

EQUITABLE POWER IN THE TIME OF  
BUDGET AUSTERITY:  
THE PROBLEM OF JUDICIAL REMEDIES  
FOR UNCONSTITUTIONAL  
DELAYS IN CLAIMS PROCESSING BY  
FEDERAL AGENCIES

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[I]n theory, the political branches of our government are better positioned than are the courts to design the procedures necessary to save veterans' lives and to fulfill our country's obligation to care for those who have protected us. But that is only so if those governmental institutions are willing to do their job. We are presented here with the question of what happens when the political branches fail to act in a manner that is consistent with the Constitution.<sup>1</sup>

—Circuit Judge Stephen Reinhardt

## INTRODUCTION

Repeatedly, the Supreme Court has stressed that the Judiciary lacks both the constitutional authority and the institutional competence to manage federal benefits programs, and has stressed that problems with such programs are better left to the political branches to solve. Unfortunately, the Court's faith in the political process has often proven unfounded, and there is widespread agreement that many federal benefits programs are in crisis. This crisis involves not only welfare programs, such as Social Security and veterans compensation, but also other types of benefits conferred by the federal government, such as recognition of intellectual property, approval of drugs, and applications for citizenship and residency.<sup>2</sup> The net result of the Court's hands-off approach to delays and other systemic issues with these programs is that the problems have now reached the point of becoming due process violations. The need to fashion remedies for these due process violations is beginning to drag courts into the forbidden zone of managing federal agencies.

A pair of recent decisions indicates that the road ahead will be rough. One case at the leading edge of this remedial problem is *Veterans for Common Sense v. Shinseki (VCS)*.<sup>3</sup> In May 2011, the U.S. Court of Appeals for the Ninth Circuit held that large portions of the U.S. Department of Veterans Affairs' (VA's) health and benefit programs violate due process, and suggested that a special master may need to be appointed to supervise reforms because the agency has failed to provide adequate mental health services and benefits to veterans with post-traumatic stress disorder (PTSD).<sup>4</sup> Nevertheless, the prospects for successful judicial intervention into the operations of VA (or any of the other major, trouble-plagued

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1. *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 850–51 (9th Cir. 2011), *reh'g en banc granted*, 663 F.3d 1033 (9th Cir. 2011).

2. *See infra* Part I.A.

3. 644 F.3d 845 (9th Cir. 2011), *reh'g en banc granted*, 663 F.3d 1033 (9th Cir. 2011).

4. *See infra* Part I.B (discussing the *Veterans for Common Sense (VCS)* decision in detail).

agencies discussed below<sup>5</sup>) are uncertain. Just days after the Ninth Circuit recommended a major new judicial intervention, the Supreme Court waded into the wreckage of sixteen years of failed attempts by the federal courts to meaningfully improve the conditions in the California prison system. In *Brown v. Plata*,<sup>6</sup> the Court was faced with the fact that more than a decade's worth of ineffective remedial orders have failed to improve prison conditions that are so deplorable that inmates are needlessly dying on a weekly basis due to unmet medical needs.<sup>7</sup> The Court concluded—by the narrowest of margins—that this history of failure justified the drastic remedy of a court-ordered release of over 46,000 inmates within the next two years to relieve overcrowding.<sup>8</sup>

The juxtaposition of the near-simultaneous opinions in *VCS* and *Plata* highlights a new Gordian Knot in administrative and constitutional law. How should federal courts approach the problem of remedying violations of constitutional rights by dysfunctional federal agencies administering benefits programs?<sup>9</sup> Although *Plata* is not a benefits case, it demonstrates

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5. See *infra* Part I.A (discussing similar problems at four major federal agencies besides the U.S. Department of Veterans Affairs (VA)).

6. 131 S. Ct. 1910 (2011).

7. See *infra* Part IV.C.2 (discussing the details of *Plata*).

8. *Plata*, 131 S. Ct. at 1923.

