of the Eleventh Amendment is clear,

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230. Hope Babcock, *The Effect of the United States Supreme Court's Eleventh Amendment Jurisprudence on Clean Water Act Citizen Suits: Muddied Waters*, 83 OR. L. REV. 47, 49 (2004).

231. See, e.g., SMCRA §520(a)(2), 30 U.S.C. §1270(a)(2) (2006); CAA § 304(a)(1)(ii), 42 U.S.C. §7604(a)(1)(ii) (2006); CWA § 505(a)(1)(ii), 33 U.S.C. 1365(a)(1)(ii) (2006).

232. See *Clean Air Council v. Mallory*, 226 F.Supp2d 705 (E.D.Pa. 2002) (holding citizen suit provisions of CAA were intended as a means of private enforcement against state officials within Eleventh Amendment limits, suit did not amount to expansive intrusion on state sovereignty interests, and emissions program was a matter of federal law); see also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75 n.17 (1996) (stating that the CWA is authorized against states under the *Ex Parte Young* doctrine).

233. *Chisholm v. Georgia*, 2 U.S. 419, 420 (1793).

234. See *Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (“That decision . . . created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States.”). Source generally substantiates the proposition, but does not mention Georgia directly.

235. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1054–58 (1983).

providing that a citizen of one state (or a citizen of another country) cannot sue one of the United States in federal court.<sup>236</sup> The interpretation of the amendment, however, has been decidedly less clear.

For most of the nineteenth century, the Court followed the interpretation of Chief Justice Marshall, holding that the Amendment was limited to its words.<sup>237</sup> However, after Reconstruction, the Supreme Court substantially broadened its interpretation of the Amendment to provide complete sovereign immunity for states—including immunity from suits brought by its own citizens.<sup>238</sup> The Court justified this interpretation by opining that “[t]he fundamental rule of which the Amendment is but an exemplification”<sup>239</sup> and that “[m]anifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States.”<sup>240</sup>

Yet, notwithstanding the expansion of immunity for states, the Supreme Court has rationalized three exceptions to the states’ sovereign immunity: “abrogation,” “waiver,” and the *Ex parte Young* doctrine. The first two exceptions are of little relevance to the citizen suit provisions to enforce state compliance with federal law mandates. Therefore, we make short work of those exceptions below, and direct our focus to the *Ex parte Young* doctrine.

### *a. Abrogation*

The abrogation of sovereign immunity only exists if Congress expresses its unequivocal intention to do so<sup>241</sup> and is pursuant to a

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236. “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. AMEND. XI.

237. See *Osborn v. Bank of the U.S.*, 22 U.S. 738, 857–58 (1824).

238. Expansion of the doctrine as a formal holding began with *Hans*, 134 U.S. at 19; see also *In re Ayers*, 123 U.S. 443 (1887) (“This historic statement justifies the following conclusions: (1) It shows that by the Constitution makers it was ordained that the original Constitution should not be construed (as it had been in *Chisholm v. Georgia*) to extend to any suit by a citizen of one State, or foreign subjects against a State. (2) If any of these suits were those of citizens against his own State (as it may have from the names of the plaintiffs in *Huger v. South Carolina* and *Grayson v. Virginia*) they, with those against a State by parties not citizens thereof, were equally condemned by this amendment.”).

239. *Ex parte New York*, 256 U.S. 490, 497 (1921).

240. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

241. *Seminole Tribe*, 517 U.S. at 55 (“Congress’ intent to abrogate the States’ immunity from suit must be obvious from ‘a clear legislative statement.’”) (quoting *Blachford v. Native Vill. of Noatak*, 501 U.S. 775, 786 (1991)).

valid grant of Constitutional authority.<sup>242</sup> Congress obtains its power to draft laws for the protection of the environment based on the Commerce Clause, a very important Constitutional provision.<sup>243</sup> However, courts have, to date, only recognized the enforcement provision of the Fourteenth Amendment (Section 5) as a constitutional basis for Congressional abrogation.<sup>244</sup>

*b. Waiver*

Although a state can also waive its Eleventh Amendment immunity and consent to be sued, the parameters put on waiver have left it an unavailable avenue around sovereign immunity. A state may waive its immunity by statute or by unequivocally expressing its intention to do so.<sup>245</sup> But most obviously, states—like people—do not like being sued and will rarely, if ever, voluntarily shed their immunity. Some have argued that by agreeing to enforce federal standards, a state has waived its sovereign immunity.<sup>246</sup> However, such a novel argument would suppose the validity of constructive waiver of a constitutional right, which has not yet been accepted by the courts.

*c. Ex parte Young Doctrine*

The most important exception to state sovereign immunity, and the saving grace for environmental citizen suits against state officials, is the *Ex parte Young* doctrine. The Supreme Court in *Ex parte Young* held that a federal court has jurisdiction over a suit against a state officer to enjoin official actions that violate federal law, even if the state itself is immune.<sup>247</sup> The *Ex parte Young* exception “create[s] an anomaly” where the enforcement of a statute is ‘state action’ under the Fourteenth Amendment, yet an ‘individual wrong’ under the Eleventh Amendment.<sup>248</sup> “In determining whether the doctrine of

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242. *Alden v. Maine*, 527 U.S. 706, 756 (1999).

