

# ARTICLE

## DELAYED JUDICIAL REVIEW OF AGENCY ACTION

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### ABSTRACT

*Should Congress be able to completely exempt the orders issued by a government agency from review by the courts? Some scholars argue that limiting courts' jurisdiction in this fashion would be unconstitutional. What if, instead, Congress merely delays the point in time when a plaintiff may challenge an administrative order?*

*In recent years, courts have interpreted many statutes to only allow delayed judicial review of orders. This can cause judicial review to be deferred for several months or even years and, as a result, this mechanism can discourage meritorious challenges of orders. Despite the unfairness of delayed judicial review for potential plaintiffs, it is a widely accepted proposition that this form of review is nonetheless necessary in many contexts. This view rests on the premise that the alternative approach, immediate judicial review, would inevitably lead to two types of problems. First, it would cause a dramatic surge in frivolous lawsuits, which, in turn, would flood courts with challenges. Second, these lawsuits would significantly delay the enforcement of many statutes.*

*This Article challenges this conventional wisdom. The arguments in support of delayed judicial review, while intuitively appealing, are not as persuasive as they seem. First, allowing immediate review would not lead to a significant increase in frivolous suits. Decisions on whether to challenge an order in court are mostly economically driven. Therefore, with limited exceptions, potential plaintiffs will tend to only bring claims that they believe they can win in court. The empirical evidence on statutes that have transitioned from a delayed to an immediate review approach shows that the increase in the number of challenges resulting from that change is minimal. Second, it is unclear that immediate judicial review would substantially delay enforcement. Orders retain their legal effect after being challenged. In fact, while the court is examining the merits of the case, copious daily penalties for violating the order keep accumulating. Therefore, plaintiffs still have a powerful incentive to comply with the order swiftly. In addition to addressing these misconceptions, this Article also fills a gap in the literature by providing an analytical framework to evaluate the constitutionality of delayed judicial review provisions under the doctrine of constitutionally intolerable choices.*

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INTRODUCTION

Judicial review is one of the most important features of the American administrative state.<sup>1</sup> And it is so for good reason. Courts’ ability to control the activity of government agencies is a necessary corollary to the principle of separation of powers.<sup>2</sup> Without it, citizens would not have a meaningful avenue to ensure that the executive branch complies with the law. Not surprisingly, scholars have debated at length the extent to which the Constitution constrains Congress’s ability to limit the jurisdiction of federal courts, especially in cases involving a challenge of some form of agency action.<sup>3</sup> The answer to this question, however, is still uncertain.<sup>4</sup> The Supreme Court has been vague and elusive in its decisions on this matter, and Congress has responded by being prudent when limiting judicial review of agency action.<sup>5</sup>

<sup>1</sup> See, e.g., John J. Coughlin, *The History of the Judicial Review of Administrative Power and the Future of Regulatory Governance*, 38 IDAHO L. REV. 89, 90 (2001) (noting “the broader significance of the judicial review of administrative action in protecting fundamental constitutional freedoms”); Jonathyn T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1, 14 (2000) (“[T]he judiciary in our modern administrative state is positioned to perform an influential function analogous to the function it was positioned to perform under the Founders’ original plan.”).

<sup>2</sup> See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 639 (2000) (noting that the principle of separation of powers affects the constitutional role of courts and administrative agencies); see also Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (referring to the executive versus courts paradigm as a central feature of the notion of separation of powers).

<sup>3</sup> See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371–74 (1953); see also Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 57–58 (1965) (noting that the right to judicial review is mandated by the Constitution); Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 420 (1958) (stating that “in our system of remedies” an individual has the right to secure judicial review).

<sup>4</sup> See Harold H. Bruff, *Availability of Judicial Review*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 1, 17 (Michael E. Hertz et al. eds., 2015) (noting that “[t]he Court was avoiding [the] lurking constitutional issue”); see also Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1309–10 (2014) (stating that it is “maddeningly hard to say” how much the Constitution limits Congress’s authority to constrain the jurisdiction of federal courts).

<sup>5</sup> See Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, 97 HARV. L. REV. 778, 791 (1984) (pointing out that courts have been dodging the constitutional question); see also *id.* (indicating that “in these

This uncertainty has also provided a fertile ground for the proliferation of delayed review provisions, that is, statutory mechanisms that do not completely eliminate the availability of judicial review but instead defer the point in time at which plaintiffs may seek it.

This Article adopts a skeptical position with respect to delayed judicial review.<sup>6</sup> As the following examples illustrate, delaying access to courts can often deter potential plaintiffs from seeking judicial review of agency action. In other words, delayed review may result in a recipient of an administrative order obtaining no review at all, which is troubling in a legal system that embraces the principle of separation of powers.<sup>7</sup> Some scholars have claimed that delayed review is necessary in certain areas of the law—especially environmental law—for public policy reasons.<sup>8</sup> These arguments are not only questionable in many instances but also frequently overlook the important constraints that the Constitution places on delayed review provisions.

The principle that delayed review can easily lead to no review at all is best illustrated through examples. Consider one of the most important environmental and public health challenges of the twenty-first century: controlling the risk associated with exposure to hazardous substances.<sup>9</sup> The Environmental Protection Agency (“EPA”) has estimated that there are more than 530,000 contaminated sites in the United States, covering approximately twenty-three million acres.<sup>10</sup> One of the main sources of this type of

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cases, [courts’] apprehensions have been evident”). For an account of the vagueness of some judicial review provisions, see *infra* Part II.B.

<sup>6</sup> Immediate review of regulations raises legal and public policy questions that do not perfectly overlap with those relevant to administrative orders. See Daniel F. McNeil, *Pre-Enforcement Review of Administrative Agency Action: Developments in the Ripeness Doctrine*, 53 NOTRE DAME L. REV. 346, 348–49 (1977) (explaining the special importance, specifically with regulations, of determining if this form of agency action is fit for review, as required by the doctrine of ripeness).

<sup>7</sup> See Steven G. Calabresi, *An Agenda for Constitutional Reform*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 22, 22 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (explaining how separation of powers is one of the pillars of American law and one of the most commonly exported features of this legal system); see also Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions A Foolish Inconsistency*, 72 CORNELL L. REV. 488, 492 (1987) (pointing out that the Constitution requires the existence of Congress, the President, and the Supreme Court as separate entities that undertake the legislative, executive, and judicial functions, respectively).

<sup>8</sup> See *infra* Part III.A.

<sup>9</sup> See Justin R. Pidot & Dale Ratliff, *The Common Law of Liable Party CERCLA Claims*, 70 STAN. L. REV. 191, 195 (2018) (noting that “more than 39 million people” in fiscal year 2013 lived near EPA-designated contamination sites); see also Hope Whitney, *Cities and Superfund: Encouraging Brownfield Redevelopment*, 30 ECOLOGY L.Q. 59, 59 (2003) (stating that contaminated properties are the source of important environmental problems and are affecting public health); *Exposure to Toxic Chemicals Threatening Human Reproduction and Health*, SCIENCE DAILY (Oct. 1, 2015), <https://www.sciencedaily.com/releases/2015/10/151001100058.htm> [<http://perma.cc/ZD29-RZ9R>] (“Exposure to toxic environmental chemicals is linked to millions of deaths and costs billions of dollars every year . . .”).

<sup>10</sup> See EPA, PROTECTING & RESTORING LAND: MAKING A VISIBLE DIFFERENCE IN COMMUNITIES 3 (2013), [https://www.epa.gov/sites/production/files/2014-03/documents/oswer\\_fy13\\_accomplishment.pdf](https://www.epa.gov/sites/production/files/2014-03/documents/oswer_fy13_accomplishment.pdf) [<https://perma.cc/TL5L-AH9M>].

contamination is the improper handling of hazardous materials in the context of manufacturing activities.<sup>11</sup>

Imagine a scenario in which the EPA issues two administrative orders to a paper company, which is located on a highly contaminated property in Scranton, Pennsylvania. The first order requires the paper company to change the way it is storing certain chemical substances. Its lawyers, however, believe that their client is not legally required to make these modifications and, as a result, want to challenge this first order in court as soon as possible. The second order mandates the paper company to clean up certain areas of its property. While the paper company does not object to it, there is an environmental group interested in challenging this second order, claiming that the cleanup method approved by the EPA is ineffective and potentially dangerous. These two plaintiffs would like to have immediate access to court to challenge these orders. The EPA would probably prefer that judicial review be delayed. The relevant question, however, is the following: what does delayed judicial review actually entail in each of these cases?

With the first order, under a delayed review approach, the paper company would only be able to access courts in the context of an enforcement action brought by the EPA.<sup>12</sup> Stated differently, for the paper company to be able to argue before a court that the order is improper, it would have to (i) not comply with it and then (ii) wait for the EPA to bring an enforcement action. If and when this happens, the paper company would be able to question the validity of the order in the same court proceeding that the agency initiated.<sup>13</sup> However, the issue is not just one of timing. If these two conditions are not met, the paper company will never have access to a court. Of course, the fulfillment of the second condition is outside the paper company's control. But, even meeting the first condition is already very problematic because noncompliance with an administrative order issued by the EPA can lead to very severe punishment. Environmental statutes generally authorize the imposition of penalties of tens of thousands of dollars for every

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<sup>11</sup> See *Report on the Environment (ROE)*, ENVTL. PROT. AGENCY, <https://www.epa.gov/report-environment/contaminated-land> [<https://perma.cc/M8GY-23WQ>] (last visited Dec. 7, 2017) (noting that manufacturing activities are one of the main causes of soil contamination).

<sup>12</sup> See Michael P. Healy, *The Effectiveness and Fairness of Superfund's Judicial Review Preclusion Provision*, 15 VA. ENVTL. L.J. 271, 324–25 (1995) (focusing on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)); see also RICHARD L. REVESZ, *ENVIRONMENTAL LAW AND POLICY* 735 (3d ed. 2015) (explaining this mechanism in the context of CERCLA's judicial review provisions); Jessica Pierce Quiggle, *Sackett v. EPA Uses Statutory Interpretation to Limit the EPA's Power over Wetlands, Overruling a Majority and Leaving Circuits Split over Due Process*, 14 FLA. COASTAL L. REV. 325, 329 (2013) (addressing this issue under the Clean Water Act).

<sup>13</sup> See 42 U.S.C. § 9613(h)(2) (2012); see also Garry A. Gabison, *The Problems with the Private Enforcement of CERCLA: An Empirical Analysis*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 189, 191 (2016) (explaining that “[i]f the EPA elects to go forth with the suit, the private individual cannot influence the process until the lawsuit begins by joining the suit as a plaintiff.”).

day of violation of the order.<sup>14</sup> This threat operates as a powerful incentive to comply with the order.<sup>15</sup> After the recipient of the order complies, the first condition for judicial review is no longer met, and as a result, a challenge in court ceases to be possible.

Because this first order involves a corporation, it is likely that this type of unfairness would not lead to outrage in many fora.<sup>16</sup> However, it is important to avoid the simplistic illusion that this problem can be reduced to a choice between the economic gains of corporations and the protection of the environment or human health—a dichotomy that lends itself to resolution based on ideological or moral grounds.

To offer a more balanced view of this problem, the next example explores a very similar timing-of-review issue from a different perspective. And it does so by focusing on the timing of review of the second order introduced above, i.e., the order issued to the paper company, which the environmental group wishes to challenge. Under an immediate review approach, the environmental group would be able to challenge the order immediately after the EPA issues it. In the more common delayed review scenario, however, the environmental group would only be able to challenge the order after the cleanup of the property is finalized.<sup>17</sup> In this second example, delayed review can easily dissuade the plaintiff from challenging the order because judicial review at such a late stage becomes futile. Environmental groups often become interested in challenging cleanups when there are delays in the remediation process or when they are being conducted in a way that could lead to harm to the environment or human health.<sup>18</sup> Thus, a

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<sup>14</sup> See, e.g., 33 U.S.C. § 1319(d) (2012) (Clean Water Act); *id.* § 6928(c) (Resource Conservation and Recovery Act (RCRA)); 42 U.S.C. § 7413(b) (2012) (Clean Air Act); *id.* §§ 9606(b), 9609(c) (CERCLA).

<sup>15</sup> One author has claimed that this can lead to orders being used as “an instrument of intimidation.” Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. 189, 190 (1994). Others have highlighted, in the context of CERCLA, the effectiveness of this approach in securing early—pre-litigation—compliance and incentivizing settlements. Healy, *supra* note 12, at 333 (recognizing the potential unfairness of delayed review under section 113(h) of CERCLA).

<sup>16</sup> See, e.g., Quiggle, *supra* note 12, at 328–29 (defending delayed review as necessary to deal with the actions of “large corporate polluters” or “giants like [General Electric]”).

<sup>17</sup> This results from the timing of review provision in CERCLA. See 42 U.S.C. § 9613(h)(4) (2012) (foreclosing citizen suits of cleanup actions that are “to be undertaken at the site”). Courts have explained that this language should be interpreted to require cleanups to be finalized before a challenge may be brought. See, e.g., *Clinton Cty. Comm’rs v. EPA.*, 116 F.3d 1018, 1023 (3d Cir. 1997) (“[A] citizens’ suit challenging a ‘removal’ action may not be brought even after completion of that removal action . . . .”); *Schalk v. Reilly*, 900 F.2d 1091, 1093 (7th Cir. 1990) (interpreting the language in § 9613(h)(4) to bar citizen suits to cleanups that are not completed); *Alabama v. EPA.*, 871 F.2d 1548, 1557 (11th Cir. 1989) (noting that actions may be brought “only after a remedial action is actually completed”).

<sup>18</sup> See Margot J. Pollans, *A “Blunt Withdrawal”? Bars on Citizen Suits for Toxic Site Cleanup*, 37 HARV. ENVTL. L. REV. 441, 483 (2013) (explaining that citizen suits are often driven by the delays in the cleanup process); see also Healy, *supra* note 12, at 301 (noting the two types of scenarios in which citizen suits are brought to protect human health or the environment).

delayed challenge is generally useless because the court would be reviewing past delay or the risk of occurrence of a harm that has already materialized.

Given the complications that delayed review creates, it is not surprising that both recipients of orders and environmental plaintiffs alike have urged courts to adopt an interpretation of many statutes that would allow immediate challenges.<sup>19</sup> As one might expect, agencies such as the EPA and the Occupational Safety and Health Administration (“OSHA”) have generally advocated for a delayed review approach.<sup>20</sup> The outcome, however, has been puzzling.

Courts, focusing their reasoning mostly on the administrative doctrines of finality and implied preclusion, have reached inconsistent conclusions on this subject.<sup>21</sup> In the environmental context, the Supreme Court held in *Sackett v. EPA* that orders issued under the Clean Water Act are immediately reviewable.<sup>22</sup> A very similar debate over so-called jurisdictional determinations issued under the Clean Water Act was resolved in a similar fashion by the Supreme Court in its 2016 decision in *U.S. Army Corps of Engineers v. Hawkes*.<sup>23</sup> The status of this issue under the Resource Conservation and Recovery Act (“RCRA”) is significantly different. The Supreme Court has not addressed this question, but lower courts have deemed orders under RCRA to be subject to delayed review only, even though the language of the provisions in RCRA and the Clean Water Act regarding these types of orders is very similar. In the area of mine safety, on the other hand, the Supreme Court has examined this issue and disallowed immediate review of orders under the Mine Safety Act.<sup>24</sup>

In addition to the inconsistencies within and across different areas of the law, the Supreme Court’s position on the delayed-versus-immediate-review debate remains uncertain for two reasons. First, it is unclear whether the Court’s view in *Sackett* that orders issued under the Clean Water Act are immediately reviewable applies to other environmental statutes.<sup>25</sup> In an earlier case, *Alaska Department of Environmental Conservation v. EPA*,<sup>26</sup> the

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<sup>19</sup> See *infra* Part II.B (referencing the cases in which plaintiffs sought immediate review of orders under the Clean Water Act, the Clean Air Act, RCRA, CERCLA, Occupational Safety and Health Act (OSH Act), and the Mine Safety Act).

<sup>20</sup> See *infra* Part II.B (in these same cases, the agency opposed immediate review).

<sup>21</sup> See *infra* Part II.B.

<sup>22</sup> 566 U.S. 120, 127–29 (2012) (finding that the order was final and its review not impliedly precluded by the statute).

<sup>23</sup> 136 S. Ct. 1807, 1816 (2016) (finding that, as with the order in *Sackett*, jurisdictional determinations were also final agency actions whose reviewability by courts was not precluded by the Clean Water Act).

<sup>24</sup> See *infra* Part II.B.5; see also *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994).

<sup>25</sup> See Damien M. Schiff, *Sackett v. EPA: Compliance Orders and the Right of Judicial Review*, 2011 CATO SUP. CT. REV. 113, 134 (2012) (explaining that it is unclear whether this decision applies to all compliance orders); see also Julia E. Stein et al., *Preenforcement Judicial Review After Sackett: Implications Beyond the Clean Water Act*, 42 ENVTL. L. REP. 10,818, 10,822 (2012) (noting that *Sackett* may affect RCRA).

<sup>26</sup> 540 U.S. 461 (2004).

Supreme Court treated an order issued under the Clean Air Act to be final and therefore immediately reviewable.<sup>27</sup> However, there is good reason to believe that the Court's statement in that regard was merely dicta given that the EPA had conceded this end, albeit only for the purposes of that particular case.<sup>28</sup> As for CERCLA, the statutory provision explicitly barring immediate judicial review—which is not present in the Clean Water Act—could justify an outcome different from that reached in *Sackett*.<sup>29</sup> Second, the extent to which delayed review frameworks are constrained by due process or the principle of separation of powers is also uncertain. The Supreme Court has not addressed this question under any of the federal environmental statutes.<sup>30</sup> In the mine safety context, although the Court deemed that it was constitutionally proper to interpret the Mine Safety Act to bar immediate review, the Court's ruling in that particular case was extremely narrow.<sup>31</sup>

One of the underlying concerns with delayed judicial review is that, by using these limitations on the timing of review of agency action, the legislative branch may be insulating the executive from effective judicial oversight.<sup>32</sup> At a time when the role of courts as a check on the Executive Branch is being amply debated, especially in areas such as immigration and environmental law, it is critical to address the undertheorized aspects of delayed judicial review. Up to this point, most of the literature has sided with the executive on this issue, arguing that delayed review is necessary for public policy reasons. As this Article explains at length, these arguments are misguided. The urgency of examining delayed judicial review in more depth is also exacerbated by the need to reconcile the inconsistent court decisions on the availability of immediate review and resolve the uncertainty with respect to the constitutionality of delayed judicial review provisions.

To address these problems, this Article makes two main contributions to the existing literature. First, it challenges the prevailing view that, from a

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<sup>27</sup> *Id.* at 482.

<sup>28</sup> See Brief for Respondents at 16, *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461 (No. 02-658) (accepting that the order was final after having disputed it at the court of appeals level); see also Transcript of Oral Argument at 43–44, *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461 (No. 02-658) (noting that this conclusion should only apply to this order given the uncommon circumstances of the case).

<sup>29</sup> See 42 U.S.C. § 9613(h) (2012).

<sup>30</sup> See Jason D. Nichols, *Towards Reviving the Efficacy of Administrative Compliance Orders: Balancing Due Process Concerns and the Need for Enforcement Flexibility in Environmental Law*, 57 ADMIN. L. REV. 193, 195 (2005) (explaining that the Court decided not to resolve the potential constitutional problems associated with the judicial review of administrative compliance orders under the Clean Air Act); see also *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring) (noting that the Court did not comment on whether delayed review of orders issued under the Clean Water Act would raise constitutional issues and expressing his opinion that disallowing immediate review would violate due process).