9. Though structural reform litigation prior to *VCS* has largely involved state and local agencies, one notable and controversial exception has been the litigation involving the Native American trust accounts managed by the Department of the Interior (Interior). See *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (ordering Interior to provide statutorily-mandated accounting for trust funds); *Cobell v. Kempthorne*, 455 F.3d 301 (D.C. Cir. 2006) (vacating a district court injunction that disconnected Interior's computer systems from Internet access to protect individual Indian trust data following the district court's holding that Interior had mismanaged trust accounts); *Cobell v. Norton (Cobell II)*, 392 F.3d 461 (D.C. Cir. 2004) (vacating, in part, a district court structural injunction against Interior); *Cobell v. Norton (Cobell I)*, 240 F.3d 1081 (D.C. Cir. 2001) (holding that Interior had breached its fiduciary duties to trust fund beneficiaries for decades). Compare Richard J. Pierce, Jr., *Judge Lamberth's Reign of Terror at the Department of the Interior*, 56 ADMIN. L. REV. 235, 261–62 (2004) (arguing that Judge Lamberth's structural injunctions against Interior in the *Cobell* litigation constituted abusive behavior), with Jamin B. Raskin, *Professor Richard J. Pierce's Reign of Error in the Administrative Law Review*, 57 ADMIN. L. REV. 229, 233 (2005) (countering that Judge Lamberth's use of power was warranted and judiciously applied). However, the *Cobell* litigation is somewhat different from *VCS* and other similar problems because the key remedy of restitution being sought in *Cobell* is unlikely to be at issue in suits against other agencies. A second exception is that, during the desegregation era, the Supreme Court found that the Department of Housing and Urban Development participated with a local agency in creating and maintaining a racially segregated public housing system. See *Hills v. Gautreaux*, 425 U.S. 284 (1976). However, in most cases, federal agencies do not participate in structural reform litigation even when state and local agencies are being sued for lack of compliance with federal programs managed by a federal agency. See ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT

that the traditional remedial strategies used in structural reform litigation frequently fail to produce results when applied to large institutions with serious, systemic problems. This is of grave concern because the task of reforming huge federal bureaucracies is likely to be an order of magnitude more complex and difficult than reforming local school districts—the birthing grounds of structural reform litigation—or even the second largest state prison system.<sup>10</sup> At the same time, judges will have to wrestle with separation of powers concerns much more imposing than the federalism issues that have arisen with past structural injunctions. In doing so, some desegregation-era remedies almost certainly will be off the table. It is nearly impossible to imagine a federal judge attempting to order Congress to increase taxes,<sup>11</sup> or adding the Secretary of the Treasury as a defendant and ordering him to transfer money to an agency.<sup>12</sup> However, the less drastic remedial plans in favor today are often ineffective.

Still, the problems must be solved. In theoretical terms, it is difficult to accept the idea that widespread constitutional violations by the federal government are immune to effective remedies.<sup>13</sup> In practical terms, dysfunctional federal agencies can impose intolerable burdens on those whom they serve, as well as on the sociological legitimacy of the modern administrative state. In human terms, the costs can be even starker. For example, the *Plata* litigation will reach its eighteenth year before the remedial deadline imposed in the latest Supreme Court decision is reached.<sup>14</sup> Based upon the evidence accepted in that case, nearly 1,000 California prisoners may have died due to constitutional violations by that time. Now consider *VCS*. The first sentence of the court’s opinion is: “On an average day, eighteen veterans of our nation’s armed forces take their

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HAPPENS WHEN COURTS RUN GOVERNMENT 135–36 (2003) (explaining that federal agencies typically remain absent from such litigation because plaintiffs are seeking a remedy only against state and local officials).

10. See *infra* notes 71–78 and accompanying text (discussing the scope of VA’s operations).

11. See *Missouri v. Jenkins*, 495 U.S. 33 (1990) (discussed *infra* at notes 252–255 and accompanying text).

12. See *Halderman v. Pennhurst State Sch. & Hosp.*, 533 F. Supp. 631, 640 (E.D. Pa. 1981) (adding the treasurer of Pennsylvania as a party), *aff’d en banc*, 673 F.2d 628 (3d Cir. 1982).

13. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”).