243. U.S. CONST art. I, § 8, cl. 3.

244. “We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power.” *Alden*, 527 U.S. at 756.

245. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238–240 (1985).

246. “Congress required the states to agree to submit to federal jurisdiction . . . to review their non-discretionary actions for conformity with federal law’ and therefore that the State ‘waived its immunity.’” *Bragg v. W.Va. Coal Ass’n*, 248 F.3d 275, 298 (4th Cir. 2001).

247. *Ex parte Young*, 209 U.S. 123, 159–60 (1908).

248. CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS*, § 48 (4th ed. 1983). *See also Idaho v. Coeur d’ Alene Tribe*, 521 U.S. 261, 288 (1997) (holding that the premise of the

*Ex parte Young* avoids an Eleventh Amendment bar to a suit, a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’<sup>249</sup> Thus, citizen environmental enforcement actions to enjoin a violation of federal law by a state fall well within the bounds of *Ex parte Young*.<sup>250</sup>

Professor Hope Babcock addressed and analyzed the four ways in which federal courts have narrowed the effectiveness of *Ex parte Young* doctrine to protect the integrity of federal environmental citizen enforcement suits: 1) the scope of the doctrine; 2) the scope of the relief; 3) the nature and type of the relief; and 4) the character of the law under which the suit has been brought.<sup>251</sup> Professor Babcock goes into great detail on these four, and her analysis sparks alarm for the future of citizen suit enforcement against states. This article focuses on the fourth limitation, and the Fourth Circuit’s recent opinion in *Bragg v. West Virginia Coal Association*. This decision may effectively turn federal environmental laws into state laws, and forever block citizens from forcing states to comply with minimum federal standards through citizen suits.

## 2. *Ex Parte Young* and the *Bragg* Barrier to Citizen Enforcement

In *Bragg v. West Virginia Coal Association*, citizens of West Virginia challenged the issuance of permits for mountaintop removal mining,<sup>252</sup> alleging that the impacts of the mining practice violated SMCRA.<sup>253</sup> The citizen complaint alleged that the Director of West Virginia’s Division of Environmental Protection violated his non-discretionary duties under SMCRA by granting the permits.<sup>254</sup> The Southern District of West Virginia found for the plaintiffs, enjoining the state to make certain findings before issuing mining permits.<sup>255</sup>

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doctrine is based on the legal fiction that states cannot authorize its officials to violate federal law).

249. *Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 645 (2002).

250. *See Seminole Tribe*, 517 U.S. at 75, n.17.

251. Babcock, *supra* note 230.

252. Mountaintop removal mining, in which the tops of mountains and hills are literally blown away to reach the coal seams below, is considered to be an especially brutal environmental practice. *See* 30 C.F.R. § 824.11 (“The activities involve the mining of an entire coal seam running through the upper fraction of a mountain, ridge, or hill, by removing all of the overburden and creating a level plateau or gently rolling contour with no highwalls remaining.”).

253. *Bragg*, 248 F.3d at 285.

254. *Id.* at 286.

255. *Id.*

On appeal, the Fourth Circuit concluded that SMCRA, although a federal statute, becomes state law once West Virginia's SMCRA program is approved by OSM.<sup>256</sup> The court found that, after it is approved by the federal government, West Virginia's SMCRA program loses its federal characteristics, which makes the state immune from a federal citizen suit under the Eleventh Amendment.<sup>257</sup>

To reach this novel result, the Fourth Circuit applied the Supreme Court's ruling in *Pennhurst State School & Hospital v. Halderman* ("Pennhurst II").<sup>258</sup> The Court in *Pennhurst II* held that citizens cannot sue state officials in federal court for violations of state law, regardless of the nature of relief sought.<sup>259</sup> Likewise, because the *Ex Parte Young* exception to sovereign immunity does not apply to violations of state law, *Bragg* held that West Virginia was therefore immune from suit.<sup>260</sup>

In defining SMCRA minimum standards as state law, the *Bragg* court emphasized the "extraordinary deference given to the states" in enforcing SMCRA.<sup>261</sup> SMCRA allows states to enact their own laws incorporating minimum standards, as well as any more stringent, but not inconsistent, standards they might choose.<sup>262</sup> The *Bragg* court emphasized that SMCRA granted to states "exclusive jurisdiction over the regulation of surface mining" within its borders<sup>263</sup> and that if a state fails to submit a program for approval, the program is not approved, or the Secretary of the Interior withdraws the approval because of inadequacy of the program, exclusive jurisdiction resides in the federal government.<sup>264</sup> The conclusion of the court is that there is either federal jurisdiction or state jurisdiction—not both.<sup>265</sup>

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256. *See id.* at 295.