<sup>31</sup> *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 n.22 (1994) (stating that the petitioner's claim was not an "abstract challenge to the Mine Act's statutory review scheme" but was limited to the "present situation"); see *infra* Part II.B.5.

<sup>32</sup> See *infra* Part IV.B.



public policy perspective, delayed review is always the superior option.<sup>33</sup> This idea is often premised on the erroneous belief that immediate judicial review inevitably leads to substantial delays in the enforcement of statutes and regulations,<sup>34</sup> and that, as a result, its adoption would cause courts to be flooded with challenges.<sup>35</sup> While these arguments possess intuitive appeal, an in-depth analysis reveals that they are not as persuasive as they initially seem. Merely allowing a plaintiff to challenge an order does not likely substantially delay enforcement.<sup>36</sup> Challenging an order does not make it unenforceable<sup>37</sup> because the plaintiff must seek and successfully obtain a preliminary injunction.<sup>38</sup> However, this is unlikely to happen given the current test for preliminary injunctions, especially in the important cases, i.e., those in which serious harm would be expected to ensue if the injunction were granted.<sup>39</sup> In the absence of an injunction, the threat of accumulating daily penalties is a very powerful incentive to comply swiftly. Moreover, courts would not be flooded with these types of challenges because, as the economic models predict and the available empirical evidence confirms, the litigation costs and increasing daily fines for non-compliance would deter frivolous claims.<sup>40</sup>

This Article makes a second contribution to the existing literature by examining the constitutional limitations on the legislature's authority to enact statutes that bar immediate review of administrative orders.<sup>41</sup> The main constraint on the design of delayed review provisions is the doctrine of constitutionally intolerable choices, which emanated from the Supreme Court case *Ex parte Young*<sup>42</sup> and its progeny.<sup>43</sup> However, neither the Supreme Court nor the literature has offered a comprehensive account of this constitu-

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<sup>33</sup> See *infra* Part III.A.

<sup>34</sup> See Valerie L. Starr, *Should Pre-Enforcement Judicial Review of Administrative Compliance Orders Be Available Under the Clean Air Act?*, 38 SUFFOLK U. L. REV. 903, 915 (2005) ("By permitting pre-enforcement judicial review, formal adjudication in the court of appeals hinders the compliance order's expediency."); see also Quiggle, *supra* note 12, at 329 (explaining that plaintiffs who are permitted to seek pre-enforcement review of compliance orders "will likely succeed in both slowing down the enforcement of environmental laws and delaying the cleanup of catastrophic contamination").

<sup>35</sup> See Christopher M. Wynn, *Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 WASH. & LEE L. REV. 1879, 1901 (2005) (noting that the majority view is that immediate review prevents floods of challenges); see also Quiggle, *supra* note 12, at 328; Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1073-74 (2013) (noting that this argument is problematic because it would require empirical evidence of the number of cases that lead to a flood of challenges).

<sup>36</sup> See *infra* Part III.A.1.a.

<sup>37</sup> See *infra* Part III.A.1.a.

<sup>38</sup> See *infra* Part III.A.1.a.

<sup>39</sup> See *infra* Part III.A.1.a.

<sup>40</sup> See *infra* Part III.A.2.

<sup>41</sup> Given that other scholars have addressed the issue, see, e.g., Davis, *supra* note 15, at 190; Starr, *supra* note 34, at 918, this Article does not analyze in depth the administrative law doctrines that have led courts to reach inconsistent conclusions on the immediate reviewability of orders.

<sup>42</sup> 209 U.S. 123 (1908).

tional doctrine. This Article fills this gap by providing a theoretical framework to evaluate the constitutionality of delayed review provisions. Two key factors to consider are the degree of coercion to comply that recipients of orders experience and whether they are able to meaningfully challenge the order in court after having previously complied with it.

This discussion focuses on a series of examples from environmental and worker safety areas, where the debate over delayed review of administrative orders has been the most animated. The analytical tools provided in both the public policy and constitutional sections of this Article, however, can be applied broadly. Similar questions have arisen under other statutes, such as the Federal Trade Commission Act, the Social Security Act, the National Labor Relations Act, and the Sarbanes-Oxley Act.<sup>44</sup> Another area in which delayed review has been controversial is tax law. Specifically, scholars have been recently examining the contours of the bar on immediate review of the assessment and collection of taxes contemplated in the Anti-Injunction Act and the Declaratory Judgment Act.<sup>45</sup> The conceptual frameworks proposed in this Article should also help illuminate analogous debates in these and other areas.

This Article proceeds in four parts. Part I provides concrete examples of environmental and worker safety statutes that illustrate the role of administrative orders as enforcement mechanisms and show why the timing of their judicial review is critical. While similar debates have also arisen in the context of challenges to regulations, this Article will focus specifically on administrative orders because the public policy and legal questions underlying the judicial review of these two forms of agency action do not overlap completely.<sup>46</sup> Part II explores the constitutional and administrative law doctrines on which courts have relied to determine whether immediate review is permissible under different statutes. This analysis also reveals that courts have

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<sup>43</sup> See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); *Reisman v. Caplin*, 375 U.S. 440 (1964); *Okla. Operating Co. v. Love*, 252 U.S. 331 (1920); *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651 (1914).

<sup>44</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (analyzing a constitutional claim against delayed review in the context of the Sarbanes-Oxley Act); *Nat'l Taxpayers Union v. Soc. Sec. Admin.*, 376 F.3d 239, 241 (4th Cir. 2004) (addressing this problem under the Social Security Act); *Beverly Health & Rehab. Servs. v. Feinstein*, 103 F.3d 151, 154–55 (D.C. Cir. 1996) (discussing delayed review under the National Labor Relations Act); *Brown & Williamson Tobacco v. Engman*, 527 F.2d 1115, 1118–20 (2d Cir. 1975) (describing a similar issue under the Federal Trade Commission Act).

<sup>45</sup> See Samuel Brunson, *Dear IRS, It Is Time to Enforce the Campaign Prohibition. Even Against Churches*, 87 U. COLO. L. REV. 143, 162 (2016) (explaining that these statutes limit pre-enforcement—i.e., immediate—review of tax assessments and collection); Stephanie Hunter McMahon, *Pre-Enforcement Litigation Needed for Taxing Procedures*, 92 WASH. L. REV. 1317, 1344 (2017) (noting courts' broad interpretation of the Anti-Injunction and Declaratory Judgment Acts).

<sup>46</sup> Immediate or pre-enforcement review of regulations raises legal and public policy questions that do not perfectly overlap with those relevant to administrative orders. See McNeil, *supra* note 6, at 348–49 (noting the special importance—in the specific context of regulations—of determining whether this form of agency action is fit for review, as required by the doctrine of ripeness).

applied these principles inconsistently to statutes that are structurally very similar. Part III presents a vigorous criticism of the widely-accepted justifications for delayed review. These justifications are largely based on a distorted view of the effects that immediate review of administrative orders would have on enforcement and court caseloads. Finally, Part IV examines the constitutional constraints on delayed review. It starts by delving into the debate over whether there is a general constitutional right to judicial review.<sup>47</sup> It then narrows its focus to provide an analytical framework to evaluate the constitutionality of different types of delayed review approaches under the doctrine of constitutionally intolerable choices.

## I. ADMINISTRATIVE ORDERS: THE TENSIONS BETWEEN ENFORCEMENT AND JUDICIAL REVIEW

### A. *Administrative Orders As Enforcement Mechanisms*

The notion of an order has very broad contours and, not surprisingly, the Administrative Procedure Act (“APA”) has defined it in the negative: an order is a decision by an agency that is not a rule.<sup>48</sup> Administrative orders are used to ensure compliance with the mandates in federal statutes and regulations. Compliance orders—also known as citations in certain contexts<sup>49</sup>—are a paradigmatic example of orders that serve this purpose. One commentator has defined them as “a directive from the [agency] requiring the recipient to comply with a particular statutory or regulatory requirement by a specified deadline.”<sup>50</sup> Their main goal is to provide an alternative to the—usually more cumbersome—judicial enforcement option and offer a swift and flexible enforcement tool to address less serious violations.<sup>51</sup> However, if the

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<sup>47</sup> See Berger, *supra* note 3, at 57–58 (noting that the right to judicial review, as that to be protected from arbitrariness, is mandated by the Constitution); Raoul Berger, *Administrative Arbitrariness: A Sequel*, 51 U. MINN. L. REV. 601, 603–04 (1967) [hereinafter Berger, *Sequel*] (restating his position that due process requires judicial review); Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 980 (1969) [hereinafter Berger, *Synthesis*] (listing the cases on which he supports his position that judicial review is constitutionally required).

<sup>48</sup> 5 U.S.C. § 551(6) (2012); WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 151 (2012). This includes “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form . . . [and also] licensing.” 5 U.S.C. § 551(6) (2012). Of course, it is not always simple to determine whether a certain form of agency action is an order or a rule—the notion that a rule, unlike an order, has general applicability and future effect is not always accurate. See William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 241 (1986) (“It is not generality, therefore, that distinguishes a rule from an order, as most people would think. Nor is it ‘future effect.’”); Merton C. Bernstein, *The NLRB’s Adjudication-Rule Making Dilemma under the Administrative Procedure Act*, 79 YALE L.J. 571, 605 (1970) (explaining that making this distinction between orders and rules can be tricky in some cases).

<sup>49</sup> See *supra* Part I.B.1.b.

<sup>50</sup> Davis, *supra* note 15, at 190.

<sup>51</sup> LAW OF ENVTL. PROT. § 9:9 (ENVTL. LAW INST. 2017).

recipient of the order does not comply with it voluntarily, agencies—which often lack authority to enforce these orders directly—will have to bring an action to seek enforcement of the order by a court.<sup>52</sup> Despite these limitations, compliance orders are very widely used. In recent years, the EPA, for example, has issued between 800 and 900 compliance orders per year.<sup>53</sup>

In order to illustrate the types of issues that delayed judicial review of administrative orders raise, the discussion in Parts II, III, and IV will focus on two broad areas of the law: environmental and worker safety law. For this reason, some additional background on these statutory frameworks is warranted.

The environmental statutes that the following sections will discuss are the Clean Air Act,<sup>54</sup> Clean Water Act,<sup>55</sup> Resource Conservation and Recovery Act (“RCRA”),<sup>56</sup> and Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).<sup>57</sup> These statutes share similar purposes. Congress enacted the Clean Air Act<sup>58</sup> and the Clean Water Act<sup>59</sup> to improve the quality of the nation’s air and waters, respectively. RCRA<sup>60</sup> and CERCLA,<sup>61</sup> on the other hand, have the goal of addressing the negative effects that hazardous substances can have on human health and the environment. These and other environmental statutes generally give the EPA four different possible courses of action after the agency identifies a potential violation: The EPA may issue a compliance order, assess civil penalties, seek the imposition of criminal penalties, or bring an enforcement action in court.<sup>62</sup>

Administrative orders also play an important role in the area of worker safety. In particular, this Article focuses on two statutes: the Federal Mine

<sup>52</sup> *Id.* (explaining that the EPA lacks contempt powers and that the only way of compelling compliance lies with the courts).

<sup>53</sup> The number of compliance orders issued per year has remained stable and in the 800 to 900 range during the 2014 to 2016 period. *See* EPA, ENFORCEMENT ANNUAL RESULTS FOR FISCAL YEAR (2014), <https://archive.epa.gov/enforcement/annual-results/web/pdf/EnforcementAnnualResultsforFiscalYear2014EnforcementUSEPA.pdf> [<http://perma.cc/5GJ6-FZ2E>]; EPA, ENFORCEMENT ANNUAL RESULTS FOR FISCAL YEAR (2015), [https://archive.epa.gov/epa/sites/production/files/2017-01/documents/enforcement\\_annual\\_results\\_for\\_fiscal\\_year\\_fy\\_2015.pdf](https://archive.epa.gov/epa/sites/production/files/2017-01/documents/enforcement_annual_results_for_fiscal_year_fy_2015.pdf) [<http://perma.cc/Z6SK-B79Z>]; EPA, ENFORCEMENT ANNUAL RESULTS NUMBERS AT A GLANCE FOR FISCAL YEAR 2016 (2016), <https://www.epa.gov/enforcement/enforcement-annual-results-numbers-glance-fiscal-year-2016> [<http://perma.cc/S75L-KK6U>].

<sup>54</sup> 42 U.S.C. §§ 7401–7671q (2012).

<sup>55</sup> 33 U.S.C. §§ 1251–1387 (2012).

<sup>56</sup> Solid Waste Disposal Act, 42 U.S.C. §§ 6901–6992k (2012) (now commonly known as RCRA).

<sup>57</sup> 42 U.S.C. §§ 9601–9675 (2012).

<sup>58</sup> *Id.* § 7401(b) (2012).

<sup>59</sup> 33 U.S.C. § 1251(a) (2012).

<sup>60</sup> 42 U.S.C. § 6902 (2012).

<sup>61</sup> *Id.* § 9604(a).

<sup>62</sup> *See, e.g.,* Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1240–41 (11th Cir. 2003) (explaining the enforcement tools under the Clean Air Act); *see also* 33 U.S.C. § 1319(b)–(d) (2012) 42 U.S.C. § 6928(a) (RCRA) (Clean Water Act); *id.* § 7413(b) (2012) (Clean Air Act); *id.* §§ 9606(b), 9609(c) (CERCLA).

Safety and Health Amendments Act of 1977 (Mine Safety Act)<sup>63</sup> and the Occupational Safety and Health Act of 1970 (OSH Act).<sup>64</sup> These two statutory frameworks, which have the goal of ensuring the health and safety of workers and miners,<sup>65</sup> are examined together due to the similarity of their enforcement mechanisms.<sup>66</sup> Under both Acts, the Secretary of Labor may issue an administrative order—referred to as “citation”—directing the employer or mine operator to abate a violation within a certain time period.<sup>67</sup> Other enforcement options include the possibility that the Secretary of Labor assess a civil penalty,<sup>68</sup> seek the imposition of criminal penalties,<sup>69</sup> or bring an enforcement action.<sup>70</sup>

### B. *The Importance Of Orders’ Timing Of Review*

The timing of review of administrative orders can have a very significant impact not only on the recipients of the orders, but also on those whom the different statutes intend to protect.<sup>71</sup> As the examples below illustrate, disallowing immediate judicial review of administrative orders can raise very different types of concerns. In the interest of clarity, the following discussion considers compliance orders and environmental cleanup orders separately, even though the legal mechanisms that delay the judicial review of these two types of orders operate in a very similar fashion.

#### 1. Hobson’s Choice: The Debate Over Delayed Review in the Context of Compliance Orders

One could theoretically challenge administrative orders at three different points in time: (i) immediately after they are issued, (ii) after the agency brings an enforcement action,<sup>72</sup> or, under some statutes, (iii) after an administrative commission rules on their validity.<sup>73</sup> Under the first option, recipients of a compliance order would simply be able to challenge it in court as soon as they receive it, without having to wait for any further action from the agency. The other options adopt a delayed review approach, which requires the recipient of the order to wait—without bringing a challenge in court—

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<sup>63</sup> 30 U.S.C. §§ 801–964 (2012).

<sup>64</sup> 29 U.S.C. §§ 651–678 (2012).

<sup>65</sup> 29 U.S.C. § 651 (2012); 30 U.S.C. § 801 (2012).

<sup>66</sup> *Ne. Erectors Ass’n v. Sec’y of Labor*, 62 F.3d 37, 40 (1st Cir. 1995).

<sup>67</sup> 29 U.S.C. § 658 (2012); 30 U.S.C. § 814 (2012).

<sup>68</sup> 29 U.S.C. § 666(a)–(d) (2012); 30 U.S.C. § 820(a), (b) (2012).

<sup>69</sup> 29 U.S.C. § 666(e) (2012); 30 U.S.C. § 820(d) (2012).

<sup>70</sup> 29 U.S.C. § 660(b) (2012); 30 U.S.C. § 816(b) (2012).

<sup>71</sup> Most notably, the general public, workers, and wildlife. *See supra* Part I.A. (explaining the goals of the Clean Air Act, Clean Water Act, RCRA, CERCLA, OSH Act, and Mine Safety Act).

<sup>72</sup> *See infra* Part I.B.1; *see also* Davis, *supra* note 15, at 190.

<sup>73</sup> *See infra* Part I.B.1.b.

until the government takes action.<sup>74</sup> The type of governmental action that will provide access to court—i.e., bringing an enforcement action or having a commission rule on an administrative appeal—varies depending on the specific statute considered. However, the statutes examined in this Article adopt one of two approaches. One generally occurs with environmental statutes and the other alternative is more common in worker safety judicial review provisions.

i. *The Need for an Enforcement Action: Delayed Review in the Context of Environmental Statutes.* In the case of compliance orders issued under the main environmental statutes, the timing of judicial review can be very relevant to the recipient of the order. The four environmental statutes examined in this Article authorize the imposition of fines for failing to comply with an order's requirements. These fines could reach astronomical amounts (e.g., up to \$37,500 for each day of violation under the Clean Water Act).<sup>75</sup> The daily nature of the fines is what makes the timing of review of compliance orders relevant. The greater the number of days without complying with an order, the larger the fine the potential violator may have to face.

With immediate review, the recipient of the order would be able to seek review of an administrative order as soon as the agency issues it.<sup>76</sup> This could also include a request for a preliminary injunction. If the court grants the preliminary injunction, the accrual of daily penalties for failing to comply with the order will cease, at least while the court is examining the challenge.<sup>77</sup>

Under a delayed review approach, however, the recipient of the order would only be able to question its validity in court when the agency brings an enforcement action.<sup>78</sup> This leaves plaintiffs with a complicated choice: complying with the order (which could be improper) or refusing to do so at their own risk. In the latter case, the daily penalties can accumulate. If the agency, several months later—given the lack of compliance with the order—

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<sup>74</sup> This form of delayed review, which requires potential plaintiffs to be in violation before they may challenge the relevant agency action, also occurs in the tax context. See McMahon, *supra* note 45, at 1383 (noting that “[o]nly those taxpayers found in violation of the tax guidance and who do not settle their tax liability are able to challenge the procedures behind the creation of the guidance”).

<sup>75</sup> See 33 U.S.C. § 1319(d) (2012) (Clean Water Act); 42 U.S.C. § 6928(c) (RCRA); *id.* § 7413(b) (2012) (Clean Air Act); *id.* §§ 9606(b), 9609(c) (CERCLA). As the Supreme Court pointed out in *Sackett v. EPA*, if a court finds the order to be proper, the recipient who did not comply with it will have to pay “up to \$37,500 for the statutory violation and up to an additional \$37,500 for violating the compliance order.” 566 U.S. 120, 123 (2012).

<sup>76</sup> See LAW OF ENVTL. PROT. § 9:92 (ENVTL. LAW INST. 2017). It is important to note that immediate review, in the context of compliance orders, is often referred to as pre-enforcement review. See *id.*

<sup>77</sup> See Davis, *supra* note 15, at 204.