14. In his dissent, Scalia accused the majority of “intellectual bankruptcy” for tacitly admitting that even this deadline would probably need to be extended by at least three years. *Brown v. Plata*, 131 S. Ct. 1910, 1957 (2011) (Scalia, J., dissenting).

own lives.”<sup>15</sup> What would be the cost to our nation’s veterans if it were to take eighteen years of judicial management of VA to reach a solution to the constitutional violations described in that case?<sup>16</sup> Will 118,341 more veterans commit suicide before VA’s health and benefits systems can be brought into compliance with due process?<sup>17</sup> The number of these lives that could be saved by remedying the due process violations found in *VCS* is unknowable but, given these stakes, finding effective judicial remedies soon is imperative.

This Article takes the position that the traditional playbook for structural reform remedies needs to be reconsidered in light of the new complex issues facing courts. Courts’ practical and theoretical unsuitability for agency management requires a different approach to judicial remedies in these cases. Rather than wasting years trying to micromanage problems that the experienced managers within agencies have been unable to solve themselves, judges should order blunt, timeline-based remedies up front. Although such remedies might be considered aggressive and constitutionally troubling, this Article takes the counterintuitive position that, if properly fashioned, such remedies could actually minimize separation of powers concerns. By preemptively announcing blunt remedies—equivalent to the prisoner release in *Plata*—that would be implemented in stages if aggressive progress schedules were not met, courts could credibly spur rapid improvement in agency performance where such improvement was possible through the political processes. If the blunt remedies were triggered, the resulting remedy would still minimize judicial interference in policy decisions committed to agencies, while assuring that constitutional violations do not fester. Furthermore, by focusing on outcomes rather than procedures, courts could avoid capture of the litigation by plaintiffs and give agencies and the elected branches the

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15. *VCS*, 644 F.3d 845, 849–50 (9th Cir. 2011), *reh’g en banc granted*, 663 F.3d 1033 (9th Cir. 2011).

16. Such delay is all too easy to imagine for a court attempting to wrap its arms around two major components of the nation’s second-largest cabinet department, which has 280,000 employees. DEP’T OF VETERANS AFFAIRS, FY 2010 PERFORMANCE AND ACCOUNTABILITY REPORT, at I-20 (2010) [hereinafter VA FY2010 PERFORMANCE REPORT], [http://www.va.gov/budget/docs/report/archive/FY-2010\\_VA-PerformanceAccountabilityReport.zip](http://www.va.gov/budget/docs/report/archive/FY-2010_VA-PerformanceAccountabilityReport.zip). For example, the Ninth Circuit panel in *VCS* took nearly two years after oral argument to produce a decision. See *VCS*, 644 F.3d at 846 (listing the argument date as August 12, 2009, and the decision date as May 10, 2011).

17. This total would be more than the number of American deaths in World War I (116,516) and more than twice that which occurred in the Vietnam conflict (58,220). See ANNE LELAND & MARI-JANA “M-J” OBOROCEANU, CONG. RESEARCH SERV., RL 32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 2–3 (2010), <http://www.fas.org/sgp/crs/natsec/RL32492.pdf>.

opportunity to figure out the best means to the constitutionally required ends. Regardless of the path followed, the timeline for judicial involvement would be minimized, and agencies could be released to independent operation more quickly. None of this is to say that such remedies would be easily swallowed, but such harsh medicine would at least hold the hope of avoiding even less palatable options.

Moreover, the blunt approach is justified as a check on the political branches' incentives to neglect benefits programs. Public choice theory predicts that the political branches will focus on creating new programs to the detriment of established benefit programs. Tolerating this tendency to allow benefits programs to fall into disarray undermines the sociological legitimacy of the government by promoting the widespread belief that the government's promises are not trustworthy. To the extent that political promises create property or liberty interests protected by due process, the Constitution allows courts to guard against political incentives to undermine the administration of these programs. Courts should be agnostic as to whether the political branches keep, modify, or withdraw their promises, but need not allow those branches to break the promises that are protected by due process.