257. "[E]ven though the States ultimately remain subject to SMCRA, the Act grants "exclusive jurisdiction" to a primacy State (one with an approved program), thereby conditionally divesting the federal government of direct regulatory authority." *Id.* at 294.

258. 465 U.S. 89 (1984).

259. *Id.* at 106 (holding that the *Ex parte Young* doctrine is "inapplicable in a suit against state officials on the basis of state law.>").

260. "In this case, the federal interest in adjudicating the dispute is undoubtedly stronger, as the rights at issue were created by the State pursuant to a federal invitation to implement a program that met certain minimum standards set by Congress. Moreover, the federal government, through the Secretary's oversight role, retains an important modicum of control over the enforcement of that State law." *Bragg*, 248 F.3d at 296.

261. *Id.* at 293.

262. *Id.* at 288. (states may adopt "more stringent, but not inconsistent" standards) (citing 30 U.S.C. § 1255(b)).

263. SMCRA § 503(a), 30 U.S.C. §1253(a) (2006).

264. *See* 30 U.S.C. §1254(a) (2006).

265. *Bragg*, 248 F.3d at 289.

### 3. The Fourth Circuit's Flawed Reasoning

The *Bragg* decision was an unprecedented interpretation of the sovereign immunity doctrine. The Fourth Circuit even acknowledged that the state's primacy is always subject to revocation, and that the federal government still oversees a delegated state program and has an obligation to inspect and monitor the operations of the state.<sup>266</sup> What the *Bragg* court missed, however, is that the existence of continuing federal oversight of primacy state programs stands for the proposition that there is not a clear "drop off" of federal jurisdiction. The enforcement of federal minimum standards is an obligation of states with approved programs.<sup>267</sup> Therefore, citizen attorneys general continue to hold authority to enforce those same minimums through citizen suits.

The Fourth Circuit recognized that "rather than asking the States to enforce the federal law, Congress through SMCRA invited the States to create their own laws, which would be of 'exclusive' force in the regulation of surface mining within their borders."<sup>268</sup> Yet, what the court failed to recognize is that Congress's "invitation" to the states was an invitation to enforce federal minimum standards, not merely a request to abide by nonbinding model legislation. In instances where a state is not yet meeting the federal regulatory floor, enforcement of the minimum standards lies with the federal government and citizens.<sup>269</sup> What the court failed to comprehend is the practical matter that in states like West Virginia and Ohio, and any other coal producing state, the so-called state law would not exist but for Congress' "invitation" to enforce SMCRA.<sup>270</sup>

The fragile balance between federal and states' rights is maintained through adherence to the doctrine of sovereign immunity, and "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform

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266. *Id.* (citing 30 U.S.C. §§ 1253(a)).

267. *See* 30 U.S.C. § 1255(b) (2006).

268. *Bragg*, 248 F.3d at 297 (emphasis added).

269. One of *Bragg's* progeny in the Third Circuit noted that when an "element of an approved state program is inconsistent with – i.e. less stringent than – the federal objective it implements," it is thus federal law and federally enforceable. *See Pennsylvania Fed'n of Sportsmen's Club v. Hess*, 297 F.3d 310, 324 (3rd Cir. 2002).

270. One reason for the legislation was to make sure that sellers of coal in different states will not be used to undermine the ability of the states to improve and maintain adequate standards, and finding that currently there were a substantial number of acres of un-reclaimed lands which have posed negative impacts and that lead to socio-economic and environmental costs. *See SMCRA § 101(g-h)*, 30 U.S.C. § 1201(g-h) (2006).

their conduct to state law.”<sup>271</sup> Yet *Bragg* takes those concepts a step too far when it finds that the state’s dignity would be impaired if federal citizen enforcement were permitted in the context of a state law.<sup>272</sup> According to the court, “[t]hat dignity interest does not fade into oblivion merely because a State’s law is enacted to comport with a federal invitation to regulate within certain parameters and with federal agency approval.”<sup>273</sup>

However, allowing citizens to use federal courts to enforce minimum federal standards does not deprive the state of its ability to tailor its regulatory scheme to their unique terrain, climate and physical characteristics.<sup>274</sup> States can continue to develop and implement a program to achieve the purposes of SMCRA as they have for over thirty years. However, whether the state’s regulations or enforcement comport to that of the federally mandated minimum standards is a question solely of federal law, and thus can be enforced by a citizen suit.

#### 4. Practical Implications of *Bragg*

The *Bragg* decision has the obvious effect of preventing SMCRA suits from compelling state officials to enforce the federal statute. *Bragg*’s implications, however, extend more broadly. The decision could prevent all potential citizen litigants from challenging state action that violates a federal environmental law.

##### *a. Preventing SMCRA Citizen Suits*

The first effect of the *Bragg* court’s Eleventh Amendment jurisprudence will be to keep many SMCRA citizen suits out of federal court in a region where enforcement is necessary. Federal law has been ignored and violated by West Virginia for more than a decade.<sup>275</sup> To the U.S. District Court for the Southern District of West Virginia, “The results are obvious: an immense state liability incurred by the mine operators, but borne by the taxpayers, and on-going pollution of the State’s streams.”<sup>276</sup> *Bragg*’s expansionist view

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271. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

272. *Bragg*, 248 F.3d at 296.