<sup>78</sup> REVESZ, *supra* note 12, at 735 (explaining this mechanism in the context of CERCLA's judicial review provisions).

brings a judicial enforcement action, and the operator is not successful in challenging the order in court, the total amount of fines could be very high.<sup>79</sup>

ii. *Prior Ruling by a Commission: OSH Act and Mine Safety Act.* Under both the OSH Act and the Mine Safety Act, if the Secretary of Labor (Secretary) determines that the employer or mine operator has violated a statute, regulation, or order, the Secretary must issue a citation. As with compliance orders in the environmental context, a citation under the OSH Act and the Mine Safety Act serves the purpose of identifying the alleged violation and providing a reasonable timeframe for its abatement.<sup>80</sup> Once the Secretary has issued a citation, the employer or operator may choose to comply with it voluntarily, contest it at the administrative level, or simply disregard it. If the employer or operator disregards the citation, the Secretary must send a notification with a proposed penalty and provide a period of fifteen or thirty days to contest the notification or proposed assessment of the penalty.<sup>81</sup> If the employer or operator does not respond in the time given, the proposed penalty becomes final and unreviewable by any other administrative body or court.<sup>82</sup>

If the employer or operator decides to contest either the initial order or the notification and proposed penalty, however, a Commission will hear that challenge.<sup>83</sup> After the appropriate hearing, the Commission will issue an order affirming, modifying, or vacating the Secretary's citation and proposed penalty.<sup>84</sup> The judicial review provisions of both statutes allow the operator or employer to challenge the order of the Commission in the appropriate court of appeals.<sup>85</sup> The Secretary may also bring an action in federal court to either obtain review or seek enforcement of an order of the Commission.<sup>86</sup>

This framework also allows for an immediate or delayed review approach. The question that the judicial review provisions of the statute did not explicitly answer was the following: may employers and operators seek immediate judicial review of citations issued by the Secretary without having to go through the process before the Commission? Delayed review can have similar effects to those under the environmental statutes examined above because the OSH Act and the Mine Safety Act provide that operators or employers who fail to comply with a citation may be assessed a penalty of

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<sup>79</sup> See LAW OF ENVTL. PROT. § 9:262 (explaining the doubling of penalties and the criminal implications of the issuance of compliance orders).

<sup>80</sup> 30 U.S.C. § 814(a) (2012) (this provision of the Mine Safety Act provides that “[e]ach citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation”). The OSH Act includes identical language. See 29 U.S.C. § 658(a) (2012).

<sup>81</sup> 29 U.S.C. § 659(b) (OSH Act); 30 U.S.C. § 815(b)(1)(A) (Mine Safety Act).

<sup>82</sup> 29 U.S.C. § 659(b); 30 U.S.C. § 815(b)(1)(A).

<sup>83</sup> 29 U.S.C. § 659(c); 30 U.S.C. § 815(d).

<sup>84</sup> 29 U.S.C. § 659(c); 30 U.S.C. § 815(d).

<sup>85</sup> 29 U.S.C. § 660(a); 30 U.S.C. § 816(a)(1).

<sup>86</sup> 29 U.S.C. § 660(b); 30 U.S.C. § 816(b).

up to \$7,000<sup>87</sup> and \$5,000,<sup>88</sup> respectively, *per day* of violation. This has created the following concern: if an operator or employer receives a citation with which it disagrees and fails to comply, penalties could accumulate throughout the administrative appeal process before the Commission and later, while the court of appeals is examining the challenge.<sup>89</sup> In order to address this problem, operators and employers have urged the courts to allow them to seek immediate judicial review of the initial citation by the Secretary.<sup>90</sup>

## 2. Futile Challenge: Delayed Review of Cleanup Orders

Delayed review has also been controversial in another context: cleanup actions issued under CERCLA and RCRA. CERCLA authorizes the EPA to clean up contaminated sites and recover, at a later time, cleanup costs from those who are responsible for the pollution.<sup>91</sup> The statute also allows private parties to carry out the cleanup and other remedial activities at the site.<sup>92</sup> In the latter case, the EPA may issue different types of orders—e.g., one directing a person to take action to remediate contamination that poses a threat to human health or the environment<sup>93</sup> or an order to memorialize an agreement between the agency and a potentially responsible party.<sup>94</sup>

Section 113(h) of CERCLA, however, deprives federal courts of jurisdiction to review challenges of cleanup actions that have been selected following the appropriate procedure, including the types of orders noted in the preceding paragraph.<sup>95</sup> This affects not only actions under CERCLA but also those that could be brought under other federal statutes, such as RCRA.<sup>96</sup>

<sup>87</sup> 29 U.S.C. § 666(d).

<sup>88</sup> 30 U.S.C. § 820(b)(1).

<sup>89</sup> See, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 205 (1994); Barry I. Buchman, Note, *A Choice Between Irreparable Harm and Occupational Safety and Health Act Penalties: Northeast Erectors Association v. Secretary of Labor*, 49 ADMIN. L. REV. 199, 217 (1994).

<sup>90</sup> See *Thunder Basin Coal Co.*, 510 U.S. at 205; *Big Ridge, Inc. v. Fed. Mine Safety & Health Comm'n*, 715 F.3d 631, 652 (7th Cir. 2013).

<sup>91</sup> See 42 U.S.C. §§ 9604(a)(1), 9607(a) (2012). For an analysis of the parties from which the EPA may recover cleanup costs, see Luis Inaraja Vera, *Compelled Costs Under CERCLA: Incompatible Remedies, Different Statutes of Limitations, and Tort Law*, 17 VT. J. ENVTL. L. 394, 396 (2016).

<sup>92</sup> See 42 U.S.C. § 9604(a)(1). CERCLA contemplates two types of actions to address contamination, i.e., removal and remedial actions. Their main difference is that removal actions are generally short term, while remedial actions are broader and aim to provide a permanent solution for the contamination at a particular site. Compare *id.* § 9601(23), with *id.* § 9601(24). While the definitions in the statute include some activities that go beyond cleanup of contaminants, such as monitoring or provision of alternative water supplies, this Article, for the sake of succinctness, will refer to removal and remedial actions collectively as “cleanup actions.”

<sup>93</sup> See 42 U.S.C. § 9606.

<sup>94</sup> See *id.* § 9622(d)(3).

<sup>95</sup> See *id.* § 9613(h).

<sup>96</sup> See *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 880–82 (D.C. Cir. 2014) (barring RCRA claims); *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239–40 (9th Cir.



This has been controversial when the potential plaintiff is the recipient of the order and also when the challenging party is a citizen group concerned with the impacts that a particular cleanup action could have on the environment or human health.<sup>97</sup> This can occur, for example, when the method used to clean up a piece of land results in some of the contaminants becoming airborne.<sup>98</sup>

When the plaintiff is a citizen group, however, the jurisdictional bar is not absolute. It instead limits *when* these challenges may be brought. Before Congress enacted the amendment that incorporated the jurisdictional bar to the statute, judicial actions against these cleanup activities could, in theory, have been brought immediately after the agency formally approved them and issued the corresponding order.<sup>99</sup> Under the current version of the statute, however, only delayed review is available. Any challenge of cleanup actions under the citizen suit provision can only be brought once the cleanup is finalized.<sup>100</sup>

It is worth highlighting that the jurisdictional bar in CERCLA was enacted with the purpose of preventing recipients of orders—i.e., generally those who are potentially responsible parties under the statute—from resorting to litigation to delay cleanups.<sup>101</sup> Taking this into account, the problem with applying it to citizen suits is twofold. First, some of these suits are brought precisely because the cleanups are paralyzed or moving forward at a very slow pace.<sup>102</sup> Second, delayed review in cases where the cleanup itself will lead to harm to human health or the environment makes the challenge futile: by the time the action is brought, any harm will have already occurred.

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1995) (barring citizen suit under the Clean Water Act and RCRA); McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 331 (9th Cir. 1995) (barring claims under RCRA and the Clean Water Act).

<sup>97</sup> See Healy, *supra* note 12, at 301 (noting the two types of scenarios in which citizen suits are brought to protect human health or the environment); Pollans, *supra* note 18, at 442.

<sup>98</sup> See, e.g., Petition Alleging Violations Of The Human Rights Of Various Residents Of Vieques, Puerto Rico By The United States Of America at 33 (Inter-Am. Comm'n H.R. Sept. 23, 2013), [http://www.nlginternational.org/report/Vieques\\_IACHR\\_petition-FINAL.pdf](http://www.nlginternational.org/report/Vieques_IACHR_petition-FINAL.pdf) [<https://perma.cc/6GUM-62FG>].

<sup>99</sup> In practice, some courts determined that immediate challenges to cleanup actions were precluded by the structure and purpose of the statute. Michael P. Healy, *Judicial Review and CERCLA Response Actions: Interpretive Strategies in the Face of Plain Meaning*, 17 HARV. ENVTL. L. REV. 1, 13–14 (1993).

<sup>100</sup> See 42 U.S.C. § 9613(h)(4) (2012) (foreclosing citizen suits of cleanup actions that are “to be undertaken at the site”). Courts have explained that this language requires cleanups to be finalized before a challenge may be brought. See, e.g., Clinton Cty. Comm’rs v. EPA, 116 F.3d 1018, 1025 (3d Cir. 1997) (“a citizens’ suit challenging a ‘removal’ action may not be brought even after completion of that removal action.”); Schalk v. Reilly, 900 F.2d 1091, 1093 (7th Cir. 1990) (interpreting the language in § 9613(h)(4) to bar citizen suits to cleanups that are not completed); Alabama v. EPA, 871 F.2d 1548, 1557 (11th Cir. 1989) (noting that actions may be brought “only after a remedial action is actually completed”).

<sup>101</sup> Lucia Ann Silecchia, *Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm*, 20 HARV. ENVTL. L. REV. 339, 348–49 (1996).

<sup>102</sup> See Pollans, *supra* note 18, at 483.

## II. THE LEGAL DEBATE OVER DELAYED REVIEW OF ADMINISTRATIVE ORDERS

### A. *Legal Doctrines In Play*

While the scholarship on delayed review of administrative orders has addressed the different policy concerns associated with the two timing-of-review options discussed above, the case law has primarily focused on a limited number of legal issues. The two most debated questions have been whether a given statute precludes immediate review of administrative orders and if this form of agency action has the necessary attributes to be considered final.<sup>103</sup> A smaller number of cases have also paid some attention to whether barring immediate review could violate the requirements of due process.<sup>104</sup> This section provides a general overview of these legal doctrines and then examines how courts have ruled on the availability of immediate review under environmental and worker safety statutes.

#### 1. Statutory Preclusion

Section 702 of the APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”<sup>105</sup> As the Supreme Court has explained, this provision encapsulates “the basic presumption of judicial review.”<sup>106</sup> Section 701 of the APA, however, limits this presumption of reviewability in two instances, the relevant one for the purposes of this discussion being when “statutes preclude judicial review.”<sup>107</sup> While the presumption of reviewability is strong, the Supreme Court has noted that it is a rebuttable one.<sup>108</sup> To overcome the

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<sup>103</sup> See *infra* Part II.B (examining the different conclusions that courts have reached applying these two doctrines to orders issued under the Clean Water Act, Clean Air Act, RCRA, CERCLA, the Mine Safety Act, and the OSH Act).

<sup>104</sup> The Supreme Court has not addressed this argument with any of the environmental statutes. See *infra* Part II.B. However, some lower courts have examined this question. See, e.g., *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 113 (D.C. Cir. 2010); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 392 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir. 1986).

<sup>105</sup> 5 U.S.C. § 702 (2012).

<sup>106</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967); see also *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993); *Lee v. U.S. Citizenship & Immigration Servs.*, 592 F.3d 612, 619 (4th Cir. 2010); *Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 788 (D.C. Cir. 2000); *Pollard v. Romney*, 512 F.2d 295, 298 (3d Cir. 1975).

<sup>107</sup> 5 U.S.C. § 701(a) (2018). As one author has explained, the Supreme Court has not taken a stance on whether Congress’s power to limit jurisdiction is limited by Article III or the Due Process Clause. Harold H. Bruff, *Availability of Judicial Review*, in *A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES* 17 (Michael E. Hertz et al. eds., 2015).

<sup>108</sup> *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (noting that the presumption “fails when a statute’s language or structure demonstrates that Congress wanted an agency to police its own conduct”).

presumption one of two things is necessary: specific statutory language or evidence of congressional intent.<sup>109</sup>

When considering preclusion in cases in which the language of the statute provides no clear guidance, the question becomes: how significant must the evidence of congressional intent be to preclude review? Those in favor of delayed review have often relied on *Block v. Community Nutrition Institute*.<sup>110</sup> This decision provided a comprehensive list of the types of evidence that may support a finding of implied preclusion, namely, the legislative history, the “contemporaneous judicial construction barring review and the congressional acquiescence in it,” and the structure of the statute.<sup>111</sup> In addition, while other decisions had explained that implied preclusion required “clear and convincing evidence,”<sup>112</sup> the Court in *Block* reinterpreted this expression to mean that the intent to preclude only needed to be “fairly discernible.”<sup>113</sup>

More recent Supreme Court opinions, however, have used the “clear and convincing” language again, which suggests a higher standard.<sup>114</sup> Moreover, one scholar has suggested that *Block* should not be afforded much weight because it possibly confuses the concepts of standing and preclusion.<sup>115</sup> As explained below, the issue of implied preclusion is a critical piece in the immediate-versus-delayed-review analysis, given that most of the statutes discussed in this Article—with the exception of CERCLA, which incorporates a provision that expressly imposes timing-of-review limitations—do not explicitly preclude immediate review of orders.

## 2. The Doctrine of Finality

An additional limitation on judicial review of agency action that has been very relevant in cases dealing with administrative orders is the doctrine of finality. The logic behind it is that courts should not meddle in ongoing agency proceedings and should instead wait until the agency reaches a final decision.<sup>116</sup> To that end, Section 704 of the APA contemplates the require-

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<sup>109</sup> See *id.*; see also *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2134 (2016); *Traynor v. Turnage*, 485 U.S. 535, 542 (1988); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 673 (1986); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984); *Ark. Dairy Co-op Ass’n, v. U.S. Dep’t of Agric.*, 573 F.3d 815, 822 (D.C. Cir. 2009).

<sup>110</sup> 467 U.S. 340.

<sup>111</sup> *Id.* at 349–50. For a recent case applying these factors, see *Cuozzo Speed Techs.*, 136 S. Ct. at 2140–42.

<sup>112</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 143 (1967).

<sup>113</sup> 467 U.S. at 351–52.

<sup>114</sup> Compare *Cuozzo Speed Techs.*, 136 S. Ct. at 2140–42, with *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 10 (2012).

<sup>115</sup> WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 281 (2012).

<sup>116</sup> *Limiting Judicial Intervention in Ongoing Administrative Proceedings*, 129 U. PA. L. REV. 452, 467 (1980) (explaining that, in addition to the requirement of exhaustion of administrative remedies, the doctrine of finality provides “a complementary approach to the problem of judicial intervention in ongoing administrative proceedings”).

ment that agency action be final before a court may review it.<sup>117</sup> Except in cases in which the statute explicitly resolves this issue, courts will have to determine, when relevant to the case at hand, whether certain agency action is final.

Courts generally use a two-part test to make this determination.<sup>118</sup> First, in order to be final, the action must mark the “consummation of the agency’s decisionmaking process.”<sup>119</sup> The Supreme Court has interpreted this requirement to mean that the decision must present the agency’s final position on the matter and is not “merely tentative” or “interlocutory.”<sup>120</sup> Second, the agency’s action “must be one by which rights or obligations have been determined, or from which legal consequences will flow.”<sup>121</sup> This does not occur when the agency is merely providing a recommendation that is not binding on the relevant actors.<sup>122</sup> Similarly, actions that do not establish any obligations or prohibitions will not meet this standard.<sup>123</sup>

While authors and courts generally focus on this two-part test when analyzing finality issues, some court decisions have taken into account additional factors.<sup>124</sup> Certain Supreme Court decisions, for example, have explained that a person seeking review under the APA must also establish that there is “no other adequate remedy in a court.”<sup>125</sup> This requirement, which comes directly from Section 704 of the APA, can be relevant in the context of administrative orders. The key question is whether the fact that the recipient of the order has the possibility of opposing an enforcement action brought by the agency provides an adequate remedy that justifies barring pre-enforcement—i.e., immediate—review.<sup>126</sup>

### 3. Procedural Due Process

Even when an order is not fit for review based on the doctrines of preclusion or finality, there are cases in which judicial review is nevertheless constitutionally mandated. The Fifth and Fourteenth Amendments to the Constitution require that any deprivation of “life, liberty, or property” be

<sup>117</sup> 5 U.S.C. § 704 (2012).

<sup>118</sup> U.S. Army Corps of Eng’rs v. Hawkes Co., 136 S. Ct. 1807, 1813 (2016); Parsons v. U.S. Dep’t of Justice, 878 F.3d 162, 167 (6th Cir. 2017); Berry v. U.S. Dep’t of Labor, 832 F.3d 627, 633 (6th Cir. 2016); *In re Murray Energy Corp. v. EPA*, 788 F.3d 330, 335–36 (D.C. Cir. 2015).

<sup>119</sup> *Bennett v. Spear*, 520 U.S. 154, 178 (1997); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948).

<sup>120</sup> *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 463 (2004); *Bennett*, 520 U.S. at 178.

<sup>121</sup> *Bennett*, 520 U.S. at 178; *see also Chi. & S. Air Lines*, 333 U.S. at 113; *Murray Energy Corp.*, 788 F.3d at 336.

<sup>122</sup> *See Bennett*, 520 U.S. at 178.

<sup>123</sup> *Murray Energy Corp.*, 788 F.3d at 336.

<sup>124</sup> *See Murray Energy Corp.*, 788 F.3d at 336–37; Bruff, *supra* note 107, at 8.

<sup>125</sup> *Sackett v. EPA*, 566 U.S. 120, 127 (2012).

<sup>126</sup> *See U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016); *Sackett*, 566 U.S. at 120.

carried out following “due process of law.”<sup>127</sup> While substantive due process focuses on whether the government has an appropriate reason to take a person’s “life, liberty, or property,” procedural due process is concerned with the procedures that the government follows when doing so.<sup>128</sup> The key questions to guide the procedural due process analysis are: (i) is due process required?,<sup>129</sup> (ii) when should the required process take place?,<sup>130</sup> and (iii) what type of process is required?<sup>131</sup>

To address these questions, it is useful to turn to the seminal court decision on procedural due process, *Mathews v. Eldridge*.<sup>132</sup> In that case, the plaintiff had his disability benefits terminated after having had an opportunity to submit written documents to the Social Security Administration.<sup>133</sup> The plaintiff’s claim was that the procedures in place before the termination of these types of benefits did not comport with due process.<sup>134</sup> In order to answer the question of whether the procedures were constitutionally sufficient, the Court laid out what is regarded as the current test for procedural due process.<sup>135</sup> Its three factors are the following: (i) “the private interest that will be affected by the official action,” (ii) “the risk of an erroneous deprivation of such interest through the procedures used,” and (iii) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>136</sup>

It is critical, for the purposes of this Article, to differentiate this traditional procedural due process requirement from what some have referred to as the *Ex parte Young* doctrine, which also has a constitutional underpinning. As examined at length in Part IV, the gist of the doctrine adopted in *Ex parte*

<sup>127</sup> U.S. CONST. amends. V, XIV.

<sup>128</sup> Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 871 (2000).

<sup>129</sup> See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985); *Bd. of Regents v. Roth*, 408 U.S. 564, 576–78 (1972); *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009) (explaining that due process is required when a property interest is implicated).

<sup>130</sup> See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 340 (1976) (analyzing whether a hearing had to occur *prior* to the deprivation of property).

<sup>131</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (examining the type of due process “that a citizen held in the United States as an enemy combatant [must] be given”).

<sup>132</sup> 424 U.S. 319 (1976).

<sup>133</sup> *Id.* at 324.

<sup>134</sup> *Id.* at 325.

<sup>135</sup> *Id.* at 335; *Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1970).

<sup>136</sup> *Mathews*, 424 U.S. at 335. This approach has been criticized vigorously in the literature. See, e.g., Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 *U. CHI. L. REV.* 28, 30 (1976) (noting that this test places too much value on questions of technique); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 *YALE L.J.* 455, 472 (1986) (“The development of the *Mathews* balancing test gave rise to a structure within which an individual can possess an undisputed property interest—and thus, a clear right to due process—but have no right to any procedures at all.”).