Part I of this Article reviews several examples of crises in federal benefits programs and focuses on *VCS* as an example of the due process problems facing those agencies. *VCS* provides a concrete case for reflecting on the problem of judicial remedies for systemic problems in the function of federal agencies that administer benefits programs. Part II considers the Supreme Court's historic reluctance to allow federal courts to become entangled in running federal benefits programs. Although this hands-off approach has led to the current crises, many of the concerns expressed by the Court are well taken and must factor into a proper remedy. Part III looks more broadly at the Supreme Court's general administrative law jurisprudence and how it reinforces the concerns of Part II. The theoretical literature in this area is well developed and helps define the separation of powers concerns raised when courts begin running federal agencies. Part IV of the Article turns to the other strain of case law that must guide courts in this area: the jurisprudence regarding structural reform and equitable relief for constitutional violations by governmental units. Although the equitable powers of district courts developed rapidly in the desegregation era, in recent decades this area has struggled to adapt to concerns about judicial overreaching, leading to some problematic outcomes in difficult cases such as *Plata*. Finally, Part V synthesizes the issues raised earlier and takes the position that blunt, timeline-based remedies are not only more likely to be successful than the current cautious approaches to judicial interventions in agency operations, but are also better at promoting the

constitutional values of separation of powers and checking strategic behavior by the political branches.

## I. THE GROWING DUE PROCESS CRISIS IN FEDERAL BENEFITS CLAIMS ADMINISTRATION

Federal agency actions can be roughly grouped into three classes for purposes of considering systemic delay problems<sup>18</sup>: rulemaking,<sup>19</sup> enforcement actions,<sup>20</sup> and benefits claims. This Article focuses on the underexplored area of how federal agencies that manage benefits operate. As discussed below, the Supreme Court has conveyed a strong hands-off message to the lower courts when it comes to systemic problems within agencies.<sup>21</sup> As a result, neither courts nor scholars have delved too deeply into the root causes of dysfunction in federal benefits agencies. The bill for this neglect is now coming due in the form of chronic problems that have reached due process violation levels.

This Part examines the problem in two sections. First, it looks at the severity of the difficulties being experienced by a wide spectrum of federal benefits agencies. Although the due process problem has boiled over in the area of veterans law,<sup>22</sup> VA is hardly the only benefits agency criticized for its inability to perform core functions. The second section begins to examine what role the courts should play in remedying these widespread

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18. Of course, there are other ways to categorize federal agencies when other issues are being considered. See, e.g., Yair Sagy, *A Triptych of Regulators: A New Perspective on the Administrative State*, 44 AKRON L. REV. 425 (2011) (distinguishing three prototypes of public regulation to enhance understanding of regulatory schemes).

19. This is agency action through formal or informal means to establish general rules or standards that will apply to the community affected by the agency's jurisdiction. There is some literature dealing with the Judiciary's ability to force delayed or ignored agency rulemaking. See *infra* Part III.E.2.

20. These are proceedings initiated by the agency to enforce statutory or regulatory rules through injunctions or penalties. The Supreme Court has essentially closed the door on suits seeking to compel agencies to engage in enforcement actions. See *infra* notes 147–152 and accompanying text.

21. See *infra* Part II.B.

22. Although frequently overlooked, veterans law has actually been a fertile ground for constitutional review of agency actions. See, e.g., *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (holding that a statutory provision creating a fee ceiling for attorneys representing veterans benefits claimants did not violate due process); *Johnson v. Robison*, 415 U.S. 361 (1974) (holding that equal protection did not prevent VA from denying benefits to conscientious objectors). See generally Kenneth B. Kramer, *Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veteran Benefits*, 17 OHIO N.U. L. REV. 99 (1990); James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 213–16 (2011) [hereinafter Ridgway, *Splendid Isolation Revisited*].



problems by taking a close look at *VCS* as an example of the context within which courts will be forced to grapple with these problems.

*A. Delay and Dysfunction in Federal Benefits Agencies*

There are many types of federal systems that are vulnerable to due process challenges similar to those raised in *VCS*. Although monetary payments naturally come to mind, the federal government runs many systems in which claimants apply for some type of property or liberty interest that may rise to the level of being protected by due process. For simplicity purposes, this Article will refer to all such programs as “benefits programs” despite the somewhat unorthodox usage of that term.