273. *Id.* at 297; cf. *United States Dep’t of Energy v. Ohio*, 503 U.S. 607, 625 (1992) (noting that state-law penalties approved by the Environmental Protection Agency and supplanting the Clean Water Act did not “arise under federal law” as meant in 28 U.S.C. § 1331).

274. See 30 U.S.C. § 1201(f) (2006).

275. *West Virginia Highlands Conservancy v. Norton*, 147 F. Supp. 2d 474, 481 (S.D. W.Va. 2001).

276. *Id.*

of the Eleventh Amendment not only has the effect of keeping citizen suits out of court, but also of preventing the enforcement of environmental laws.

The decision in *Bragg* has been held as controlling also in a Third Circuit case, eerily similar to the facts and regulatory predicament Ohio faces in dealing with enforcement of the bonding requirements of SMCRA.<sup>277</sup> In *Pennsylvania Federation of Sportsmen's Clubs v. Hess*, environmental and conservation groups brought an action against the Secretary of the Pennsylvania Department of Environmental Protection under SMCRA, alleging a failure to perform duties concerning enforcement of its reclamation bonding program.<sup>278</sup> The Court ruled that because Pennsylvania is a primacy state, "OSM has relinquished its regulatory authority and regulation has become a matter of state law."<sup>279</sup>

#### *b. Denial of Federal Court Jurisdiction*

The denial of federal court as a venue for citizen suits resulting from *Bragg* has several adverse effects for citizen litigants, each decreasing the potential for effective public enforcement of environmental laws.

##### i. Loss of Fee-shifting Opportunities

First, without access to the federal courts, citizens could lose the opportunity to recover litigation costs. As explained at length in this article, one of the biggest incentives for a citizen litigant to bring an enforcement suit is the assurance that he will be able to recover attorneys' fees if successful.<sup>280</sup> Such fee shifting is rarely offered by state courts, however. Therefore, denying citizens the right to enforce federal environmental standards in federal court, pursuant to federal statutes, removes an important incentive to bring suit.

##### ii. Less Impartial Decision-making

Second, unlike federal court where the President appoints judges to life terms, many state judges are elected.<sup>281</sup> Local politics is thus

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277. See *infra* Part II.C.1.a.

278. 297 F.3d 310 (3rd Cir. 2002).

279. *Id.* at 324.

280. See *infra* Part III.A for a discussion of fee-shifting clauses in citizen suit provisions. One commentator has gone so far as to say that federal citizen suits are "made possible" by the inclusion of fee shifting provisions. Florio, *supra* note 67, at 707.

281. In total, thirty-nine states elect judges at some level, <http://www.pbs.org/wgbh/pages/frontline/teach/american/justice> (last visited Dec. 30, 2009).

thrust into the center of environmental enforcement. As states continue to try to “level the playing field” for business, the state court becomes a less than hospitable place for a citizen plaintiff to assert his right to enforce environmental mandates. Finally, many states have their own version of sovereign immunity from actions in state court as well.<sup>282</sup> If the *Bragg* decision stands, transforming federal law into state law for primacy states, the cloak of sovereign immunity could be used as a complete bar to citizen suit enforcement of federal environmental standards against recalcitrant state agencies.

*c. The Broader Threat to Citizen Enforcement*

The federal sovereign always carries the right to sue its state subordinate for a violation of a federal standard;<sup>283</sup> therefore, the citizen attorney general standing in the shoes of the sovereign also possesses an equal right. However, as more and more states gain primacy, the Eleventh Amendment as interpreted by the Fourth Circuit could lead to a systematic dismantling of citizen enforcement in a time when it is needed most. Although the Fourth Circuit has been the only circuit to address the issue, broadly applying the Fourth Circuit’s doctrine would bar citizens from enforcing the federal minimums of any environmental statute.

*D. “Diligent Prosecution”*

The legislative history of the CAA, used routinely by courts to determine the intent of all citizen enforcement provisions, indicates a balance between two very important considerations. First, the legislative history shows that Congress wanted citizen enforcement to provide more and better enforcement by “prodding the government” to take action against violators and empowering the citizens to take action when the government failed to respond.<sup>284</sup> Second, this authority was qualified to make sure that citizen enforcement “did not unduly disrupt or conflict with government enforcement or harass violators.”<sup>285</sup>

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282. See, e.g., OHIO REV. CODE ANN. [BB T.1-OH] § 2744 (2009).

283. “Sovereign immunity does not, for example, prevent the U.S. itself from bringing suit against an unconsenting state to ensure compliance with federal law.” *Bragg*, 248 F.3d (citing *United States v. Texas*, 143 U.S. 621, 644–45 (1892)).