*Young* is that recipients of orders should not be put in a position in which, in order to challenge the order, they have to risk the imposition of high fines or imprisonment.<sup>137</sup> This would occur, for example, when one is forced to disobey a law in order to be able to challenge it.<sup>138</sup> While some courts have treated this doctrine as a requirement of procedural due process, others have correctly observed that it constitutes a separate constitutional principle.<sup>139</sup>

### B. *The State Of The Issue Under The Different Statutes*

In light of the strong economic incentive to comply with administrative orders, the issue of whether the recipients of compliance orders may seek judicial review before the agency decides to bring an enforcement action in court—which could potentially take a very long time—can be critical.<sup>140</sup> As discussed earlier, interest in obtaining judicial review of administrative orders can also arise in other contexts, such as when citizen groups seek judicial review of a cleanup order issued under CERCLA.<sup>141</sup> Delayed review in those cases can make the later challenge futile.<sup>142</sup> Although all the relevant statutes share similar goals to protect the environment, human health, and the safety of workers,<sup>143</sup> courts have been inconsistent when answering the question of whether immediate judicial review of administrative orders is available.<sup>144</sup> These discrepancies are, in many cases, not justified by the language of the enforcement provisions of the different statutes. This subsection examines how courts have decided this issue under the Clean Air Act, Clean Water Act, RCRA, CERCLA, the Mine Safety Act, and OSH Act.

#### 1. Clean Water Act

Before the Supreme Court examined this question in 2012, the agreement among lower courts was that immediate review of administrative orders issued under the Clean Water Act was barred based on the doctrine of

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<sup>137</sup> See *infra* Part IV.B.1.

<sup>138</sup> This issue, which the article discusses in Part IV, arises when a statute only allows a recipient of an order to question its validity in the context of an enforcement action brought by the agency. See *infra* Part IV.C.1.

<sup>139</sup> See *infra* notes 295–303 and accompanying text (explaining that while procedural due process is mostly concerned about the process that is followed when a person is deprived of life, property, or liberty at the administrative or judicial levels, the *Ex parte Young* doctrine tries to ensure that recipients of orders will have an opportunity to question the validity of such orders in court).

<sup>140</sup> See *supra* Part I.B.1.

<sup>141</sup> See *supra* Part I.B.2.

<sup>142</sup> See *supra* Part I.B.2.

<sup>143</sup> See *supra* Part I.A.

<sup>144</sup> Compare *Acker v. EPA*, 290 F.3d 892, 894 (7th Cir. 2002) (finding an order issued under the Clean Air Act to not be immediately reviewable), with *Sackett v. EPA*, 566 U.S. 120, 126–27, 129 (2012) (concluding that orders issued under the Clean Water Act are final and immediately reviewable by the courts).

preclusion.<sup>145</sup> In *Sackett v. EPA*, however, the Supreme Court examined the government's contentions that the order at issue was not final and that the Clean Water Act impliedly precluded its immediate review.<sup>146</sup> The relevant facts of the case are as follows. Michael and Chantell Sackett ("the Sacketts") had placed fill material on their property.<sup>147</sup> The EPA considered this action to violate the Clean Water Act and issued an order directing the Sacketts to restore their property to its original state.<sup>148</sup> The Sacketts sought immediate review of the order, but both the district court and the Ninth Circuit concluded that the Clean Water Act precluded that challenge.<sup>149</sup>

On the finality question, the Supreme Court ruled against the government and found that the order was final.<sup>150</sup> Focusing on the first finality prong, the Court noted that the order "determined rights or obligations" because it imposed on the Sacketts a legal duty to restore their land, and the failure to comply with the order exposed the Sacketts to penalties if the EPA decided to initiate an enforcement proceeding in the future.<sup>151</sup> The government's argument—based on the second prong of the finality test—that the order did not constitute the "consummation of the agency's decisionmaking process" because it invited "informal discussion" ultimately failed.<sup>152</sup> The Court considered that the mere possibility of talking to EPA officials did not offer the Sacketts a meaningful opportunity for agency review and that, therefore, the order was final.<sup>153</sup>

As for the preclusion issue, the Court opined that the Clean Water Act did not preclude immediate review.<sup>154</sup> Unlike other environmental statutes,<sup>155</sup> the Clean Water Act contains no language precluding judicial review. For that reason, the Court focused its analysis on whether the Act should be interpreted to impliedly preclude immediate review of compliance orders.<sup>156</sup> The EPA's argument was that the purpose of the statute—improving the quality of the nation's waters—as well as the fact that there are provisions in the statute expressly allowing judicial review of other agency actions, led to the conclusion that the immediate review of compliance orders was impliedly precluded.<sup>157</sup> The Court disagreed and pointed out that these argu-

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<sup>145</sup> See Stein et al., *supra* note 25, at 10,819.

<sup>146</sup> See *Sackett*, 566 U.S. at 126–27, 129.

<sup>147</sup> *Id.* at 125.

<sup>148</sup> *Id.* at 126.

<sup>149</sup> *Id.* at 125.

<sup>150</sup> See *id.* at 126–27.

<sup>151</sup> *Id.* at 126 (internal quotation marks omitted).

<sup>152</sup> *Id.* at 127 (internal quotation marks omitted).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 128–31.

<sup>155</sup> CERCLA is an example of a statute that does explicitly preclude immediate review.

See *supra* Part I.B.II.

<sup>156</sup> *Sackett*, 566 U.S. at 129.

<sup>157</sup> *Id.* at 128–31.

ments were not sufficient to overcome the presumption of reviewability in the Administrative Procedure Act.<sup>158</sup>

The *Sackett* case provided a final answer to the question of whether administrative orders issued by the EPA under the Clean Water Act are immediately reviewable. More recent cases have reached a similar conclusion with respect to determinations made by the Corps of Engineers under this same statute.<sup>159</sup> Because these challenges were resolved based on the doctrines of finality and preclusion, the Court did not have an opportunity to address the due process argument.<sup>160</sup> Nevertheless, Justice Alito's concurrence in *Sackett* included a statement indicating that delayed review in that case would have led to results that are "unthinkable" in "a nation that values due process."<sup>161</sup>

## 2. Clean Air Act

While other environmental statutes such as the Clean Water Act and RCRA have also raised statutory preclusion questions, the controversy over whether the EPA's orders issued under the Clean Air Act are subject to immediate review by courts has focused on finality. The Clean Air Act, however, is different from other statutes in this regard because, although it does not specify the timing of review of administrative orders, it does contain a general provision that allows for judicial review of *any* final action of the Administrator.<sup>162</sup> Thus, determining if administrative compliance orders are final has become the key part of the analysis.

Circuit courts of appeals have disagreed over whether compliance orders under the Clean Air Act are final. Some circuits have answered this question in the negative.<sup>163</sup> In a Seventh Circuit case, for example, the court concluded that the plaintiff—i.e., the recipient of the order—had failed to meet either of the two prongs of the finality test.<sup>164</sup> First, the court noted that the order did not meet the first prong because it did not represent the consummation of the agency's decisionmaking process.<sup>165</sup> It viewed the order as simply notifying the plaintiff of the "potential" legal consequences that fur-

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<sup>158</sup> *Id.* at 129.

<sup>159</sup> *See, e.g.*, U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813–16 (2016) (finding that a jurisdictional determination by the Corps of Engineers was immediately reviewable).

<sup>160</sup> The due process argument would come into play when the plaintiff believes that an order deemed not final or whose review is precluded by the statute should nonetheless be immediately reviewable by a court. If a court concludes that the order is final and subject to judicial review, there is no need to examine the due process claim.

<sup>161</sup> *Sackett*, 566 U.S. at 132 (Alito, J., concurring).

<sup>162</sup> 42 U.S.C. § 7607(b)(1) (2018).

<sup>163</sup> *Acker v. EPA*, 290 F.3d 892, 894 (7th Cir. 2002); *see also* *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1076 (3d Cir. 1989); *Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765, 768 (2d Cir. 1988).

<sup>164</sup> *Acker*, 290 F.3d at 894.

<sup>165</sup> *Id.*



ther violation of its obligations under the Clean Air Act could entail.<sup>166</sup> As for the second prong, that is, the requirement that legal consequences flow from the agency action, the Seventh Circuit interpreted it to mean that when an order does not impose a penalty, that order is generally not final.<sup>167</sup> As a result, the court noted that, because the EPA's order did not impose a sanction, it was not final and, thus, also not fit for judicial review.<sup>168</sup>

Other circuits have reached the opposite conclusion.<sup>169</sup> The Ninth Circuit determined that the two finality requirements had been met with respect to an order that the EPA had issued under the Clean Air Act.<sup>170</sup> First, it concluded that the order was the agency's last word on the matter and thus constituted the "consummation of the agency's decision-making process."<sup>171</sup> Second, it explained that "rights or obligations" had been determined because the order had the effect of paralyzing the plaintiff's facility, and that legal consequences could flow from the order—in the form of criminal and civil penalties—if the plaintiff failed to comply with it.<sup>172</sup>

It is unclear if the Supreme Court has settled whether orders issued under the Clean Air Act are final. As one commentator has explained, the Supreme Court appears to have conceded in *Alaska Department of Environmental Conservation v. EPA* that compliance orders under the Clean Air Act are final and therefore reviewable.<sup>173</sup> In that case, the Court explained that the order issued to the operator met the two finality prongs.<sup>174</sup> First, it noted that the agency "had spoken its 'last word'" on the matter and, second, the order had legal effect by potentially subjecting the operator to civil and criminal penalties if it defied it.<sup>175</sup>

Other commentators, however, do not share the view that this case resolved the circuit split with regard to the finality of orders under the Clean Air Act.<sup>176</sup> One possible reason to doubt that the Supreme Court settled this question is that, while the EPA had argued before the Ninth Circuit that the order was not final, it reconsidered its position when the case reached the Supreme Court.<sup>177</sup> The practical consequence would be that the Court's statements on the finality of the order were dicta. Interestingly, the EPA's counsel

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<sup>166</sup> *Id.* (emphasis omitted).

<sup>167</sup> *Id.* at 895.

<sup>168</sup> *Acker*, 290 F.3d at 894–95.

<sup>169</sup> See *Alaska Dep't of Env'tl. Conservation v. EPA*, 244 F.3d 748 (9th Cir. 2001); *All-steel, Inc. v. EPA*, 25 F.3d 312 (6th Cir. 1994).

<sup>170</sup> *Alaska Dep't of Env'tl. Conservation*, 244 F.3d at 751.

<sup>171</sup> *Id.* at 750 (internal quotation marks omitted).

<sup>172</sup> *Id.*

<sup>173</sup> See *Nichols*, *supra* note 30, at 205–06 (pointing out that this holding is applicable to other compliance orders under the Clean Air Act).

<sup>174</sup> *Alaska Dep't of Env'tl. Conservation*, 540 U.S. at 482.

<sup>175</sup> *Id.* at 483.

<sup>176</sup> See *Stein et al.*, *supra* note 25, at 10,820–21 (noting that, years after the Supreme Court decision in *Alaska Dep't of Env'tl. Conservation* was published, there was a circuit split on this issue).

<sup>177</sup> Brief for Respondents at 16, *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461 (2004) (No. 02-658).

suggested in the oral argument that the agency's position on finality applied only to that particular dispute, given that it presented an unusual fact pattern.<sup>178</sup> In that case, the state had issued a permit to a mining facility operator, and then the EPA had ordered the operator to halt the construction of the plant.<sup>179</sup> Therefore, the obligation to stop the construction only arose after the issuance of the order because the operator had a valid permit. This is different from the more common scenario in which the order merely directs the operator to comply with what a statute or regulation already required.

It is important to note that the Supreme Court's decision in *Sackett* did not necessarily resolve the uncertainty over whether immediate review is available with respect to orders issued under the Clean Air Act. As some authors have pointed out, it is unclear whether the Court would extend its view that orders under the Clean Water Act are immediately reviewable to other statutes such as the Clean Air Act.<sup>180</sup> Another aspect to consider is that the EPA published a memorandum in March of 2013 suggesting that several types of orders issued under the Clean Air Act are immediately reviewable.<sup>181</sup> The EPA's view, however, is subject to change.<sup>182</sup>

Before moving on to the next statute, a note on due process is in order. It is worth highlighting that the Supreme Court cases on the Clean Air Act never addressed the due process argument—which only comes into play when, under the finality and preclusion doctrines, the order is deemed to not be immediately reviewable.<sup>183</sup> As a result, a circuit split still exists on whether due process would require immediate review of orders under the Clean Air Act.<sup>184</sup> Part IV will suggest a framework to analyze this question.

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<sup>178</sup> Transcript of Oral Argument at 43–44, *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461 (2004) (No. 02-658).

<sup>179</sup> *Id.*

<sup>180</sup> See Stein et al., *supra* note 25, at 10,822 (noting that *Sackett* “may” affect RCRA); Schiff, *supra* note 25, at 134 (explaining that it is unclear whether this decision applies to all compliance orders). However, the language in the more recent Supreme Court case dealing with the orders issued by the Corps of Engineers under the Clean Water Act suggests that the Court may be willing to apply the conclusions it reached in *Sackett* to other statutes. See *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (“As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of ‘serious criminal and civil penalties.’”).

<sup>181</sup> Susan Shinkman, Dir., Office of Civil Enf't, EPA, Memorandum on the Language Regarding Judicial Review of Certain Administrative Enforcement Orders Following the Supreme Court Decision in *Sackett v. EPA* 5 (Mar. 21, 2013) (requiring the inclusion of language in compliance orders indicating that the orders are subject to judicial review) <https://www.epa.gov/sites/production/files/documents/languageconcerning-sackett032113.pdf> [<https://perma.cc/5UFW-AD9S>].

<sup>182</sup> See Jamison E. Colburn, *Agency Interpretations*, 82 *TEMPLE L. REV.* 657, 658–59 (2009) (stressing the mutability of memoranda and other guidance documents).

<sup>183</sup> Nichols, *supra* note 30, at 195.

<sup>184</sup> *Id.*

### 3. RCRA

The enforcement frameworks in RCRA and the Clean Water Act are very similar in that they are both completely silent with respect to whether courts may review orders immediately.<sup>185</sup> As a result, the litigation over whether compliance orders under RCRA may be challenged at the pre-enforcement stage has mostly focused on the issue of preclusion.<sup>186</sup>

Most courts have agreed that RCRA impliedly precludes review of compliance orders until the EPA brings an enforcement action.<sup>187</sup> To reach this conclusion, courts have articulated different arguments. Some courts have considered that Congress's purpose was to free the "EPA from the burden of answering challenges at every phase of environmental clean-up."<sup>188</sup> Another common argument has focused on the structure of the enforcement mechanisms in the statute.<sup>189</sup> According to a district court judge, when the EPA decides to take action against the potential release of hazardous waste, RCRA gives the agency a choice between initiating a judicial action immediately and issuing an administrative compliance order.<sup>190</sup> Courts have explained that allowing the recipient of a compliance order to challenge it in court would effectively eliminate "Congress's scheme of giving the EPA some choice on how to proceed."<sup>191</sup>

In short, courts have concluded that compliance orders issued under RCRA may not be challenged outside of an enforcement action initiated by the EPA—i.e., are not subject to immediate review. Although the arguments that these courts have relied on may be at odds with the Supreme Court's position in the *Sackett* decision—which dealt with the Clean Water Act—it remains uncertain whether the Court would interpret RCRA and the Clean Water Act consistently in this regard.<sup>192</sup> Moreover, it is important to note that, currently, the EPA's 2013 memorandum requires the agency to include

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<sup>185</sup> Stein et al., *supra* note 25, at 10,822. As noted earlier, the Clean Air Act is different because it contains a provision allowing judicial review of any final action of the EPA. See *supra* Part II.B.2.

<sup>186</sup> *Felix v. Pic-N-Run, Inc.*, No. CV 09-8015-PCT-JCT, 2010 WL 1856347, at \*3 (D. Ariz. May 4, 2010) ("[B]ecause the EPA has not yet sought to enforce its order, this Court is precluded from issuing a similar RCRA declaration."); *Ross Incineration Servs., Inc. v. Browner*, 118 F. Supp. 2d 837, 844–46 (N.D. Ohio 2000); *United States v. Mobil Oil Corp.*, No. 96-CV-1432 (JG), 1997 WL 1048911, at \*3–7 (E.D.N.Y. Sept. 11, 1997).

<sup>187</sup> *Pic-N-Run, Inc.*, No. CV 09-8015-PCT-JCT, 2010 WL 1856347, at \*3 (D. Ariz. May 4, 2010) ("[B]ecause the EPA has not yet sought to enforce its order, this Court is precluded from issuing a similar RCRA declaration."); *United States v. Mobil Oil Corp.*, No. 96-CV-1432 (JG), 1997 WL 1048911, at \*3–7 (E.D.N.Y. Sept. 11, 1997); *Ross Incineration Servs., Inc. v. Browner*, 118 F. Supp. 2d 837, 844–46 (N.D. Ohio 2000).

<sup>188</sup> See, e.g., *Mobil Oil*, 1997 WL 1048911, at \*5.

<sup>189</sup> See *Ross Incineration Servs.*, 118 F. Supp. 2d at 846.

<sup>190</sup> *Id.* at 843; see also 42 U.S.C. § 6928(h) (2012).

<sup>191</sup> *Ross Incineration Servs.*, 118 F. Supp. 2d at 846.

<sup>192</sup> See Stein et al., *supra* note 25, at 10,822 (noting that *Sackett* "may" affect RCRA); Schiff, *supra* note 25, at 134 (explaining that it is unclear whether this decision applies to all compliance orders).

language in compliance orders issued under RCRA stating that the order is subject to judicial review.<sup>193</sup>

#### 4. CERCLA

CERCLA is different from the other statutes considered above in that it is the only one that contains a provision expressly precluding immediate judicial review of administrative orders.<sup>194</sup> However, as explained earlier, this prohibition is structured differently for recipients of orders than for environmental groups who wish to challenge a cleanup order under the citizen-suit provision of the act.<sup>195</sup>

In the first case, the preclusion provision in CERCLA would not allow the recipient of the order to challenge it in court immediately.<sup>196</sup> However, if the EPA were to bring an enforcement action or one to recover a penalty for failure to comply with the order, the recipient of the order would then be able to challenge its validity in that judicial proceeding.<sup>197</sup> The second scenario deals with situations in which citizens and organizations have objections about the cleanup activities at a particular site. Those—other than recipients—willing to challenge the agency action approving the cleanup action to be undertaken at the site would be able to do so under the citizen-suit provisions of the Act.<sup>198</sup> However, courts have interpreted the preclusion provision of CERCLA<sup>199</sup> to not permit challenges to *ongoing* cleanup actions.<sup>200</sup> In other words, citizen groups are only able to challenge cleanups once they have finalized.<sup>201</sup>

Given the explicit bar on immediate challenges, it is not surprising to see that many recipients of compliance orders have resorted to procedural due process arguments in an attempt to persuade courts to grant them immediate review of orders.<sup>202</sup> These challenges, however, have been generally unsuccessful. Before any penalties can be imposed on the recipient of an order, there will be a hearing in court and, thus, the due process requirements are met.<sup>203</sup> As examined in Part IV, courts have also rejected *Ex parte*

<sup>193</sup> Shinkman, *supra* note 181, at 3–5.

<sup>194</sup> 42 U.S.C. § 9613(h).

<sup>195</sup> See *supra* Part I.B.2.

<sup>196</sup> See 42 U.S.C. § 9613(h).