Five examples give some idea of the breadth of such programs. VA and the Social Security Administration (SSA) provide monetary benefits. The U.S. Patent and Trademark Office (PTO) and the U.S. Food and Drug Administration (FDA) provide legal protections that add value to the products that they approve. The Department of Homeland Security’s U.S. Citizenship and Immigration Services Division (USCIS)<sup>23</sup> determines whether applicants should be granted temporary residence, permanent residence, or citizenship. Although these agencies are very different in many important ways, they are sadly united in experiencing chronic, systemic problems.

The struggles of VA, as described by the Ninth Circuit in *VCS* below,<sup>24</sup> are the norm for such agencies rather than the exception. The Social Security disability system has experienced a “meteoric rise in claims,”<sup>25</sup> and the number of individuals found disabled has risen from a little over 400,000 in 1980 to nearly 1.1 million in 2009.<sup>26</sup> As a result of the rise in claims, SSA has been facing huge backlogs. As the Government Accountability Office reported:

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23. The functions of U.S. Citizenship and Immigration Service were formerly part of Immigration and Naturalization Services (INS). INS was folded into the Department of Homeland Security in 2003. See Noel L. Griswold, Note, *Forgetting the Melting Pot: An Analysis of the Department of Homeland Security Takeover of the INS*, 39 SUFFOLK U. L. REV. 207, 221 (2005).

24. See *infra* notes 52–66 and accompanying text; see also James D. Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 268–70 (2010) [hereinafter Ridgway, *VJRA Twenty Years Later*].

25. Jeffrey S. Wolfe, *The Times They Are a Changin’: A New Jurisprudence for Social Security*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 515, 523 (2009).

26. SOC. SEC. ADMIN., OFFICE OF RET. & DISABILITY POLICY, OFFICE OF RESEARCH, EVALUATION, & STATISTICS, ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2009, at 85 (2010), [http://www.ssa.gov/policy/docs/statcomps/di\\_asr/2009/di\\_asr09.pdf](http://www.ssa.gov/policy/docs/statcomps/di_asr/2009/di_asr09.pdf).

[B]y the end of fiscal year 2006, the time required to reach a decision had increased dramatically. In fiscal year 2000, SSA's average processing time was 274 days. However, by fiscal year 2006, this average had increased to 481 days, with many cases taking much longer. For example, 30 percent (about 170,000) of the decisions issued in fiscal year 2006 took 600 days or more; about 2 percent (12,000) took over 1,000 days.<sup>27</sup>

SSA asserts that it has made some progress on its backlog in recent years.<sup>28</sup> However, the problem is not limited to delay. Due in part to the fact that "SSA is prohibited from supervising [administrative law judges] or evaluating their performance," the system is experiencing wild variations in the outcomes of appeals that undermine its legitimacy.<sup>29</sup> Some of the agency's administrative law judges (ALJs) are granting benefits in virtually 100% of appeals.<sup>30</sup> As a result, many believe the system is in desperate need of reform, even if they do not agree on what form it should take.<sup>31</sup>

It is not only the monetary benefits systems that are in trouble. "There is widespread agreement that the patent system in the United States is broken."<sup>32</sup> But the PTO faces an enormous volume of work. In the last decade, "the number of patent examiners has more than doubled, from 2,900 to 6,200. The length of time to process a patent has increased 40% from 25 to 35 months. Further, the backlog of applications awaiting review increased 139 percent, from 308,000 to 736,000."<sup>33</sup> In fiscal year 2010, the PTO received over 500,000 patent applications and issued over 233,000

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27. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-40, SOCIAL SECURITY DISABILITY: BETTER PLANNING, MANAGEMENT, AND EVALUATION COULD HELP ADDRESS BACKLOGS 22 (2007) (footnote omitted), <http://www.gao.gov/new.items/d0840.pdf>.

28. See, e.g., SOC. SEC. ADMIN., NATIONAL HEARINGS AVERAGE PROCESSING TIME (FY 2007–FY 2011) (2011), (documenting a drop in processing times in appeals involving hearings from 514 days in fiscal year 2008 to 364 days in the first eight months of fiscal year 2011).