284. Jeffrey G. Miller, *Overlooked Issues in the “Diligent Prosecution” Citizen Suit Provision*, 10 WID. L. SYMP. 63, 70–71 (2003) (citing Senator Hart’s statement commenting that the notice would have the effect of “prodding governmental enforcement. See 116 Cong. Rec. 33,104 (1970) (statement of Sen. Hart)).

285. *Id.* at 70.

Unfortunately, however, courts' interpretation of these provisions has been inconsistent. This section examines the "diligent prosecution" clauses and explains why the absence of a clear definition of their terms harms citizen litigants.

### 1. Balancing Government & Citizen Enforcement

The balance between government and citizen enforcement in the CAA was struck through the incorporation of the notice, delay, and preclusion provisions.<sup>286</sup> Under the CAA, "[n]o action may be commenced if the Administrator or State has commenced and *is diligently prosecuting* a civil action *in a court* of the United States or a State *to require compliance* with the standard, limitation, or order, but in any such action in a court of the United States *any person may intervene as a matter of right.*"<sup>287</sup> Thus, if the state has the resources and the political will to prosecute a violator that has been brought to its attention through a citizen's 60-day notice, the state should have the first bite at the apple.

As the language implies, and the Courts have interpreted, the ability of the state to have the first prosecution right does not bar a citizen action once the state merely files suit. Beyond the statute's grant of intervention to a citizen in the state's case as a matter of right, there are four important caveats to the state's prosecution barring a citizen action: 1) the prosecution must be commenced before the citizen files; 2) the state must be diligent in its prosecution; 3) the state's action must be in a court; and 4) the state's action must be meant to require compliance.<sup>288</sup>

While the diligent prosecution bar's line of case law is not a direct assault on citizen enforcement actions, the case law does bring to light the unnecessary ambiguities in the provisions. We next focus on two of those ambiguities which courts could use as a barrier to citizen enforcement unless there is quick and decisive clarification by Congress.

### 2. What is "Diligent" & What Constitutes "Compliance"?

The first and most obvious question is: what constitutes "diligent" prosecution of a violation? The dictionary definition of diligent is "careful; attentive; persistent in doing something."<sup>289</sup> This

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286. See 42 U.S.C. § 7604(b) (2006).

287. CAA § 304(b)(1)(B), 40 U.S.C. § 7604(b)(1)(B) (2006) (emphasis added).

288. See 42 U.S.C. § 7604(b) (2006).

289. BLACK'S LAW DICTIONARY 469 (7<sup>th</sup> ed. 1999).

definition provides little help in the context of litigation, as it is qualitative and subjective, leaving too much to the whims of the court. One qualification to the diligent prosecution bar is the requirement that the state enforcement action must be one calculated to “require compliance.” Courts, in determining the scope of the term “diligent” look to whether an action is capable of or calculated to lead to compliance.<sup>290</sup>

Unfortunately, courts have not reached a consensus on what actions are capable of leading to compliance. Questions still persist as to what is meant to require compliance; whether a preclusive action by the state is meant to require compliance; and whether the government’s prosecution should enjoin the violation or serve as a deterrent from future violations. The last question, of course is the most important as it determines what is meant by compliance and whether an action leads to compliance.

### 3. Who Bears the Burden of Proof?

To make matters worse, courts have placed citizen plaintiffs with the burden of proving that the state’s prosecution is not diligent. Courts have held that diligence will be presumed, and, where an agency has specifically addressed concerns of analogous citizen suit, “deference to an agency’s plan of attack is particularly favored.”<sup>291</sup> It is unreasonable to expect a citizen plaintiff, whose chief concern is protecting the environmental and human health of his community, to effectively rebut the presumption that every state action toward a defendant was capable of requiring compliance.

Plaintiffs’ burden to rebut the presumption of diligence juxtaposes defendants’ burden to persuade the court that a case is precluded by the doctrines of mootness<sup>292</sup> and *res judicata*.<sup>293</sup> The

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290. See *St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d. 592, 606 (E.D. La. 2007), *reconsideration denied*, 2007 U.S. Dist. LEXIS 81829 (E.D. La. 2007) (holding that “the ‘diligent prosecution’ analysis should look to whether government enforcement action is capable of requiring compliance with the Clean Air Act and is in good faith calculated to do so.”).

291. *Am. Canoe Ass'n v City of Attalla*, 2003 U.S. Dist. LEXIS 25057, at \*6 (N.D. Ala. 2003).

292. See *Friends of the Earth v. Laidlaw Env'tl. Services*, 528 U.S. 167, 189 (2000) (quoting *U.S. v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968) (“A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”)).

293. See *Worrie v. Boze*, 95 S.E.2d 192, 196–197 (Va. 1956) (“One who asserts the defense of *res adjudicata* has the burden of proving that the very point or question was in issue and

doctrines of mootness and *res judicata* work as the common law equivalent of the statutory preclusive device of the diligent prosecution bar. All three doctrines essentially state that if a decision on the matter has been made, then allowing the case to continue would be purely academic or at the most, wasteful of the court's resources.