<sup>197</sup> *Id.* § 9613(h)(2); see Gabison, *supra* note 13, at 191 (explaining that “[i]f the EPA elects to go forth with the suit, the private individual cannot influence the process until the lawsuit begins by joining the suit as a plaintiff”).

<sup>198</sup> See 42 U.S.C. § 9659.

<sup>199</sup> *Id.* § 9613(h)(4).

<sup>200</sup> See, e.g., *Clinton Cty. Comm’rs v. U.S. EPA*, 116 F.3d 1018, 1025 (3d Cir. 1997); *M.R. (Vega Alta), Inc. v. Caribe Gen. Elec. Prods., Inc.*, 31 F. Supp. 2d 226, 234 (D.P.R. 1998).

<sup>201</sup> See, e.g., *Clinton Cty. Comm’rs*, 116 F.3d at 1025; *Vega Alta*, 31 F. Supp. 2d at 234.

<sup>202</sup> See, e.g., *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 113 (D.C. Cir. 2010); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 392 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir. 1986).

<sup>203</sup> See *Jackson*, 610 F.3d at 113.

*Young*-type arguments against CERCLA, which generally focus on the hurdles that recipients of orders face before being able to seek judicial review.<sup>204</sup>

## 5. The OSH Act and Mine Safety Act

The concern under the OSH Act and Mine Safety Act is that, if the Secretary of Labor issues a citation to an operator or employer, and the latter files an administrative appeal, the penalties for non-compliance with this order could accumulate while the Commission is evaluating the validity of the citation. For that reason, operators and employers have tried to obtain immediate review of the Secretary's citations.<sup>205</sup>

However, courts have refused to allow such challenges. To justify this outcome, courts have mostly relied on the doctrine of preclusion.<sup>206</sup> Although the provisions of the OSH Act and Mine Safety Act do not expressly preclude judicial review of citations issued by the Secretary, courts have found these claims to be impliedly precluded.<sup>207</sup> Two reasons have supported this finding. The first one is the structure of these Acts. While the statutes are silent on the reviewability of orders issued by the Secretary, they expressly allow challenges of orders issued by the Commission.<sup>208</sup> The second argument that courts have used to justify implied preclusion under the Acts is that recent amendments to these two statutes suggest that the legislators had the intent of strengthening the two Acts' enforcement provisions.<sup>209</sup>

Those seeking immediate review of citations have also relied on the *Ex parte Young* doctrine. Their claim has been that the penalties that may accumulate while the Commission is examining the administrative appeal create an impermissible coercion to comply, and compliance can lead to harm that will not necessarily be repaired with later judicial review.<sup>210</sup> Courts have generally rejected this argument, especially after the Supreme Court ruled on a similar issue in *Thunder Basin*. In that case, a mine operator was seeking immediate review of a letter sent by the manager of the Mine Safety and Health Administration.<sup>211</sup> The Supreme Court's response to this argument incorporated references to both the requirement of procedural due process, when the Court used the expression "pre-deprivation hearing," and to the *Ex*

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<sup>204</sup> See *Solid State Circuits*, 812 F.2d at 389–92; *Wagner Seed*, 800 F.2d at 317.

<sup>205</sup> See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 205 (1994); *Big Ridge, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 715 F.3d 631, 652 (7th Cir. 2013).

<sup>206</sup> See *Thunder Basin Coal Co.*, 510 U.S. at 207–12; *Big Ridge*, 715 F.3d at 652–54; *E. Bridge, LLC v. Chao*, 320 F.3d 84, 88–91 (1st Cir. 2003); *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 871–76 (D.C. Cir. 2002) (applying *Thunder Basin Coal Co.*'s test for preclusion to decide whether the court had jurisdiction to hear an immediate challenge to a warrant issued under the OSH Act).

<sup>207</sup> See *Thunder Basin Coal Co.*, 510 U.S. at 207–12; *Big Ridge*, 715 F.3d at 652–54; *E. Bridge*, 320 F.3d at 88–91; *Sturm, Ruger & Co.*, 300 F.3d at 871–76.

<sup>208</sup> See *supra* note 207.

<sup>209</sup> See *supra* note 207.

<sup>210</sup> See *Thunder Basin Coal Co.*, 510 U.S. at 216; *Big Ridge*, 715 F.3d at 653.

<sup>211</sup> *Thunder Basin Coal Co.*, 510 U.S. at 204.

*parte Young* doctrine, which the Court explicitly alluded to.<sup>212</sup> Similarly to what lower courts had ruled on the procedural due process claim under environmental statutes, the Court noted that, because the penalties would only be payable after the court reviewed them, there was no pre-deprivation hearing.<sup>213</sup> With regard to the *Ex parte Young* argument, the Court explained that, given that mine operators can obtain temporary relief from certain citations—meaning that, in these instances, penalties would not accumulate while the Commission is examining their validity—there was no *Ex parte Young* violation either.<sup>214</sup>

While many courts have relied on *Thunder Basin* to decide similar challenges to the OSH Act and Mine Safety Act, it is important to note how narrow this ruling actually was.<sup>215</sup> First, this was not a facial challenge to the constitutional validity of the enforcement and judicial review provisions of the Mine Safety Act. On the contrary, the Court specifically stated that the petitioner's claim was not an "abstract challenge to the Mine Act's statutory review scheme," but was limited to the "present situation."<sup>216</sup> Second, while the Court explained that an *Ex parte Young* challenge would fail in cases in which temporary relief from the accumulation of penalties was available, it never clarified what would happen in the not uncommon case of citations for which the Act does not provide this option.<sup>217</sup>

In short, the *Thunder Basin* ruling on whether the Mine Safety Act could raise constitutional concerns under *Ex parte Young* was very narrow. In addition, the Supreme Court has not considered these types of challenges in the context of the OSH Act or any of the environmental statutes discussed above. A framework that allows courts and legislatures to evaluate the constitutionality of delayed review provisions is long overdue. Part IV of this Article will take on this task after a critical analysis, in Part III, of the public policy arguments in support of delayed review.

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<sup>212</sup> *Id.* at 218.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> See, e.g., *Big Ridge*, 715 F.3d at 653–54; *Reich v. Manganas Painting Co.*, 104 F.3d 801, 802–03 (6th Cir. 1997).

<sup>216</sup> *Thunder Basin Coal Co.*, 510 U.S. at 218 n.22.

<sup>217</sup> *Id.* at 218. The constitutional problems that arise under these other types of citations for which no temporary relief is available were thoroughly examined by a district court many years before the Court decided *Thunder Basin Coal Co.* See *Lucas v. Morton*, 358 F. Supp. 900, 903–05 (W.D. Pa. 1973) (explaining how, without an avenue to obtain immediate judicial review in the case of irreparable harm, barring temporary relief of certain orders could be unconstitutional).

### III. THE QUESTIONABLE PUBLIC POLICY FOUNDATION OF DELAYED JUDICIAL REVIEW

#### A. Arguments in Support of Delayed Judicial Review

Delayed judicial review has an unquestionable intuitive appeal. If it increases the pressure on recipients of orders to comply with what an agency demands, then this form of review is preferable because, despite the fairness concerns that it may raise, it will help further the goals of the particular statute under which an order is issued.<sup>218</sup> Those who support delayed judicial review tend to also rely on a series of generic arguments about the dangers of immediate review, namely that it leads to delays in enforcement<sup>219</sup> and to a significant increase in the number of court challenges of compliance orders.<sup>220</sup> The more serious these effects, the easier it is to brush aside the fairness concerns associated with delayed review. The following analysis shows that these arguments are not as persuasive as a superficial look would suggest and that they can only justify delayed review under a very limited set of circumstances.

#### 1. The Argument That Allowing Immediate Review Would Cause Important Delays in Enforcement

One of the main arguments against immediate judicial review of administrative orders is that it delays enforcement and that this, in turn, could lead to harm to the environment or human health.<sup>221</sup> There are two theories that scholars use to support this idea. The first one is that allowing a challenge in court causes, by itself, a direct delay in the enforcement of the order.<sup>222</sup> The second theory is that the delay is of an indirect nature, brought about, for example, by the way an agency reacts to a challenge of one of its orders.<sup>223</sup>

i. *Delays Directly Resulting From a Challenge.* The first theory is the least convincing one. The legal effects of compliance orders are not inter-

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<sup>218</sup> See David Montgomery Moore, *Pre-Enforcement Review of Administrative Orders to Abate Environmental Hazards*, 9 PACE ENVTL. L. REV. 675, 678 (1992) (explaining that immediate review of orders has been perceived to be in tension with the fulfillment of the statute's purpose); Starr, *supra* note 34, at 918 ("Pre-enforcement judicial review of administrative compliance orders hinders the purpose of the statute.").

<sup>219</sup> See Healy, *supra* note 12, at 325.

<sup>220</sup> See Quiggle, *supra* note 12, at 328–29.

<sup>221</sup> See Starr, *supra* note 34, at 913 ("By permitting pre-enforcement judicial review, formal adjudication in the court of appeals hinders the compliance order's expediency."); see also Quiggle, *supra* note 12, at 329 (explaining that plaintiffs who are permitted to seek pre-enforcement review of compliance orders "will likely succeed in both slowing down the enforcement of environmental laws and delaying the cleanup of catastrophic contamination").

<sup>222</sup> See Starr, *supra* note 34, at 915 (explaining that formal adjudication in court "hinders the compliance order's expediency").

<sup>223</sup> See Healy, *supra* note 12, at 326 (explaining the EPA's reluctance to continue with cleanups after the response action is challenged).

rupted merely as a result of the plaintiff's bringing a challenge in court.<sup>224</sup> The order will only become unenforceable while the court is examining the merits of the challenge if the recipient of the order seeks a preliminary injunction and the court decides to grant it.<sup>225</sup> However, the likelihood of this happening in cases in which the order is both legal and necessary to prevent the occurrence of a substantial harm to the environment is low.

To be successful, the plaintiff seeking a preliminary injunction must generally show a likelihood of success on the merits, irreparable harm, that the harm to the moving party is higher than the harm to the non-moving party, and that the balance between the public and private interests favors the public interest.<sup>226</sup> Before examining the four prongs of the test, it is important to highlight an implied assumption of the argument that immediate review inevitably leads to delay, i.e., that the order in question is appropriate. In other words, the premise is that the courts would uphold the order, if challenged. This is because, by identifying the issue as 'delay,' one is assuming that the challenge itself would ultimately be unsuccessful and that the problem is that the order would end up being enforced *later* than it would otherwise have been.

With this assumption in mind, if we are focusing on appropriate orders, by definition, the likelihood that plaintiffs will succeed on the merits is going to be low. As courts have put it, plaintiffs must show "[m]ore than a mere possibility of relief."<sup>227</sup> If the order that is being challenged is proper, the plaintiffs' ability to demonstrate to the court that they are likely to prevail at the end of the proceeding will be low in most cases.

As for the second factor—i.e., the existence of irreparable harm—the Supreme Court has set a high bar by noting that movants do not meet their burden by merely "showing some possibility of irreparable injury."<sup>228</sup> Plaintiffs only meet their burden if they show that they would be "likely" to suffer an irreparable injury.<sup>229</sup> However, in the majority of cases involving the types of plaintiffs that those concerned with immediate review tend to focus on the most—i.e., manufacturing companies<sup>230</sup>—the harm experienced

<sup>224</sup> See Davis, *supra* note 15, at 204.

<sup>225</sup> See *id.*

<sup>226</sup> Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (citing Munaf v. Geren, 553 U.S. 674, 689–90 (2008); Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–12 (1982)); see Bethany M. Bates, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1523 (2011).

<sup>227</sup> Nken v. Holder, 556 U.S. 418, 434 (2009) (alteration in original) (internal quotation marks omitted).

<sup>228</sup> *Id.* (internal quotation marks omitted).

<sup>229</sup> Winter, 555 U.S. at 22 (citing Los Angeles v. Lyons, 461 U.S. 95, 103 (1983); Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 441 (1974); O'Shea v. Littleton, 414 U.S. 488, 502 (1974)).

<sup>230</sup> See Quiggle, *supra* note 12, at 329 (focusing on "large polluters like General Electric").



by the recipient of the order will be of an economic nature, which is often deemed not “irreparable” by courts.<sup>231</sup>

The third and fourth factors, which merge when the government is the defendant,<sup>232</sup> also favor the agency. The cases in which granting a preliminary injunction most damaging for the government and the general public—i.e., those where the lack of compliance with the order would cause an important environmental or health impact—present a balance between public and private interest in favor of the private interest. This supports a denial of the preliminary injunction, especially in light of the Supreme Court’s view that environmental harm—i.e., what the court would balance against the economic injury that the plaintiff would allege—can rarely be remedied with monetary damages and tends to be irreparable.<sup>233</sup>

In short, this analysis of the factors that guide whether the court will grant a preliminary injunction shows that such an outcome is unlikely in cases involving adequate orders. As a result, the probability that these challenges would directly cause delays in the enforcement process is also low. Moreover, given the balancing of harms that the test demands, it is even less likely that a preliminary injunction would be granted in cases in which doing so could result in serious harm to the environment or human health.

ii. *Indirect Sources of Delay.* The second delay theory, which is based on the *indirect* effects of litigation, is more persuasive, but it is very limited in scope. The claim is that litigation tends to divert agency resources, thereby reducing the agency’s capacity to attend to enforcement activities.<sup>234</sup> While there may be some noticeable effects of litigation on how swiftly certain compliance activities are performed, it is important to highlight three points.

First, agency resources—at least, the time and work of some government employees—will be expended every time that an agency contests or is otherwise involved in a challenge of an administrative action. This fact, by itself, does not automatically justify limiting judicial review or explain why

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<sup>231</sup> See, e.g., *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009), *abrogated on other grounds* by *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008); see also *Ace Am. Ins. Co. v. Wachovia Ins. Agency Inc.*, 306 Fed. App’x 727, 731 (3d Cir. 2009) (“[A] preliminary injunction must be the only way of protecting the plaintiff from harm and may not be granted to relieve purely economic harm.” (citing *Frank’s GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988)); *Daily Caller v. U.S. Dep’t of State*, 152 F. Supp. 3d 1, 6 (D.D.C. 2015) (“[W]e see no reason to depart from the general rule that economic harm does not constitute irreparable injury.”); *Safari Club Int’l v. Jewell*, 47 F. Supp. 3d 29, 36 (D.D.C. 2014) (“[T]he general rule in this Circuit is that economic harm does not constitute irreparable injury . . . the fact that economic losses may be unrecoverable does not, in and of itself, compel a finding of irreparable harm.” (internal quotation marks omitted)).

<sup>232</sup> *Nken*, 556 U.S. at 435.

<sup>233</sup> *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

<sup>234</sup> See Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 598 (2001) (noting that “not spending time in the litigation of enforcement action” may increase the number of sites that are remediated); see also Healy, *supra* note 12, at 325–26 (explaining these indirect sources of delay); Levy, *supra* note 34, at 1061.

judicial review should be delayed in some instances—e.g., in environmental cases—but not in others. Second, these claims are documented with respect to one statute. In particular, these types of delays seem to arise in the context of CERCLA and only when the agency has to develop a factual record to aid the court in ruling on the claim that a particular party should not be held liable for the cleanup costs associated with a contaminated site.<sup>235</sup> The need to spend resources on a factual record, however, will also depend on whether the defense raised is essentially a legal one or one that requires a thorough analysis of the industrial activities carried out by the potentially responsible party.<sup>236</sup> Thus, while the argument may be valid in some cases, it is only persuasive under a very limited set of circumstances. Thus, it cannot be reasonably used to support a broader claim that substantial enforcement delays are an inherent feature of immediate judicial review.

Third, even in the CERCLA context, part of the delay seems to result from the agency's reluctance to move forward with the cleanup process when a court is examining a challenge, even in the absence of a preliminary injunction.<sup>237</sup> This can occur when the agency perceives that not continuing with the cleanup action will be strategically advantageous in court.<sup>238</sup> This type of delay could be avoided by the agency and, therefore, does not provide an adequate basis to support the need to bar immediate challenges either.

## 2. Allowing Immediate Judicial Review and the Alleged Flood of Challenges

The other argument often offered in support of delayed judicial review is that, with immediate review, the agency would “quite possibl[y] face[ ] judicial review of every administrative order it issues.”<sup>239</sup> The idea behind this view is that, because the order generally requires its recipient to act in a way that will be economically costly, a simple cost-benefit analysis would always lead the operator to challenge the order regardless of its merit in order to avoid these compliance costs.<sup>240</sup>

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<sup>235</sup> In fact, Professor Healy, who lays out this argument in his scholarship, does not state that this claim is valid in other contexts. See Healy, *supra* note 12, at 325–26; see also Healy, *supra* note 99, at 12 (explaining the different types of settings under which potentially responsible parties under CERCLA may challenge their liability in court.).

<sup>236</sup> For example, the question of a party's ownership of a facility is essentially a legal question that can affect whether that party is potentially liable under the statute or not. See 42 U.S.C. § 9607(a)(1).

<sup>237</sup> Healy, *supra* note 12, at 326.

<sup>238</sup> See *id.*

<sup>239</sup> Quiggle, *supra* note 12, at 328; see also Wynn, *supra* note 35, at 1901 (noting that the majority view is that immediate review prevents floods of challenges).

<sup>240</sup> See Quiggle, *supra* note 12, at 363–64. It is important to note that there is no empirical support for this claim, as some scholars have deemed necessary for those making similar “flood of challenges” arguments. See Levy, *supra* note 35, at 1073.

The problem with this argument is that it overlooks the costs that recipients of orders face if they decide to bring a challenge. Under the traditional economic model for litigation, parties make their decision on whether to bring a court action taking into account the “expected value” of their claim and its potential costs.<sup>241</sup> To do so, the potential plaintiff will ponder the following key factors: the likelihood of success of the claim (P), the gain in the event of success (G), and the costs associated with litigating the case (C).<sup>242</sup> This process involves “attach[ing] probabilities and payoffs” to the different options.<sup>243</sup> In the typical case involving the challenge of an order, cost is the key issue—i.e., costs incurred with the challenge and compliance costs potentially avoided if the challenge is successful. The following table lays out the different possible scenarios:

	Cost of Bringing the Action	Cost of Compliance	Fines for Non-Compliance	Gain from Delayed Compliance
No Challenge	N/A	Full Cost	N/A	N/A
Challenge	Full Cost	$(1 - P) \times \text{Cost}$	$(1 - P_i) \times \text{Cost}$	$P_i \times \text{Cost}$

Under a “no challenge” scenario, the recipient of the order must pay the full cost of compliance. If the plaintiff brings a challenge, the costs associated with that decision will vary depending on whether the plaintiff wins or loses in court and also be based on the court’s decision on whether to grant a preliminary injunction.<sup>244</sup> “P” represents the likelihood of prevailing in the challenge and “ $P_i$ ” is the likelihood of obtaining a preliminary injunction. Under this “challenge” scenario, there is always a cost to bringing the action, but the evaluation of the other costs and gains will depend on P and  $P_i$ .<sup>245</sup> How likely the recipient of the order is to have to ultimately pay compliance costs depends on the probability of prevailing in the suit (P), whereas the likelihood of having to pay fines for non-compliance that accrue while the court is examining the merits of the case depends on the probability of obtaining a preliminary injunction ( $P_i$ ). Similarly, the savings from not having to comply with the order until after the date of the court’s ruling are tied to the likelihood of securing a preliminary injunction ( $P_i$ ).<sup>246</sup>

<sup>241</sup> See Jennifer K. Robbennolt, *Litigation and Settlement*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 2 (Eyal Zamir & Doron Teichman eds., 2014).