29. Richard J. Pierce, Jr., *What Should We Do About Administrative Law Judge Disability Decisionmaking?* 7 (The George Washington Univ. Law Sch. Legal Studies Research Paper No. 573, 2011), available at <http://ssrn.com/abstract=1890770>.

30. *Id.* at 2, 8 (discussing one administrative law judge (ALJ) who reversed Social Security Administration (SSA) denial decisions in 2,285 cases in 2007 and another judge who granted benefits in 1,280 out of 1,284 cases in 2010 and had a 100% award rate through the first half of 2011).

31. See *id.* at 18–23 (arguing that the ALJ level of review should be abolished); Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731 (2003) (discussing multiple options); Wolfe, *supra* note 25, at 562 (advocating a change in the "current system of rewarding claimants' representatives for delay").

32. Michael J. Burstein, *Rules for Patents*, 52 WM. & MARY L. REV. 1747, 1750 (2011).

33. U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2010, at 113 (2010), <http://www.uspto.gov/about/stratplan/ar/2010/USPTOFY2010PAR.pdf>.

patents.<sup>34</sup> It takes an average of over two years for the PTO to take its first action<sup>35</sup> on a claim and three years to receive a final decision,<sup>35</sup> even though the total amount of time spent by an examiner reviewing a claim during that time averages only eighteen hours.<sup>36</sup> There are tremendous incentives for patent examiners to “dispose of cases as quickly as possible,” despite the likely adverse effects on the quality of decisions.<sup>37</sup> Savvy applicants can wear down examiners with submissions and responses that generate no work credit for the examiner and encourage the examiner to grant the application just to be done with it.<sup>38</sup> Accordingly, there is a widely shared belief that the process not only takes too long but produces dubious results as well.<sup>39</sup>

In a similar vein, the Food and Drug Administration has been described as “in shambles” after “suffering catastrophic, highly publicized failures—think Vioxx.”<sup>40</sup> The agency is overwhelmed with drugs awaiting review and approval. In 1962, Congress required the FDA to review the efficacy of 16,573 prescription drugs that had been found safe under the prior regulatory system.<sup>41</sup> *Over forty years later*, in 2006, the agency had still not completed its review of those drugs originally designated for review, much less all the drugs submitted to it in the intervening decades.<sup>42</sup> As a result of these delays, there are thousands of unapproved drug products on the

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34. *Id.* at 125.

35. *Id.* at Performance Highlights tbl.

36. DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* 23 (2009). A claim can sit at the U.S. Patent and Trademark Office for two years before it is even looked at by anyone for the first time. *Id.*

37. *Id.*

38. *See id.* at 23–24.

39. *See, e.g., id.*; JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2008); Burstein, *supra* note 32; Robert P. Merges, *As Many as Six Impossible Patents Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 *BERKELEY TECH. L.J.* 577 (1999). In response to these concerns and many others, Congress very recently passed a major patent reform package, but it is far too soon to tell what effect, if any, it will have on the process. *See Leahy–Smith America Invents Act*, Pub. L. No. 112-29, 125 Stat. 284 (2011).

40. Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 *TEX. L. REV.* 1741, 1741 (2008). Shapiro and Steinzor reach a similar verdict as to the Environmental Protection Agency, the Occupational Health and Safety Administration, the National Highway Traffic Safety Administration, and the Consumer Product Safety Commission. *See id.*

41. Michael D. Sant’Ambrogio, *Agency Delays: How a Principle–Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 *GEO. WASH. L. REV.* 1381, 1401 (2011) (citing U.S. DEP’T OF HEALTH & HUMAN SERVS., *CTR. FOR DRUG EVALUATION & RESEARCH, MARKETED UNAPPROVED DRUGS—COMPLIANCE POLICY GUIDE 9* (2006)).