Courts generally do not presume that a given case is *res judicata* or moot. Thus shifting the burden for essentially the same reasoning and outcome is contrary to established doctrines. Such burden shifting also stands as a disincentive to citizens filing suit if most of their resources will be spent rebutting deferential presumptions.

#### 4. Inconsistency of Interpretation Between Acts

There is also a distinct and unnecessary divergence between the CWA and the CAA as to the boundaries of the term "diligent." Under the CWA, the courts have created a higher barrier for the citizen suit by stating that "the presumption [of diligence] is not rebutted merely by showing that the settlement in the state action was less burdensome to the discharger than that demanded in the citizen suit."<sup>294</sup>

Under the CAA, however, at least one court expressed opposition to the incredible deference to the government in the context of citizen enforcement, going as far as saying that "[c]omplete deference to agency enforcement strategy, adopted and implemented internally and beyond public control, requires a degree of faith in bureaucratic energy and effectiveness that would be alien to common experience."<sup>295</sup> The court in *Gardeski v. Colonial Sand & Stone* thus chose to examine the specifics of state enforcement that would enable citizens to challenge state enforcement that appears to be lax.<sup>296</sup> Such divergence in interpretation between environmental statutes is unproductive. Congress can resolve these ambiguities by placing the burden of proving diligence in the hands of the citizen suit defendant.

The courts have not technically created a barrier to citizen enforcement through their various interpretations of the terms "diligent" or "to require compliance," but the ambiguity left by Congress could stand to unnecessarily keep valid citizen suits out of

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determined in the former suit."); *see also* Commonwealth ex. rel. Gray v. Johnson, 7 Va. App. 614, 618 (1989).

294. Conn. Fund for the Env't v. Contract Plating Co., 631 F.Supp. 1291 (D. Conn. 1986).

295. *Gardeski v. Colonial Sand & Stone Co.*, 501 F.Supp. 1159, 1168 (S.D.N.Y. 1980).

296. *See id.*

court. Beyond Congressional intervention,<sup>297</sup> the courts have the ability to ensure that the spirit and intent of citizen suits is maintained, and that the important goal of guaranteeing environmental compliance is met. Courts, when faced with a citizen suit where the government has not acted to the citizen litigant's satisfaction, should provide citizens the ability to file successive actions if the government's prosecution does not require compliance, is too dilatory, or is completely inadequate.

### 5. State Preemption of Citizen Suits

Uncertainty over the definition of diligence and absolute deference to the government's "plan of attack" are most problematic for the future effectiveness of citizen suits when the government preempts the citizen suit for reasons beyond environmental protection. The notice provisions show that agencies were intended to be primary enforcers. The intervening 60 days prior to the citizen filing its suit is meant to provide the government with the "first bite at the apple" of enforcing environmental law. But the provisions are not meant as an opportunity for the state to preempt the enforcement by the citizens to the detriment of environmental protection and public participation.

As David Hodas has explained, several states have adopted this preclusion approach—in practice if not in explicit words—as a way to avoid liability.<sup>298</sup> Environmental groups such as Chesapeake Bay Foundation and Natural Resources Defense Council have been victims of collusion between states and polluters.<sup>299</sup> The result of the preemption has routinely been more lenient sanctions on the polluter than the citizen action had demanded.<sup>300</sup>

The basis for some of the preemption of citizen suits is to protect local industries.<sup>301</sup> It has long been believed by some that environmental enforcement stymies economic growth, and has been the battle-cry of some business groups and lawmakers. In these lean economic times, these arguments have become louder and have surfaced in the form of regulatory reform initiatives such as those discussed in Part II. Collusive state preemption of citizen suits will only increase as long as lawmakers and policymakers feel that the

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297. We address Congressional intervention to clarify and remove barriers in Part IV, *infra*.

298. See Hodas, *supra* note 300, 1648–49.

299. *Id.*

300. *Id.*

301. *Id.* at 1650.

duty of the state to attract business is mutually exclusive from and in overt opposition to the duty to protect environmental health.

#### IV. THE CALL TO CONGRESS TO PROTECT AND PRESERVE ENVIRONMENTAL CITIZEN SUITS

This article has argued that citizen enforcement is the vital third leg of the cooperative federalist regime of environmental enforcement. We have also explained why citizen enforcement is especially necessary when economic distress affects both public and private sectors. We have also discussed how courts have created barriers that impede the full, vigorous citizen enforcement of environmental laws that Congress intended—and that has proven necessary today.

In this final section, we propose legislative solutions that will maximize the efficacy of supplemental citizen litigation, allowing citizen litigants to act as the “citizen attorneys general” that Congress envisioned. These legislative solutions will address the four major court-created issues that act as either disincentives or outright barriers to citizen litigation. The solutions we propose take the form of legislation—a model act—that will address the major impediments to full citizen participation in environmental enforcement.