<sup>242</sup> See Robert G. Bone, *Economics of Civil Procedure*, in THE OXFORD HANDBOOK OF LAW AND ECONOMICS, PUBLIC LAW AND LEGAL INSTITUTIONS 6 (Francesco Parisi ed., 2017); see also Bruce Kobayashi, *Economics of Litigation*, in THE OXFORD HANDBOOK OF LAW AND ECONOMICS, PUBLIC LAW AND LEGAL INSTITUTIONS 6 (Francesco Parisi ed., 2017).

<sup>243</sup> ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 420 (2008).

<sup>244</sup> These costs include legal fees and experts, and also reputational costs and the time dedicated to the lawsuit. See Robbennolt, *supra* note 241, at 2.

<sup>245</sup> Where  $(1 - P)$  is the likelihood of losing and  $(1 - P_i)$  is the likelihood of not being granted the preliminary injunction.

<sup>246</sup> This, of course, only applies to a situation in which the court grants a preliminary injunction and dismisses the challenge to the order.

What this model shows is that the decision of whether to challenge an order may point in different directions depending on the factors outlined above. In other words, the cost-benefit analysis does not always justify a challenge.<sup>247</sup> When the order is perceived to be proper and, thus, likely to be upheld, its recipient has a higher probability of having to pay the cost of compliance and the full cost of bringing the claim. For the reasons explained above, the likelihood of obtaining a preliminary injunction in these cases is also low.<sup>248</sup> If the plaintiff does not obtain a preliminary injunction, continuing with the challenge without complying with the order will also create a serious risk of having to pay substantial daily fines if the court upholds the order. Therefore, these actions would be brought primarily when the costs of compliance are extremely high, or when the order is perceived to be so flawed that the chances of a successful challenge are high.<sup>249</sup>

The notion that introducing immediate review would not cause recipients of compliance orders to systematically challenge them in court has also been confirmed in practice with the Clean Water Act. Before 2012, courts only permitted delayed review of compliance orders issued under the Clean Water Act. This changed in 2012 as a result of the Supreme Court decision in *Sackett*.<sup>250</sup> More than five years later, attorneys have not observed “the flood of litigation that many expected.”<sup>251</sup> On the contrary, the number of challenges of compliance orders under the Clean Water Act has been very low.<sup>252</sup>

### B. *Evaluating The Convenience Of Delayed Review In Specific Cases*

The purpose of the previous analysis was to challenge the notion that the arguments about delay and unmanageable amounts of litigation can support delayed review in all circumstances. The conclusion that delayed review is not necessarily the superior alternative in many instances begs the question: how can we evaluate, from a public policy standpoint, whether delayed review is better than immediate review? Part III.B provides a basic frame-

<sup>247</sup> McMahon, *supra* note 44, at 1384–85 (explaining how the expenses associated with litigation can be higher than the advantage conferred by winning in court and how this operates as a disincentive to sue).

<sup>248</sup> See *supra* Part III.A.1.a. As also explained above, the assumption is that those making these arguments in support of delayed review are primarily concerned about challenges to perfectly appropriate orders, which courts would be very likely to ultimately uphold.

<sup>249</sup> As the D.C. Circuit pointed out, many recipients of these orders comply with what the agency requires from them because they believe that the order is “accurate and would withstand judicial review.” *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 128 (D.C. Cir. 2010).

<sup>250</sup> 566 U.S. 120 (2012).

<sup>251</sup> Amena H. Saiyid, *Challenges to Corps Waters Findings Still a Trickle After Ruling*, BLOOMBERG LAW (Feb. 22, 2017), <https://www.bna.com/challenges-corps-waters-n57982084170/> [<https://perma.cc/QUH6-M8HE>].

<sup>252</sup> Even a broad search on Westlaw for cases decided by U.S. district courts after *Sackett* including the terms “compliance order” and “Clean Water Act” (which includes cases in which administrative orders were not being challenged at all) yields an average of ten cases per year in the entire United States.

work to make this type of determination. This discussion examines a set of environmental statutes that, as explained above, share a similar enforcement structure: the Clean Air Act, the Clean Water Act, and RCRA.<sup>253</sup>

The first step in the analysis is to divide the universe of situations in which compliance orders may be issued into four categories. The first two categories differentiate between orders that are appropriate—defined as those that would be expected to withstand judicial review—and those that are deficient—i.e., those likely to be set aside by a court. The other distinction focuses on whether the recipient of the order would be willing to challenge it in court if immediate judicial review were available. The following matrix shows the four possible scenarios.

	<b>Would Challenge</b>	<b>Would Not Challenge</b>
<b>Appropriate Order</b>	Appropriate WC	Appropriate WNC
<b>Deficient Order</b>	Deficient WC	Deficient WNC

To evaluate whether delayed review is the preferable enforcement/review option, this discussion will analyze each category and compare two different scenarios: one where there is immediate judicial review with one in which only delayed review is available. It is worth noting that most of the criticisms of immediate judicial review have focused on the first category—appropriate order/plaintiff would challenge.<sup>254</sup> With respect to the second, third, and fourth categories, the notion that immediate judicial review creates net benefits should be less controversial.

### 1. Appropriate Order/Plaintiff Would Challenge

This category includes compliance orders that courts would uphold but that their recipients would challenge, given the opportunity. Before revisiting the arguments in favor or against allowing immediate review of these types of orders, it is important to examine the different scenarios that this category deals with. The following table synthesizes the different expected outcomes with delayed and immediate review of compliance orders.

<sup>253</sup> See *supra* Part I.B.

<sup>254</sup> See *supra* Part III.A.

With Delayed Review	With Immediate Review
The operator complies with it to avoid risk of penalties.	The operator complies with it to avoid risk of penalties.
The operator complies after the EPA brings a successful enforcement action.	The operator complies after the EPA brings a successful enforcement action.
The operator does not comply with the order and the EPA does not bring an enforcement action.	The operator does not comply with the order and the EPA does not bring an enforcement action.
	<i>The operator complies with the order after seeking immediate review thereof and losing in court.</i>

As the table shows, introducing the possibility of immediately challenging a compliance order would only add one additional scenario to this category of orders: the recipient of the order complies with it after an unsuccessful challenge in court. Those who oppose immediate judicial review of compliance orders focus on this particular scenario and claim that this form of judicial review would (i) lead to delays in the enforcement of environmental laws and regulations that could result in harm to human health and the environment,<sup>255</sup> and (ii) cause courts to be flooded with challenges of compliance orders.<sup>256</sup> As the discussion above explained, none of these arguments is persuasive.<sup>257</sup>

With regard to the argument that there would be substantial delays in enforcement, a mere challenge without a preliminary injunction would not render the order unenforceable, and the penalties for non-compliance with it would continue to accrue.<sup>258</sup> These penalties only contribute to incentivizing compliance. Moreover, applying the current test for preliminary injunctions, the likelihood that a plaintiff would be able to obtain this form of temporary relief in the case of appropriate orders is low, and especially of those orders trying to prevent serious harm to human health or the environment.<sup>259</sup>

As for the argument relating to the potential flood of challenges, this is also unlikely to occur. The economic model discussed in detail above suggests that the likelihood of success is an important factor in the decision of whether to challenge an order or not.<sup>260</sup> With appropriate orders, the

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<sup>255</sup> Quiggle, *supra* note 12, at 329 (explaining that plaintiffs who are permitted to seek pre-enforcement review of compliance orders “will likely succeed in both slowing down the enforcement of environmental laws and delaying the cleanup of catastrophic contamination”); Starr, *supra* note 34, at 918 (“By permitting pre-enforcement judicial review, formal adjudication in the court of appeals hinders the compliance order’s expediency.”).

<sup>256</sup> See Wynn, *supra* note 35, at 1901 (noting that the majority view is that immediate review prevents floods of challenges); see also Quiggle, *supra* note 12, at 328.

<sup>257</sup> See *supra* Part III.A.1.

<sup>258</sup> See *supra* Part III.A.1.

<sup>259</sup> See *supra* Part III.A.1.

<sup>260</sup> See *supra* Part III.A.2.

probability of success is low by definition.<sup>261</sup> Thus, unless the cost of compliance is very high, the assumption that plaintiffs would systematically challenge compliance orders is unconvincing.<sup>262</sup> Further, the experience with the Clean Water Act confirms that immediate review does not necessarily lead to a significant increase in litigation.<sup>263</sup>

## 2. Appropriate Order/Plaintiff Would Not Challenge

This is the most desirable category because orders are appropriate, and there is no unnecessary litigation. Introducing immediate review would not have a negative impact on this subset of orders, given that it would provide their recipients with an option—challenging the order—that they are not interested in using.

However, there would be global positive effects associated with immediate judicial review: it would increase the share that this category represents in the total number of orders. Scholars have noted that more extensive judicial review creates a powerful incentive for the executive to avoid acting in an irrational or lawless fashion, increasing the quality of the final product<sup>264</sup>—in this case, of administrative orders. Therefore, allowing immediate review of orders should increase the overall share of appropriate orders.

## 3. Deficient Order/Plaintiff Would Not Challenge

There are at least two scenarios in which, if immediate review were available, a deficient order would remain unchallenged. First, if an operator realizes that the cost of challenging the order would be higher than that of complying with it, it may choose to not challenge the order. The cost of complying with the order, however, could still be significant. Therefore, reducing the number of cases in which this occurs would still be important from both a fairness and an efficiency standpoint. While allowing immediate review would not translate into an increase in judicial review of orders in the ‘deficient/would not challenge’ category, this form of review may still contribute, as noted above, to an overall increase in the quality of orders.<sup>265</sup> This, in turn, would make this undesirable category of orders smaller.

Second, the recipient of a compliance order may comply voluntarily with it because the order is very lenient and potentially more advantageous to the owner/operator than the statute or regulations allow for. This has been an issue, for example, in the context of CERCLA/RCRA cleanup actions,

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<sup>261</sup> Of course, there could still be a small number of cases in which a plaintiff is able to bring a colorable challenge of an appropriate order.

<sup>262</sup> See *supra* Part III.A.2.

<sup>263</sup> See *supra* Part III.A.2.

<sup>264</sup> Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 527–28 (1989).

<sup>265</sup> See *supra* Part III.B.2. (explaining how more extensive judicial review is perceived to lead to orders of a higher quality).

where the type/level of cleanup that the order directs the recipient to undertake/reach does not meet appropriate standards, or where the time provided to complete the cleanup is unreasonably long.<sup>266</sup> In these cases, permitting immediate judicial review would provide citizen groups the opportunity to challenge these orders before the cleanup is finalized.

#### 4. Deficient Order/Plaintiff Would Challenge

This is the most problematic situation and the one that could be dramatically reduced with immediate review. Allowing immediate judicial review of compliance orders would solve the problem of deficient orders that have an economic impact on their recipients that is sufficiently great to justify their challenge in court, but for which, either by statute or judicial interpretation, prompt judicial review is not available. As explained earlier, the option of seeking injunctive relief is critical to this type of challenge—so that the potential penalties do not accumulate.<sup>267</sup> However, unlike with the first category—i.e., appropriate orders that their recipient would challenge—the likelihood of success in the case of a deficient order would be higher, which would make the issuance of the preliminary injunction more likely. Moreover, with deficient orders, the assumption that their enforcement would help prevent damage to the environment or human health does not necessarily hold true.<sup>268</sup>

#### 5. Summing Up: Overall Appropriateness of Immediate Review of Environmental Compliance Orders

There are several conclusions to extract from the preceding analysis. First, criticisms of immediate review of environmental compliance orders apply to only one of the four categories of orders: i.e., the first one—appropriate orders that would be challenged by their recipients. Second, the arguments against immediate review of these types of orders—based on the purported dramatic increase in the number of challenges and delays in enforcement—are not very persuasive. Third, it can hardly be controversial that, under categories two, three, and four, immediate review would be beneficial or, at least, not harmful. Last, the economic analysis described in Part

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<sup>266</sup> See, e.g., Petition Alleging Violations Of The Human Rights Of Various Residents Of Vieques, Puerto Rico By The United States Of America at 33 (Inter-Am. Comm'n H.R. Sept. 23, 2013), [http://www.nlginternational.org/report/Vieques\\_IACHR\\_petition-FINAL.pdf](http://www.nlginternational.org/report/Vieques_IACHR_petition-FINAL.pdf) [<https://perma.cc/6GUM-62FG>] (claiming that the polluter “engaged in substandard cleanup practices, such as the open-air detonation of munitions and open burning of vegetation, which the Environmental Protection Agency determined to be hazardous to the environment.”).

<sup>267</sup> See *supra* Part III.A.1.a.

<sup>268</sup> A classic example, in the worker safety context, that this assumption may not be accurate, especially when dealing with a deficient order, can be found in *Ne. Erectors v. Sec’y of Labor*, 62 F.3d 37 (1st Cir. 1995). There, an employer was trying to obtain immediate review of administrative action that had the effect of compromising workers’ safety. See Buchman, *supra* note 89, at 201–03.



III.A suggests that the first category of orders does not, as defenders of delayed review would argue, include the vast majority of the orders that agencies issue.<sup>269</sup> One of the features of this category is that the recipient of the order would challenge it. However, the economic model shows that there can be many scenarios under which these potential plaintiffs may be unwilling to challenge the orders because there is an economic incentive to not do so unless the costs of compliance are very high.<sup>270</sup>

#### IV. CONSTITUTIONAL CONCERNS WITH DELAYED JUDICIAL REVIEW

Most of the statutes described in part II of this Article are silent on whether immediate judicial review of orders is permitted.<sup>271</sup> This has led some courts to conclude that Congress nonetheless intended to foreclose such review.<sup>272</sup> With respect to CERCLA, courts have been virtually unanimous in reaching the same conclusion in light of the statute's explicit bar on immediate review of cleanup orders.<sup>273</sup> Because the majority of these cases have focused on the doctrines of preclusion and finality, the question of whether Congress is constitutionally permitted to limit judicial review in this manner is still not conclusively answered.

The extent to which Congress may limit judicial review of agency action generally has been amply debated. Some authors see judicial review of agency's orders and regulations as a basic principle of the American legal system that can be traced back to *Marbury v. Madison*.<sup>274</sup> Others deny the notion that there is a general constitutional right to judicial review of agency action.<sup>275</sup> These two positions represent the two sides of a spectrum: one that would require judicial review in all cases and another one that would be comfortable with denying it completely in certain instances.

Delayed judicial review falls somewhere between these two extreme positions: it is placing an important limitation on judicial review, but it is not eliminating it altogether. Some could claim that leaving open the possibility of review under certain conditions—which delayed review generally does—complies with any constitutional requirement of access to courts. Others

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<sup>269</sup> The argument relating to the “flood of challenges” is premised on the notion that most recipients of orders would challenge them. The economic argument laid out above questions that assumption. The consequence of this is that the first category of orders—in which the recipient would challenge the order—would not integrate the vast majority of appropriate orders. In other words, many appropriate orders would fall into the “appropriate/recipient would not challenge” category. In this same vein, see *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 128 (D.C. Cir. 2010) (explaining that many recipients of these orders comply with what the agency requires from them because they believe that the order is “accurate and would withstand judicial review”).

<sup>270</sup> *Id.*

<sup>271</sup> See *supra* Part II.B.1, 2, 3, 5.

<sup>272</sup> See *supra* Part II.B.2, 3, 5.

<sup>273</sup> See *supra* Part II.B.4.

<sup>274</sup> Berger, *supra* note 3, at 89 n.180.

<sup>275</sup> Bagley, *supra* note 4, at 1309.

would counter, however, that those who are coerced to comply with an administrative order under the threat of increasing daily penalties are seeing their right to judicial review impermissibly curtailed.<sup>276</sup>

To address this issue, Part IV starts by examining whether there is a general constitutional right to obtain judicial review of agency action. The second part of the analysis focuses on a more limited theory of judicial review—the doctrine of constitutionally intolerable choices—and provides a comprehensive framework to evaluate the constitutionality of different delayed review provisions.

### A. *Is There A Constitutional Right To Judicial Review?*<sup>277</sup>

If delayed judicial review is, in fact, problematic from a constitutional standpoint, there is a threshold question that must be addressed first. And that is whether the Constitution expressly or impliedly recognizes a general right to challenge administrative action in court. Given the constitutional dimension of this hypothetical right, it would include not only situations where the statute is silent—i.e., implied preclusion—but also those in which Congress has explicitly barred judicial review of a certain form of agency action—i.e., express preclusion.<sup>277</sup>

Scholars have been debating, and disagreeing on, this issue for a long time.<sup>278</sup> However, these conversations in the literature have, at least, contributed to delineating the potential sources of such a constitutional requirement. Two doctrines that scholars have frequently cited as constitutional hooks to justify the existence of a universal right to judicial review are separation of powers and the non-delegation doctrine.<sup>279</sup> It is worth noting, however, that

<sup>276</sup> See *Ex parte Young*, 209 U.S. 123, 148 (1908); John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 991–93 (2008) (explaining the legal framework in *Ex parte Young* and how the Court concluded that it was unconstitutional because, in practice, it inhibited judicial review).

<sup>277</sup> For a discussion of the difference between these two forms of preclusion and their treatment by courts, see *supra* Part II.A.1.

<sup>278</sup> See, for example, the back and forth between Professors Raoul Berger and Kenneth Culp Davis that started in the 1960s. Berger, *supra* note 3, at 57–58 (noting that the right to judicial review, as that to be protected from arbitrariness, is mandated by the Constitution); Kenneth Culp Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823, 831 (1966) [hereinafter Davis, *Postscript*] (explaining that “Mr. Berger’s position is that *all* discretion must be reviewable for arbitrariness or abuse, and that position is not at all supported by constitutional doctrine.”). Further see Berger, *Sequel*, *supra* note 47, at 603–04; Kenneth Culp Davis, *Administrative Arbitrariness Is Not Always Reviewable*, 51 MINN. L. REV. 643, 646 (1967) [hereinafter Davis, *Reviewable*] (questioning whether Prof. Berger’s conclusion follows from the cases he cites); see also Berger, *Synthesis*, *supra* note 46, at 980–81 (listing—in response to Professor Davis’s claim—the cases on which he supports his position that judicial review is constitutionally required).

<sup>279</sup> Berger, *supra* note 3, at 88–89 (stating that one of the justifications for the availability of judicial review “as of right” has, as one of its sources, the constitutional restrictions on delegation of powers); *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, 97 HARV. L. REV. 778, 785–87 (1984) (tying

the scholarship on this matter is often unclear when tying arguments in support of universal judicial review to specific constitutional doctrines.<sup>280</sup>

Supporters of the notion that there is a universal right to judicial review often view it as a necessary structural element of our legal system. The argument starts with the premise that the Constitution does not allow the government to exercise its power arbitrarily, which is a notion the Supreme Court recognized and later codified in the Administrative Procedure Act.<sup>281</sup> With that understanding in mind—which has generally not been questioned by the critics of this theory<sup>282</sup>—some scholars have then argued that, if these prohibitions are to have any effect, courts must have the ability to review acts of the executive in order to determine whether the government has acted in compliance with the law and the Constitution.<sup>283</sup>

Some scholars have questioned the validity of this conclusion vehemently.<sup>284</sup> One common criticism has been that the notion that judicial review must be generally available does not follow from the fact that the Constitution proscribes arbitrary action by the executive.<sup>285</sup> In other words, an agency may be prohibited from acting arbitrarily, but this does not necessarily mean that courts have authority to review these actions in the absence of a congressional grant of jurisdiction.<sup>286</sup>

Be that as it may, most scholars have been able to agree on one thing: the extent to which the Constitution requires judicial review of agency action is uncertain. One scholar explained in the 1970s that the question of whether there is a right to judicial review mandated by the Constitution is “unresolved and obscure.”<sup>287</sup> More recently, another scholar has stated that de-

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the general availability of judicial review to separation of powers and the non-delegation doctrine).