42. *Id.* at 1401.

market.<sup>43</sup> Moreover, delays cost manufacturers whose patents continue to run while waiting for approval, spark litigation about drugs that are marketed without proper approval, and—most importantly—cost thousands of lives each year.<sup>44</sup>

The USCIS is yet another struggling agency.<sup>45</sup> The immigration system faces “huge backlogs” due to many factors, including the key problem that “adjudicators simply do not have the resources that they need.”<sup>46</sup> “The average processing time for citizenship applications . . . rose from approximately six months in 2003 to fifteen months in 2008, with some applicants waiting as long as six years for the adjudication of their applications.”<sup>47</sup> Similarly, applicants for legal permanent resident status can face long waits, and as a result, these applicants have begun to flood federal courts with petitions for mandamus with mixed results.<sup>48</sup> Due to these delays, applicants must wrestle with uncertainty and struggle to make long-term plans.

The five agencies discussed above are not alone in their struggles, and there are almost certainly smaller federal agencies experiencing similar problems.<sup>49</sup> Thus, there is every reason to believe that the finding of due process violations in *VCS* is not an aberration but a bellwether.<sup>50</sup>

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43. *Id.*

44. *Id.* at 1399 & n.71, 1401.

45. See U.S. DEP'T OF HOMELAND SEC., CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, ANNUAL REPORT 2010, at 9–62 (2010), [http://www.dhs.gov/xlibrary/assets/cisomb\\_2010\\_annual\\_report\\_to\\_congress.pdf](http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf) (discussing the many “pervasive and serious problems” facing the agency).

46. Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 542 (2011).

47. Sant'Ambrogio, *supra* note 41, at 1385 n.10 (citing U.S. DEP'T OF HOMELAND SEC., CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, ANNUAL REPORT 2008, at 2 (2008), [http://www.dhs.gov/xlibrary/assets/CISOMB\\_Annual\\_Report\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2008.pdf), and specific cases as examples of delays in application processing).

48. See Lauren E. Sasser, *Waiting in Immigration Limbo: The Federal Court Split Over Suits to Compel Action on Stalled Adjustment of Status Applications*, 76 FORDHAM L. REV. 2511 (2008) (discussing the split among districts courts over the jurisdictional authority to adjudicate lawful permanent resident applications).

49. See, e.g., Elliot Golding, Essay, *Medicare Part D: Rights Without Remedies, Bars to Relief, and Miles of Red Tape*, 77 GEO. WASH. L. REV. 1044, 1046 (2009) (arguing that “the failure of Congress to include remedial provisions leaves many on the brink of poverty with no avenue to seek redress when avoidable errors by [Health and Human Services] and the SSA push them over the edge”).

50. Shortly before this article went to press, the Ninth Circuit granted an en banc rehearing in *VCS*, 663 F.3d 1033 (9th Cir. 2011). Although the ultimate fate of the case is unknown at this point, if the problems discussed in this Part persist, the pressure for judicial remedies will continue to rise. Therefore, a close examination of the remedial problem is merited.

### B. Veterans for Common Sense

As discussed below, an equitable remedy should be narrowly tailored to the constitutional violation at issue. What exactly constitutes a due process violation based upon systemic problems in a federal benefits system is beyond the scope of this Article. However, an actual remedial problem is useful in considering the many dimensions of the issue. As such, it is helpful to begin by looking at the facts supporting the Ninth Circuit's opinion in *VCS*.

The question presented to the Ninth Circuit in *VCS* was whether the severe delays plaguing the veterans benefits system amount to a violation of veterans' constitutional rights. The plaintiffs were challenging aspects of the two main components of VA: the Veterans Health Administration (VHA), which delivers health services, including mental health treatment to eligible veterans,<sup>51</sup> and the Veterans Benefits Administration (VBA), which adjudicates claims for benefits that determine what types of services a veteran is eligible to receive from VHA.<sup>52</sup> The opinion concluded that disputed portions of both systems violated due process protections.

This was not a conclusion that the court reached easily. After nearly two years of deliberation, the panel was divided and produced 140 pages of opinions debating the issue.<sup>53</sup> The *VCS* majority began with a campaign of statistical shock and awe focused on VHA:

On an average day, eighteen veterans of our nation's armed forces take their own lives. Of those, roughly one quarter are enrolled with the [VA] health care system. Among all veterans enrolled in the VA system, an additional 1,000 attempt suicide each month. Although the VA is obligated to provide veterans mental health services, many veterans with severe depression or [PTSD] are forced to wait weeks for mental health referrals and are given no opportunity to request or demonstrate their need for expedited care. For those who commit suicide in the interim, care does not come soon enough.<sup>54</sup>

The "Background" section expanded the discussion of numbers and consequences:

From 2002 to 2003 there was a 232 percent increase in PTSD diagnoses

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51. VA FY2010 PERFORMANCE REPORT, *supra* note 16, at I-20.