##### *A. The “Omnibus Environmental Enforcement Act”*

Congress giveth citizen suits, the courts taketh away, and now it is imperative that Congress step in once more to make sure that federal citizen suits are able to pick up the slack for the failure of cooperative federalism. The solution to these problems is decisive action by the 111<sup>th</sup> Congress to pass an “Omnibus Environmental Enforcement Act” (“the Act”) as a means to facilitate public enforcement of environmental laws. The Act would be codified most appropriately as additional provisions of the National Environmental Policy Act (NEPA),<sup>302</sup> divided into three sections as explained below.

##### *B. Section One: Congressional Findings*

The Act would initially begin with a list of Congressional findings to stand as a backdrop explaining why Congress chose to act in the

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302. The National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321–4347 (2000), was one of the first laws ever written that establishes the broad national framework for protecting our environment, and therefore appropriate for a broad reaching citizen suit provision stylized for the same purpose.

1970s and why it must act again. The findings clause would: 1) reiterate the Congressional intent of the original environmental citizen suits as a means to provide more and better enforcement of environmental and human health protections; 2) find that courts have misread legislative histories and misinterpreted many citizen suit provisions; and 3) state that human and financial resource scarcity in federal and state government agencies make it imperative that citizens be given full power to step in the shoes of governmental regulators to enforce Congress' important environmental mandates.

### *C. Section Two: Essential Framework of Citizen Suits*

The Act would then rescind all current federal environmental citizen suits and replace them with one centralized citizen suit provision that governs all federal environmental protection laws. The provisions in all acts are all substantially similar.<sup>303</sup> The minor differences in the processes of citizen enforcement from one environmental statute to the next are unnecessary, and only contribute to further eroding of citizen enforcement potential. There have been no viable arguments that the process for citizen enforcement of CWA, SMCRA, or CAA, or any of the other score of environmental laws must be dissimilar from each other or dissimilar than the enforcement processes of the federal government.<sup>304</sup>

The Act would maintain much of the CAA's enforcement structure, including the notice, delay, and venue provisions of current citizen suits. The Act would also preserve the enforcement rights of agency heads. The Act would permit a citizen to sue a member of the regulated community for a violation of a standard or limitation or the state or federal government for not enforcing Congressional mandates under one of the enumerated statutes. However, the barriers that have intentionally or otherwise been erected by states or courts to keep citizen suits out of court must be eliminated.

### *D. Section Three: Eliminating Procedural Barriers*

The final section would act as a clarifying provision that would address each of the major court-created barriers to citizen litigation that we outline in Part III. The suggestions we propose would allow citizen litigants the flexibility to effectively enforce federal

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303. See *supra* note 7.

304. For example, one model citizen suit provision could eliminate the differences in the various fee-shifting provisions. See *infra* Part III.A.

environmental laws by providing incentives and reducing barriers to their litigation.

### 1. Clarifying Attorneys' Fees Clauses

First, the provision would provide clear parameters for the recovery of attorneys' fees following a suit. Congress recognized and intended the fee-shifting provisions in the CAA and other environmental statutes to act as a statutory exception to the American rule.<sup>305</sup> Congress can resolve the ambiguity created by *Ruckelshaus* by defining the phrase "whenever appropriate."<sup>306</sup> In this definition, the Act would explicitly permit courts to allow unsuccessful plaintiffs who "serve the public interest" to receive appropriate fees.

The provision should also explicitly *not* allow courts to grant attorneys' fees to defendants when a plaintiff, if unsuccessful, brings an otherwise colorable claim. Admittedly, some would counter this with the argument that explicit disapproval of fee shifting for the defendant would lead to unheeded citizen suits over every state action and every environmental permittee, thus deadlocking the courts and keeping state officials from actively enforcing environmental laws. However, under Rule 11 sanctions<sup>307</sup> and other frivolous law suit standards,<sup>308</sup> courts still will be able to keep such frivolous suits out of the federal judicial system.

### 2. Defining "Diligent Prosecution"

The Act would clarify the ambiguities concerning diligent prosecution. The currently undefined term "diligent"<sup>309</sup> would be defined temporally by applying six to twelve month transparency benchmarks during which the agency must keep the citizen who filed the notice informed of its prosecution. Also, "diligent" would be defined qualitatively, by stating that the prosecution shall be one that is calculated to lead to compliance *and* deter future violations.

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305. "[C]ongress meant something more by the provision in the Clean Air Act: it intended to encourage the participation of 'public interest' groups in resolving complex technical questions and important and difficult questions of statutory interpretation, and in monitoring the prompt implementation of the Act." *Gorsuch*, 672 F.2d at 38.

306. *See infra* Part III. A.

307. Federal Rule 11(b) allows for sanctions when a suit or pleading is brought for an "improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. P. 11(b)(1).

308. *See supra* note 178.

309. *See* discussion at *supra* note 56.

Theoretically, this would require judgment on whether a settled sanction between the violator and the government was stringent enough for both specific and general deterrence of that violation, thus both limiting the need for future governmental or citizen enforcement actions.