<sup>280</sup> See Jaffe, *supra* note 3, at 420 (stating that “in our system of remedies,” an individual has the right to secure judicial review, but without specifying the particular constitutional doctrine that supports this conclusion).

<sup>281</sup> See Berger, *supra* note 3, at 57.

<sup>282</sup> Professor Kenneth Culp Davis is very critical of the idea that judicial review is always available but agrees that the Constitution does not permit arbitrary behavior on the part of the executive. See Davis, *Reviewable*, *supra* note 278, at 646 (“Mr. Berger presents an impressive collection of Supreme Court statements that our Constitution and our institutions leave no place for arbitrary exercise of power. I agree with those statements.”).

<sup>283</sup> See Jaffe, *supra* note 3, at 403 (“[T]here is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitutions and legislatures.”); see also Berger, *Synthesis*, *supra* note 47, at 980–81 (explaining that it would not be reasonable for the Supreme Court to state that the executive must not act arbitrarily if there was no way of enforcing this prohibition).

<sup>284</sup> See Bagley, *supra* note 4, at 1314 n.166 (arguing that the claim that the Constitution requires judicial review of arbitrariness “finds little to recommend it in either historical or modern practice.”); Davis, *Reviewable*, *supra* note 278 (noting that arbitrariness and abuse are not always reviewable.).

<sup>285</sup> Davis, *Reviewable*, *supra* note 278, at 646 (noting that it is a “mistake[ ] is to equate lack of authority to act arbitrarily with judicial reviewability”).

<sup>286</sup> See *id.*

<sup>287</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1724–25 n.276 (1975).

termining how much the Constitution limits Congress's authority to limit the jurisdiction of federal courts is "maddeningly hard to say."<sup>288</sup>

The main reason why this question eludes resolution is that the Supreme Court has not provided a clear framework delineating Congress's power to restrict the jurisdiction of federal courts.<sup>289</sup> The Court has never explicitly stated that there is a general right to judicial review of administrative action. However, it has expressed that a categorical bar on judicial review can raise serious constitutional concerns.<sup>290</sup>

Regardless of where one falls on this debate, the uncertainty surrounding this doctrine of 'universal judicial review' makes the doctrine unfit to answer the question of whether it is constitutionally proper for Congress to enact delayed review provisions. The next subsections explore a narrower doctrine that can be useful in determining the constitutional boundaries of legal provisions placing limitations on immediate judicial review of agency action.

### B. *The Doctrine Of Constitutionally Intolerable Choices*

Even in the absence of a general right to obtain judicial review of agency action, there is one constitutional doctrine that restricts the types of delayed judicial review frameworks that Congress may enact. The so-called doctrine of constitutionally intolerable choices limits Congress's ability to draft judicial review provisions in a way that allows an agency to coerce the recipients of its orders or regulations into compliance while also making access to courts excessively burdensome.<sup>291</sup> The scenario in which this typically occurs is one where the recipient of a compliance order (i) can only challenge its validity after failing to comply with and (ii) the statute provides very severe penalties for the violation of the order.<sup>292</sup>

<sup>288</sup> Bagley, *supra* note 4, at 1310.

<sup>289</sup> See Bruff, *supra* note 4, at 17 (noting that "[t]he Court was avoiding [the] lurking constitutional issue."); *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, *supra* note 279, at 791 (pointing out that courts have been dodging the constitutional question).

<sup>290</sup> See *Johnson v. Robison*, 415 U.S. 361, 366–67 (1974) (explaining that a statutory bar that bars courts from examining the constitutionality of the legislation would be constitutionally troublesome); *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, *supra* note 279, at 791 (indicating that "in these cases, [courts'] apprehensions have been evident").

<sup>291</sup> See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (describing the situation in which a "constitutionally intolerable choice" exists as one where the recipient of the order can be coerced into compliance by severe penalties).

<sup>292</sup> See, e.g., *Reisman v. Caplin*, 375 U.S. 445, 447 n.7, 449 (1964) (noting that the addressee of the summons—i.e., the witness—may make "objections at the hearing before the court," which occurs after the witness refuses to comply with the summons and the Secretary brings an action before a judge or United States commissioner); *Okla. Operating Co. v. Love*, 252 U.S. 331, 336 (1920) (pointing out that the only possible judicial review is one in the context of "proceedings to punish for contempt"); *Ex parte Young*, 209 U.S. 123, 145–46 (1908) (explaining that the validity of the orders at issue can only be tested if they are disobeyed first).

These situations can raise different concerns that can be tied to a variety of more general constitutional principles. Courts have often looked to due process as one of the constitutional hooks for the doctrine of constitutionally intolerable choices.<sup>293</sup> Another possibility is to tie this doctrine to the principle of separation of powers, given that it prevents the legislative branch from insulating certain acts of the executive from the scrutiny of the courts. Some courts have even relied on other constitutional requirements such as the right to equal protection of the laws.<sup>294</sup>

As mentioned earlier, however, it is important to differentiate the doctrine of constitutionally intolerable choices from the requirement of procedural due process.<sup>295</sup> Procedural due process generally addresses the need for a hearing, and it is satisfied even if it takes place at the administrative level.<sup>296</sup> The doctrine of constitutionally intolerable choices, on the other hand, is mostly concerned with access to courts.<sup>297</sup> For this reason, providing further opportunity to be heard at the administrative level can resolve procedural due process issues. Violations of the doctrine of constitutionally intolerable choices, on the other hand, can only be addressed by reducing the coerciveness of the agency action<sup>298</sup> or by granting the potential plaintiff with swift access to court.<sup>299</sup>

One of the first Supreme Court decisions that articulated this doctrine—at the beginning of the 20th century—was *Ex parte Young*.<sup>300</sup> While this case is generally known for the Court's holding on sovereign immunity and federalism,<sup>301</sup> it is also a landmark case on access-to-courts issues.<sup>302</sup> Later cases have helped clarify some of the questions that *Ex parte Young* did not fully

<sup>293</sup> See, e.g., *Wadley Southern Co. v. Georgia*, 235 U.S. 651, 661 (1914) (“any party affected . . . is entitled, by the due process clause, to a judicial review”); *Thunder Basin Coal Co.*, 510 U.S. at 218 (examining the issue under Part IV of the opinion, which responds to plaintiff's due process claim).

<sup>294</sup> *Ex parte Young*, 209 U.S. at 146.

<sup>295</sup> See *supra* Part II.A.3.

<sup>296</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (concluding that the administrative procedures in question were sufficient to comport with the requirement of due process).

<sup>297</sup> See, e.g., *Reisman*, 375 U.S. at 447 n.7, 449; *Oklahoma Operating Co.*, 252 U.S. at 336; *Ex parte Young*, 209 U.S. at 145–46.

<sup>298</sup> See *infra* Parts IV.B.1, 2, 3.

<sup>299</sup> For a discussion on the differences between procedural due process and access to courts, see Bagley, *supra* note 4 at 1316–18.

<sup>300</sup> *Ex parte Young*, 209 U.S. 123, 145 (1908). For an explanation of the basic facts underlying that case, as well as the multiple legal proceedings involved, see Harrison, *supra* note 276, at 991–94.

<sup>301</sup> See, e.g., Note, *Congressional Intent to Preclude Equitable Relief — Ex Parte Young After Armstrong*, 131 HARV. L. REV. 828, 844 (2008) (“[T]he *Ex parte Young* doctrine . . . has focused on federalism concerns about federal courts' interference with state action.”); Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 510–11 (1997) (pointing out that the principle that “suits against state officers are not regarded as suits against the State for purposes of the Eleventh Amendment” is commonly referred to as the “*Ex Parte Young*’ doctrine”).

<sup>302</sup> See Harrison, *supra* note 276, at 993 (explaining that the Court “concluded that [the statutory penalties] were inconsistent with the requirements of due process because of the burden they placed on access to the courts”).

address.<sup>303</sup> None of these court decisions, however, offer a complete picture of the doctrine of constitutionally intolerable choices and its different moving parts. The following subsections address this problem by proposing a three-factor framework to assess the constitutionality of delayed judicial review provisions.

### 1. Severity of the Punishment

As noted above, coercion is one of the central elements of the doctrine of constitutionally intolerable choices. If recipients of an order are coerced to comply with it to avoid very severe penalties and doing so leads them to lose the right to seek judicial review, there is a high likelihood that the statute is unconstitutional. Therefore, the severity of the punishment for violating the order is a key element in this analysis.<sup>304</sup> This first factor focuses on the punishment that the statute authorizes. In contrast, the next subsection will examine legal mechanisms that may temper the actual penalties that a court would be likely to impose.

*Ex parte Young* provides an example of when the punishment is so great that it could easily deter potential plaintiffs from resorting to courts. In that case, the punishment for failing to comply with the orders issued by the Railroad and Warehouse Commission was particularly severe: daily fines of up to \$5000 (over \$130,000 in current dollars)<sup>305</sup> and imprisonment for a period not exceeding five years.<sup>306</sup> Moreover, courts had interpreted the statute not to allow challenges to these orders unless the plaintiff had violated them first and the state had brought an enforcement action.<sup>307</sup> The Supreme Court concluded that this framework was unconstitutional.<sup>308</sup>

This case raises two questions with regard to the severity of the punishment that is required to violate this doctrine. The first one is whether a statute that does not include imprisonment as a potential punishment for those who violate the orders could still be deemed coercive under the doctrine of constitutionally intolerable choices. This question should be answered in the affirmative. Monetary fines can generate a very powerful incentive to comply with what an agency demands.<sup>309</sup> In extreme cases, for example, severe fines may threaten the continuation of a business.

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<sup>303</sup> See, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994); *Reisman v. Caplin*, 375 U.S. 445, 447 (1964).

<sup>304</sup> See *Ex parte Young*, 209 U.S. at 147 (explaining that when fines are enormous, they can intimidate the potential plaintiff from taking the issue to court).

<sup>305</sup> *Inflation Calculator*, IN 2013 DOLLARS, <http://www.in2013dollars.com/1907-dollars-in-2018?amount=5000> [<https://perma.cc/9TNJ-YTZ6>] (last visited Oct. 14, 2018).

<sup>306</sup> *Ex parte Young*, 209 U.S. at 145.

<sup>307</sup> *Id.* at 145–47.

<sup>308</sup> *Id.* at 148.

<sup>309</sup> There are various examples of decisions in which the Supreme Court has examined, under the doctrine of constitutionally intolerable choices, statutes that did not contemplate penalties of imprisonment, without concluding that this circumstance made them automatically compliant with this constitutional doctrine. See *Thunder Basin Coal Co. v. Reich*, 510 U.S.

The second question relates to the amount of the fines. When the statute authorizes the imposition of a very high one-time fine, the deterrent effect to forego judicial review can be substantial. That is what occurred in *Ex parte Young*, where the total amount of the fine could have reached approximately \$134,000 in today's dollars.<sup>310</sup> However, lower daily penalties, if allowed to accumulate, can have an even more powerful coercive effect. This was illustrated in *Okla. Operating Co. v. Love*, where an order of the Oklahoma Corporation Commission prohibited the plaintiff from requesting payments for laundry services that exceeded certain maximum rates.<sup>311</sup> As in *Ex parte Young*, the orders were initially treated as not subject to immediate review.<sup>312</sup> The individual fines that the statute allowed for the failure to comply with the order were ten times lower than in *Ex parte Young*, but the Court did not hesitate to find them unconstitutionally coercive because "each day's continuance of the refusal after service of the orders [was] 'a separate offense.'"<sup>313</sup>

Last, it is important to note that the doctrine of constitutionally intolerable choices does not apply to those who are not recipients of compliance orders. While these potential plaintiffs may wish to bring a challenge, the agency has not directed its request at them, and thus, they cannot be fined for failing to comply with the order.<sup>314</sup> Therefore, when considering a third-party plaintiff, there is no coercion of the type that the doctrine of constitutionally intolerable choices intended to prevent.<sup>315</sup>

## 2. Is There a Reasonable and Predictable Possibility of Not Being Punished if a Challenge is Unsuccessful?

While the previous factor looked at the maximum punishment authorized by the statute, this factor examines something different. It focuses on

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200, 218 (1994) (focusing its rejection of the claim on the availability, for the plaintiff, of temporary relief that would reduce the amount of the fines, without mentioning the fact that the statute did not authorize imprisonment of non-compliant parties); *Okla. Operating Co. v. Love*, 252 U.S. 331, 336 (1920) (ruling for plaintiff in a case involving a statute that authorized monetary fines only); *Wadley Southern Co. v. Georgia*, 235 U.S. 651, 659 (1914) (examining the claim that the statute was for the imposition of high monetary fines, without reference to the fact that imprisonment was not authorized in the statute).

<sup>310</sup> *Ex parte Young*, 209 U.S. at 145.

<sup>311</sup> *Okla. Operating Co.*, 252 U.S. at 333–36.

<sup>312</sup> *Id.* at 336.

<sup>313</sup> *Id.* at 337 (explaining, a propos of \$500 daily penalties, that "[o]bviously a judicial review beset by such deterrents does not satisfy the constitutional requirements"). This amount, adjusted for inflation, would approximate \$6300. *Inflation Calculator*, IN 2013 DOLLARS, <http://www.in2013dollars.com/1920-dollars-in-2018?amount=500> [https://perma.cc/FKQ8-L4HR] (last visited Oct. 14, 2018).

<sup>314</sup> As explained above, this can arise under CERCLA when a citizen group is dissatisfied with a cleanup order directed to a potentially responsible party. See *supra* Part II.B.4.

<sup>315</sup> This idea echoes the Supreme Court's inclination, in the context of some implied preclusion claims, to interpret statutory bars to judicial review literally when the plaintiff is deemed a third party. See, e.g., *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 341–48 (1984) (finding implied preclusion where the plaintiffs were consumers and non-profit organizations challenging an order that set minimum milk prices between handlers of dairy products and producers).

other features of the statute—or its judicial interpretation—that may provide some reassurance to potential plaintiffs that they will not be severely punished if they decide to violate the order with the goal of challenging it, but ultimately lose in court. In other words, this subsection analyzes whether there are any legal mechanisms that may reduce the coercive effect of the threatened penalties. These mechanisms typically adopt one of two forms: the so-called “good faith” defense or the temporary relief approach.

Under a good faith defense, the plaintiff may fail to comply with the order and question its validity in court without risking serious penalties, as long as the violation of the order was in good faith, i.e., reasonably believing that there was a valid defense justifying non-compliance.<sup>316</sup> While this approach can provide some peace of mind to some plaintiffs and is therefore preferable to a statute that does not contemplate this exception, there are two reasons why it is not as effective in preventing coercion as a statute that allows for immediate review to begin with.

First, it may be difficult, in close cases, to determine the types of arguments that the court may deem “reasonable.” One way to address this problem is to put the burden of showing the plaintiff’s unreasonableness on the agency, unless there are detailed regulations that can assist the plaintiff in making this determination.<sup>317</sup> Second, a statute may be ambiguous with respect to whether a good faith defense is available.<sup>318</sup>

It is important to distinguish the good faith defense from cases in which a statute merely confers discretion to the court to determine the amount of the fines or whether they should be imposed at all. While a good faith defense can save a statute from violating the doctrine of constitutionally intolerable choices, it does not follow that giving discretion to the court justifies that same result. While some courts have adopted that position,<sup>319</sup> as explained above, the key consideration under the doctrine of constitutionally intolerable choices is the extent to which recipients of orders feel coerced to comply even when they believe that the order is improper.<sup>320</sup> Statutes that

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<sup>316</sup> See *Reisman v. Caplin*, 375 U.S. 445, 447 n.6 (1964) (explaining how a good faith defense operates in these cases); *Solid State Circuits, Inc. v. U.S. EPA*, 812 F.2d 383, 392 (8th Cir. 1987) (describing this type of defense as involving an “objectively reasonable belief in the validity or applicability of a cleanup order”); *United States v. Valentine*, 885 F. Supp. 1506, 1515 (D. Wyo. 1995) (applying this same reasonableness analysis).

<sup>317</sup> For an example of this type of approach, see *Solid State Circuits, Inc.*, 812 F.2d at 392 (discussing that, absent regulations, the burden should be placed on the agency).

<sup>318</sup> See, e.g., *Reisman*, 375 U.S. at 447–49 (examining at length whether the statutes at issue in that case should be interpreted to only punish “contumacious” violations).

<sup>319</sup> See *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 118 (D.C. Cir. 2010) (citing other decisions for the proposition that “there is no constitutional violation if the imposition of penalties is subject to judicial discretion,” none of which were issued by the Supreme Court); *Big Ridge, Inc. v. Fed. Mine Safety and Health Comm’n*, 715 F.3d 631, 653–54 (7th Cir. 2013) (listing discretion as one factor that supported the constitutionality of the statute that the court was considering in that particular case, even though the court’s citation to *Thunder Basin Coal Co. v. Reich* does not support that point).

<sup>320</sup> See *supra* Part IV.B.1.



simply provide that the court “may” impose those penalties, as opposed to indicating that it “shall” do so, leave some uncertainty as to what the punishment will be. This is unlikely to appease the plaintiffs’ concerns and eliminate the coercion they experience to comply with the order.

The other way of reducing the coercive effect of the threatened penalties is to provide some form of temporary relief during an administrative appeal. This applies when a statute allows the imposition of daily penalties for non-compliance with the order but also contains an exhaustion requirement that forces the recipient of the order to go through an administrative appeal process before seeking judicial review. The OSH Act and Mine Safety Act discussed above are an example of this type of framework.<sup>321</sup> If the agency grants the temporary relief, the fines will not accumulate during the administrative review period. This approach may help reduce the pressure that recipients of orders experience under some delayed review statutory schemes.<sup>322</sup> However, if the criteria to grant or reject the request for temporary relief are not carefully drafted, the statute may leave the door open for the agency to deny these types of requests in order to encourage immediate compliance with the order.

### 3. Is It Possible to Comply with the Order and Still Challenge It in Court?

The typical case to which the doctrine of constitutionally intolerable choices applies is one where the recipient of the order is able to bring a challenge only after failing to comply with it.<sup>323</sup> However, the doctrine has also been invoked in the context of statutes that require those who receive an order to first go through an administrative appeal process before they can access courts. In the latter scenario, the recipients of orders can bring a challenge regardless of whether they comply with the order or not. In these cases, the question then becomes: does the fact that recipients of orders can challenge them in court—albeit not immediately—regardless of whether they comply remove this type of framework from the doctrine of constitutionally intolerable choices? In other words, does the fact that compliance with the order does not prevent a future court challenge make the statute automatically constitutional? There are two main views on whether that should be the case.

Under the first one, if the recipient of the order has the opportunity to comply with the order and then challenge it in court, there is no constitu-

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<sup>321</sup> Examples of this type of framework can be found in 30 U.S.C. § 815(b)(1)(A) (2012); 29 U.S.C. § 659(b) (2012). For an explanation of how the process works, see *supra* Part II.B.5.

<sup>322</sup> See, e.g., *Thunder Basin Coal Co.*, 510 U.S. at 218 (explaining how temporary relief takes the statute out of the scope of the *Ex parte Young* doctrine). Other courts have followed suit. See, e.g., *Big Ridge, Inc.*, 715 F.3d at 653 (7th Cir. 2013) (noting that the recipient of the order could “request that the Secretary delay imposing the penalties until further review”).

<sup>323</sup> See *supra* Part IV.B.1.

tional problem.<sup>324</sup> However, this interpretation of the doctrine leaves an important problem unaddressed. If the agency's request is not very onerous, or the harm that it may cause to the recipient of the order can be reversed, then the operator may have a relatively safe avenue to seek and obtain judicial review of the order, even if it comes at a later time. The operator may just comply with the order and challenge it later, after the agency has ruled on the appeal.