The Act would specifically provide for successive citizen suits when governmental enforcement has been ineffective or inadequate; and it would task the courts to determine the adequacy of governmental enforcement based on whether the outcome has or would lead to compliance. Also, it would expressly allow for successive citizen suits if the governmental prosecution did not cover all allegations of the citizen suit notice. Finally, this provision would address collusive or dilatory preclusion by states by requiring the precluding agency or defendant to shoulder the burden of proving that the governmental prosecution was diligent and was calculated to require compliance.

### 3. Reaffirming the Citizen Attorney General Concept

This section would first address citizen standing by creating a new standing paradigm for environmental plaintiffs, one allowing them to act as true “citizen attorneys general.” As we described in Part III, standing remains the fundamental barrier to citizen enforcement of environmental laws, a barrier that prevents the full realization of the citizen attorney concept.

First, Congress can include language in a new act such as ours to reaffirm both its intent and its power to confer a cause of action and create a generalized grievance. This could be accomplished with simple language that expands upon the attempted grant of universal standing in each of the environmental statutes. The environmental statutes provide that “any person” may sue to enforce the acts, yet the Court has not recognized this language as a grant of universal standing.<sup>310</sup> Congress should unequivocally assert its intention to confer a cause of action to all citizens as a way to ensure that their environmental laws are complied with.

An additional device to ensure standing, first proposed by Cass Sunstein, would be the inclusion of cash bounties.<sup>311</sup> For example, Congress could allow successful citizen litigants to obtain modest cash prizes, perhaps a few hundred up to a few thousand dollars, in addition to litigation expenses. Citizens would then have a direct

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310. CAA § 304(a), 42 U.S.C. § 7604(a) (2006).

311. Sunstein, *supra* note 183, at 232.

interest and a concrete stake in the outcome of the litigation: win and they make money.

At the very least, our suggestions would force the Supreme Court to focus squarely on Congress' constitutional power to confer such a cause of action to citizens. The novel language we suggest would no doubt be challenged and would almost certainly reach the Court. But such a challenge would provide an opportunity for the Court to move beyond the narrow analysis of the sufficiency of injuries in fact. The Court could move instead to the more fundamental question of whether Congress has the power to convey universal standing to citizen plaintiffs.

#### 4. Eleventh Amendment

Finally, the Act would affirm that state regulations pursuant to federal laws shall remain federal laws. This clarification would ensure that the Eleventh Amendment does not immunize state officials from citizen suits. As stated previously, it is imperative that citizens be allowed to stand in the shoes of the federal government when enforcing environmental mandates in suits against both private individuals and the government itself. Just as the federal government can take action against a state to require adherence to federal mandates, so shall citizens.

In fact, the proposed provision should implicitly reference the *Ex parte Young* doctrine as the basis for citizen enforcement of federal standards against state officials as an exception to sovereign immunity.<sup>312</sup> The proposed provision would maintain the language in current citizen suits that a citizen may bring suit against governmental instrumentality or agency “to the extent permitted by the Eleventh Amendment.”<sup>313</sup> However, it would clarify the phrase “to the extent permitted by the Eleventh Amendment to the Constitution” by permitting citizens of a state to file suit against its state or state agency or official for not enforcing; conforming its regulations to; or otherwise abiding to the federal minimum standards or limitations of the enumerated environmental laws covered by the Act.

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312. The provision may state that “a federal court can issue prospective injunctive and declaratory relief compelling a state official to comply with federal law.” See *S&M Brands v. Cooper*, 527 F.3d 500, 507 (6th Cir. 2008).

313. “[A]ny citizen may commence a civil action on his own behalf against . . . any governmental instrumentality or agency to the extent permitted by the eleventh amendment.” See CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1) (2006).

## CONCLUSION

The idea for this article was borne from our simple belief that environmental laws should be vigorously enforced to be effective. By including citizen suit provisions in nearly every environmental statute enacted since the 1970s, Congress has demonstrated that it, too, shares our belief. These provisions act as an insurance policy, as a way to ensure that environmental laws can be enforced even when state and federal governments fail to do so. Indeed, the legislative histories behind these acts show that Congress did not want an ineffective, or broken, enforcement model to impede natural resource protection.

As we have explained, the cooperative federalist enforcement model has proven ineffective on many levels, resulting in unenforced laws. Each flaw in this model, moreover, is created by or compounded by political resistance to regulation and tightening state agency budgets. Citizen enforcement, therefore, is increasingly necessary. It is true that “the citizen suit is meant to supplement rather than to supplant governmental action.”<sup>314</sup> But the citizen suit should not itself be supplanted by procedural obstacles. The four major legal barriers we have described that hamper citizen access to the courts are significant but not insurmountable. The effect of these barriers is to alter Congress’s grant of citizen standing, preventing public interest groups like ours from enforcing national standards. But relatively simple legislative changes, such as the ones we have described, will allow Congress to reassert its intention and power to convey citizens’ broad enforcement powers.

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314. *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987).