However, if complying with the order may cause irreparable harm, later judicial review may be futile. This can occur, for example, if the agency requests that an operator share sensitive information or make an important investment to modify a facility. In these types of cases, while there is a theoretical right to judicial review after compliance, it may be useless to the recipient of the order, who has decided to meet the agency's demands to avoid the risk of penalties—the harm is already done. This situation ends up being very similar to what the Supreme Court was trying to avoid in cases such as *Ex parte Young*: the operator is coerced into compliance by the threat of severe fines, while the role that courts play is minimized.<sup>325</sup>

To address this concern, the second and better view on whether these types of frameworks comply with the doctrine of constitutionally intolerable choices is more nuanced. The statute is constitutional as long as compliance with the order does not cause its recipient to suffer irreparable harm.<sup>326</sup> This can be prevented either by avoiding delayed judicial review altogether or by allowing courts to make a preliminary finding on whether immediate judicial review is necessary in that particular case to avoid irreparable harm. The latter option, however, presents certain risks. For example, as has happened under the OSH Act, courts may misinterpret existing precedent and neglect to do an irreparable-harm analysis when recipients of orders bring immediate challenges.<sup>327</sup>

In short, statutory provisions that would otherwise be unconstitutional under the previous two factors can avoid that result if they meet two conditions. First, they must allow recipients of orders to bring a challenge even if they comply with the orders, and second, they must still provide an opportunity to obtain immediate judicial review when the harm associated with compliance is serious and irreparable.

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<sup>324</sup> *Thunder Basin Coal Co.*, 510 U.S. at 221 (Scalia, J., concurring) (explaining that there is no constitutional problem because the “petitioner . . . had the option of complying and then bringing a judicial challenge”).

<sup>325</sup> See *supra* Part IV.B.1.

<sup>326</sup> *Thunder Basin Coal Co.*, 510 U.S. at 216 (rejecting the constitutional claim because there was “no evidence that petitioner w[ould] be subject to serious harm if it complie[d] with” the agency’s request); *E. Bridge, LLC v. Chao*, 320 F.3d 84, 90 (1st Cir. 2003) (finding no constitutional violation because compliance would not cause the plaintiff to suffer irreparable harm).

<sup>327</sup> See Buchman, *supra* note 88, at 215–18 (criticizing the court’s reliance on *Thunder Basin* without performing an adequate irreparable-harm analysis).

C. *Applying This Framework To Enforcement And  
Judicial Review Provisions*

The framework laid out in Part IV.B provides a set of tools to assess the constitutionality of enforcement and judicial review provisions. The first two factors—severity of the fines and reasonable expectation of not being punished for mere good faith disobedience—must be present in order for the statute to be unconstitutionally coercive. The third factor—dealing with the possibility of complying with the order and challenging it later—on the other hand, may prevent a statute that meets the first two factors from reaching unconstitutional results. The following discussion uses this framework to examine the constitutional issues raised by several federal statutes.

1. Clean Water Act, Clean Air Act, RCRA, and CERCLA

As explained in more detail earlier,<sup>328</sup> the enforcement approaches in the Clean Air Act, the Clean Water Act, RCRA, and CERCLA have many similarities. All four statutes allow the EPA to issue compliance orders.<sup>329</sup> There is, however, a critical difference in how courts have interpreted their judicial review provisions. After *Sackett*,<sup>330</sup> the Clean Water Act has been interpreted to allow immediate review of compliance orders, and thus, access to courts is not delayed or otherwise significantly limited.<sup>331</sup> This interpretation, therefore, has removed the judicial review provisions of the Act from the scope of the doctrine of constitutionally intolerable choices. Because the plaintiff can request a preliminary injunction from the court as soon as it receives the order, there is no coercion to comply built around a delayed access to courts.

In contrast, under some enforcement provisions of the Clean Air Act,<sup>332</sup> CERCLA, and RCRA, the recipient of the order has more limited options. It is important to note that the analysis below applies to the Clean Air Act and RCRA insofar as they are interpreted to allow delayed judicial review only, as many courts have done.<sup>333</sup> Under a delayed review approach, the plaintiff has two options after receiving a compliance order. The first option is to comply with it, which also operates as a relinquishment of any future right to judicial review.<sup>334</sup> Alternatively, the recipient of the order may refuse to

<sup>328</sup> See *supra* Part I.B.1.

<sup>329</sup> See, e.g., 42 U.S.C. § 6928(c) (2012) (RCRA); *id.* §§ 7413(c), 7477 (Clean Air Act); For a more exhaustive list of the provisions providing the EPA authority to issue compliance orders, see Nichols, *supra* note 29, at 196–200.

<sup>330</sup> *Sackett v. EPA*, 566 U.S. 120, 126–27, 129 (2012).

<sup>331</sup> See *supra* Part II.B.1.

<sup>332</sup> This assumes they are still interpreted, as some circuit courts have done, to bar immediate judicial review. See *supra* Part II.B.2.

<sup>333</sup> See *supra* Part II.B.2, II.B.3.

<sup>334</sup> See *supra* Part I.B.1.

abide by the order's terms.<sup>335</sup> In this second case, the EPA has the authority to bring a judicial action requesting the court to enforce the administrative order and/or impose penalties on its recipient.<sup>336</sup> Under certain interpretations of the Clean Air Act, and under RCRA and CERCLA, this is the only avenue that will allow the recipient of the order to obtain judicial review.<sup>337</sup>

The constitutional framework laid out above strongly suggests that some of the enforcement provisions in the Clean Air Act<sup>338</sup> and RCRA present serious constitutional problems if they continue to be interpreted to bar immediate judicial review of orders.<sup>339</sup> CERCLA, on the other hand, has some features that justify a different conclusion.<sup>340</sup> The following discussion analyzes these statutes under the three-factor framework introduced in the previous subsection.

First, the three statutes allow courts to impose fines of tens of thousands of dollars *per day* on those who fail to comply with an order.<sup>341</sup> These daily penalties accrue while the agency decides whether it will bring an enforcement action in court, but during this time, the recipient of the order may not obtain judicial review.<sup>342</sup> The final dollar amounts of the fines can therefore easily reach six figures. As explained above, the Supreme Court has considered lower daily penalties to be coercive. A fine that today would approximate \$6000 was deemed to "obviously" meet the coerciveness standard.<sup>343</sup>

Second, based on the language of the statutes, the recipient of an order issued under certain provisions of the Clean Air Act<sup>344</sup> or RCRA has no reasonable expectation of not being severely punished. Section 3008 of RCRA provides that the violation of a compliance order can lead to the imposition of fines of up to \$25,000 per day.<sup>345</sup> This section, however, contains no language suggesting that those violating a compliance order can

<sup>335</sup> See *supra* Part I.B.1.

<sup>336</sup> See, e.g., 33 U.S.C. §1319(b), (c), (d) (2012) (Clean Water Act); 42 U.S.C. §6928(a) (RCRA); *id.* §7413(b) (Clean Air Act); *id.* §§ 9606(b), 9609(c) (CERCLA).

<sup>337</sup> See *Fry Roofing Co. v. EPA*, 415 F. Supp. 799, 806–07 (W.D. Mo. 1976) (cited in Moore, *supra* note 218, at 700).

<sup>338</sup> This assumes they are still interpreted, as some circuit courts have done, to bar immediate judicial review. See *supra* Part II.B.2.

<sup>339</sup> As discussed in this same subpart, the good faith defense exists with respect to the violation of some orders but not others, which affects the outcome as to whether the enforcement and judicial review framework is constitutional.

<sup>340</sup> At least one scholar has pointed out that the *Ex parte Young* line of cases may require immediate reviewability. Frederick R. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261, 306 (1985). However, this position overlooks the effect that a good faith defense can have on the constitutionality analysis.

<sup>341</sup> 42 U.S.C. §7413(b) (2012) (Clean Air Act); *id.* § 6928(c), (h) (RCRA); *id.* §§ 9606(b), 9609(c) (CERCLA). In some cases, the Clean Air Act also authorizes criminal penalties. See *id.* § 7413(c)(1); *Alaska Department of Environmental Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001).

<sup>342</sup> See *supra* Part I.B.1.

<sup>343</sup> See *supra* Part IV.B.1.

<sup>344</sup> This assumes they are still interpreted, as some circuit courts have done, to bar immediate judicial review. See *supra* Part II.B.2.

<sup>345</sup> 42 U.S.C. § 6928(c), (h) (2012).

avail themselves of a good faith defense.<sup>346</sup> Similarly, while this type of defense is available under section 113(e) of the Clean Air Act, it only applies to some types of orders.<sup>347</sup> In contrast, section 106 of CERCLA provides that fines can be imposed on those who “without sufficient cause, willfully” violate a compliance order.<sup>348</sup> As some courts have recognized, this language creates a good faith defense and therefore appeases the constitutional concerns under the doctrine of constitutionally intolerable choices.<sup>349</sup>

The last factor focuses on the possibility of complying with an order and then challenging it in court. When the Clean Air Act,<sup>350</sup> RCRA, and CERCLA are interpreted to only allow delayed review of orders, compliance operates as a relinquishment of the right to obtain judicial review.<sup>351</sup> Therefore, this factor does not cure the statutes’ coercion issues identified under the first two factors.

In conclusion, these three factors strongly suggest that some of the enforcement and judicial review provisions in the Clean Air Act and RCRA, if interpreted to allow delayed access to courts only, are unconstitutional.<sup>352</sup> CERCLA avoids this problem altogether by providing a good faith defense.

## 2. The OSH Act and Mine Safety Acts

The OSH Act and Mine Safety Act have very similar enforcement and judicial review structures. As explained earlier, most courts have interpreted these statutes to allow only delayed review of administrative orders.<sup>353</sup> Once an employer or operator receives a citation, it must go through an administrative appeal process before it will gain access to a court.<sup>354</sup> While an ad-

<sup>346</sup> *Id.* § 6928(b) (RCRA). With orders issued under other provisions of RCRA, however, the conclusion is different. Section 7003(b) authorizes the imposition of penalties to “[a]ny person who *willfully* violates” an order issued under section 7003(a). *Id.* § 6973. Consistent with this language, courts have been more receptive to recognizing a good faith defense in the case of § 7003(a) orders. *See, e.g.*, *United States v. Valentine*, 885 F. Supp. 1506, 1514–16 (D. Wyo. 1995) (deeming it necessary to examine whether the recipient of the order violated the order in good faith).

<sup>347</sup> 42 U.S.C. § 7413(e) (limiting the “sufficient cause” defense to the failure to comply with certain administrative subpoenas and orders under § 7414, but leaving out, for example, orders issued under § 7413).

<sup>348</sup> *Id.* § 9606(b).

<sup>349</sup> *See Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 118–19 (D.C. Cir. 2010) (“CERCLA’s ‘willfulness’ and ‘sufficient cause’ requirements are quite similar to the good faith and reasonable grounds defenses that the Supreme Court has found sufficient to satisfy due process.”); *Solid State Circuits v. EPA*, 812 F.2d 383, 391 (8th Cir. 1987) (explaining that the language “sufficient cause” meets the constitutional standard); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir. 1986) (“Assuming the inclusion of the willfulness standard, a good faith defense may be read into § 9606(b).”).

<sup>350</sup> This assumes they are still interpreted, as some circuit courts have done, to bar immediate judicial review. *See supra* Part II.B.2.

<sup>351</sup> *See supra* Parts I.B.1., II.B.1.

<sup>352</sup> The Eleventh Circuit concluded that this enforcement framework was unconstitutional in *Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1258–59 (11th Cir. 2003).

<sup>353</sup> *See supra* Part II.B.5.

<sup>354</sup> 29 U.S.C. § 660(a) (2012); 30 U.S.C. § 816(a)(1) (2012).

ministrative commission examines the appeal, the daily penalties authorized by the statute may accumulate. Although courts have overwhelmingly supported the constitutionality of these enforcement and judicial review provisions, there are some cases in which the Mine Safety Act could lead to constitutionally impermissible results.

As for the first factor in the constitutional framework proposed in Part IV.B, the daily fines that both statutes authorize for the failure to comply with a citation are coercive under *Okla. Operating Co. v. Love*, where the Supreme Court considered a \$6000 fine to be clearly excessive.<sup>355</sup> The OSH Act and Mine Safety Act allow courts to impose penalties of up to \$7000<sup>356</sup> and \$5000,<sup>357</sup> respectively, per day of violation of a citation—the same order of magnitude that the Supreme Court has deemed to have a significant coercive power to induce compliance with an order.

The second factor—which examines if the recipient of an order may have a reasonable expectation of not being punished if the later challenge of the order fails—requires a more extensive discussion. This part of the analysis focuses on whether there is a good faith defense to the penalties or if there is ample opportunity to minimize their effect by obtaining temporary relief at the administrative level. Only one of the two statutes contemplates a good faith defense to the penalties that accrue while the Commission examines a challenge to the citation. The OSH Act incorporates clear language in that regard, and courts have interpreted it so that the default rule is that non-compliance penalties do not accrue during the administrative appeal process unless there is a finding of bad faith.<sup>358</sup> This alleviates the constitutional concerns with the statute, given that it reduces the coercion that the daily penalties could generate. There is no similar provision creating a good faith presumption or defense in the Mine Safety Act.

The possibility of obtaining temporary relief from the accumulation of fines while the Commission is hearing a challenge is also different in the OSH Act and Mine Safety Act. The good faith provision in the OSH Act operates as temporary relief because it has the effect of preventing the accrual of daily fines before the Commission has ruled on the administrative challenge of the citation. The Mine Safety Act, on the other hand, has a more intricate mechanism by which recipients of orders may obtain temporary relief.<sup>359</sup> The operator has the opportunity to submit a request for temporary relief, and the Commission decides based on the likelihood that the operator will succeed in the appeal and the probability of harm to miners if such relief is granted.<sup>360</sup>

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<sup>355</sup> See *supra* Part IV.B.1.

<sup>356</sup> 29 U.S.C. § 666(d).

<sup>357</sup> 30 U.S.C. § 820(b)(1).

<sup>358</sup> See 29 U.S.C. § 666(d) (2012); see, e.g., *Marshall v. Reinhold Constr., Inc.*, 441 F. Supp. 685, 689 n.3 (M.D. Fla. 1977).

<sup>359</sup> See 30 U.S.C. § 815(b)(2) (2012).

<sup>360</sup> See *id.* § 815(b)(2)(A), (B).

However, there is an important caveat: the opportunity to obtain temporary relief under the Mine Safety Act does not apply to orders issued under two subsections of the main enforcement provision of the statute.<sup>361</sup> These are not minor exclusions. One of these subsections refers to orders that the Secretary may issue for any violation of any health or safety standard, rule, order, or regulation.<sup>362</sup> Given that the Mine Safety Act does not include a good faith defense, the provision eliminating an operator's opportunity to seek temporary relief from certain orders is problematic from a constitutional standpoint.

This conclusion may seem to be at odds with the Supreme Court's decision in *Thunder Basin*. The Court treated the possibility of obtaining temporary relief as a feature of the Mine Safety Act that supported its constitutionality.<sup>363</sup> However, the Supreme Court's position cannot be reasonably interpreted to mean that all the enforcement and judicial review provisions of the Act are constitutional. First, the case that the Court was examining did not deal with one of the types of orders for which there is no temporary relief, so this language should be considered dicta with respect to the excluded orders.<sup>364</sup> Second, the plaintiff did not bring a facial challenge of the statute and, therefore, the decision was also not intended to provide an abstract assessment of the constitutionality of the Act, as the Court itself pointed out.<sup>365</sup>

The third factor of the analysis is identical for both statutes. Neither the OSH Act nor the Mine Safety Act limits the ability of a recipient of a citation to challenge it in court after having complied with it. This is an important advantage compared to the enforcement and judicial review provisions in the environmental statutes discussed above. However, as explained earlier, this only solves the constitutional problem if, in cases in which compliance would cause serious irreparable harm, the recipient of the order has the opportunity to obtain immediate review of the order.<sup>366</sup> Otherwise, the operator could end up in a situation in which it has to choose between the immediate harm caused by compliance or the risk of very serious fines in the future if it decides to not comply with the order. None of the statutes expressly recognize the possibility of allowing immediate review in these cases. Some courts, however, have expressed their inclination to permit these types of

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<sup>361</sup> See *id.* § 815(b)(2) (providing that “[n]o temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 814”); see also *Lucas v. Morton*, 358 F. Supp. 900, 904 (W.D. Pa. 1973) (quoting the language from a decision of the Board of Mine Operations echoing this interpretation of sections 105(d) and 104(b) and (i), which now correspond to sections 815(b) and 814 (a) and (f) of the Act).

<sup>362</sup> See 30 U.S.C. § 814(a).

<sup>363</sup> See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994) (explaining that a mine operator can request temporary relief from “certain” orders).

<sup>364</sup> See *id.* at 216 (“[T]he company sued before a citation was issued.”).

<sup>365</sup> See *id.* at 218 n.22 (explaining that the petitioner expressly stated that it was not bringing an abstract challenge to the statute).

<sup>366</sup> See *supra* Part IV.B.3.

immediate challenges when the facts support a finding of irreparable harm.<sup>367</sup>

In sum, the penalties that both the OSH Act and the Mine Safety Act authorize are susceptible of generating a powerful incentive to comply. This coercion, however, is significantly lower in the case of the OSH Act due to the provision in the statute creating a good faith defense and temporary relief from the accumulation of penalties. The constitutional propriety of the Mine Safety Act, on the other hand, points in different directions depending on the type of order at issue. The coercion that a recipient will experience is likely to be low when temporary relief is available for the particular type of order that the operator received. This is not so, however, with orders for which there is no such option. In these cases, because the level of coercion to comply is high, the third factor is decisive. The enforcement and judicial review provisions of the statute will only be constitutional if they are interpreted to allow immediate judicial review of orders that can cause serious irreparable harm to their recipients.

#### CONCLUSION

Delayed judicial review of agency action has attracted the attention of scholars and practitioners for decades. Surprisingly, there are two aspects of the immediate/delayed review dichotomy that had not been studied in depth. This Article addresses them both.

First, many scholars have argued that administrative compliance orders in the environmental context should not be subject to immediate judicial review because these challenges would cause important delays in enforcement and overburden courts. As this Article shows, these criticisms are misguided. Enforcement would not be delayed by simply allowing a plaintiff to challenge an administrative order. This would only occur if courts grant preliminary injunctions that render the orders unenforceable while they are evaluating the merits of the plaintiffs' claims. Under the current preliminary injunction jurisprudence, courts are very unlikely to grant this form of injunctive relief, especially in cases in which substantial harm could follow from non-compliance with the order. Moreover, courts would not be flooded with immediate challenges of orders because, as the available empirical evidence supports, litigation costs and the risk of higher penalties are likely to deter frivolous challenges.

Second, this Article argues that the doctrine of constitutionally intolerable choices places important limitations on the types of delayed review provisions that legislatures can enact and provides a framework to evaluate the

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<sup>367</sup> See, e.g., *Thunder Basin Coal Co.*, 510 U.S. at 212–13 (dismissing the constitutional claim, in part, because the petitioner had not proved that it would be suffering irreparable harm in that particular case, which suggests that a different outcome would be possible if an operator were able to prove a harm of that nature); *Lucas v. Morton*, 358 F. Supp. 900, 905 (W.D. Pa. 1973).



constitutionality of delayed review provisions under this doctrine. Examined under this framework, there are provisions in the Clean Air Act, RCRA, and Mine Safety Act that present very serious constitutional issues, if interpreted, as many courts have done, to deny immediate judicial review.