52. *Id.* at I-21 to -22.

53. The dissent vigorously challenged much of the factual basis upon which the majority structured its opinion and ultimately accused the majority of "dramatically overstep[ping] its authority [and] tearing huge gaps in the congressional scheme for judicial review of VA actions." *VCS*, 644 F.3d 845, 900-05 (9th Cir. 2011) (Kozinski, C.J., dissenting), *reh'g en banc granted*, 663 F.3d 1033 (9th Cir. 2011). Whether the majority opinion should be considered correct is beyond the scope of this Article, as the district court facing the remedy problem on remand will be bound by the majority opinion.

54. *Id.* at 849-50 (majority opinion).

among veterans born after 1972. A 2008 study by the RAND Institute shows that 18.5 percent of U.S. service members who have returned from Iraq and Afghanistan currently have PTSD, and that 300,000 service members now deployed to Iraq and Afghanistan “currently suffer PTSD or major depression.” Delays in the treatment of PTSD can lead to alcoholism, drug addiction, homelessness, anti-social behavior, or suicide.<sup>55</sup>

Ultimately, the opinion turned to the current status of claimants at VHA and noted that, “as of April 2008, approximately 85,450 veterans remained on VHA waiting lists for mental health services.”<sup>56</sup>

Turning to the adjudication of benefits claims by VBA, the opinion noted that it takes an average of 3.9 years for a veteran who disputes a decision by VA to receive a decision from the Board of Veterans Appeals (BVA).<sup>57</sup> In particular, the opinion focused on “the 573-day average delay for a Regional Officer to certify an appeal to the BVA.”<sup>58</sup> “In just the six months between October 2007 and April 2008, at least 1,467 veterans died during the pendency of their appeals.”<sup>59</sup> When the BVA does decide a claim, sixty percent of the time it concludes that the local office’s decision cannot be affirmed.<sup>60</sup>

Despite the starkness of the numbers, the Ninth Circuit did not base its decision on the outcomes alone, but also upon VA’s inability to react appropriately to these problems. The opinion contained a litany of unsuccessful VA initiatives to put its house in order on its own.<sup>61</sup> As to the problems facing VHA, the Ninth Circuit took care to note that VHA’s chief

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55. *Id.* at 853.

56. *Id.* at 855.

57. *Id.* at 859. In the VA system, nonattorney adjudicators make initial claims decisions at regional offices located throughout the country. Dissatisfied veterans can appeal to the Board of Veterans Appeals (BVA), where their claims are reviewed de novo by BVA members, who are attorneys. Veterans whose claims remain denied can appeal outside the agency to the Court of Appeals for Veterans Claims and then to the Federal Circuit. See Ridgway, *VJRA Twenty Years Later*, *supra* note 24, at 257–58 (describing the origins of this system of review).

58. *VCS*, 644 F.3d at 855.

59. *Id.* at 860.

60. *Id.* (noting that BVA grants the claim 20% of the time and remands for further proceedings 40% of the time). Although not discussed by the Ninth Circuit, the overwhelming majority of BVA decisions that are appealed to the Court of Appeals for Veterans Claims (CAVC) are vacated and remanded on the grounds that the BVA decision is flawed. See James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VET. L. REV. 113, 151–57 (2009) [hereinafter Ridgway, *Why So Many Remands?*].

61. See *VCS*, 644 F.3d at 853–55 (describing Veterans Health Administration (VHA) initiatives beginning in 2004 and subsequent reports by VA’s Office of Inspector General concluding that problems remained widespread).

financial officer had denied a budget crisis and asserted that VHA had adequate resources to perform its mission.<sup>62</sup> The opinion further noted that VHA had recently been authorized thousands of new mental health staff positions, but that 500 to 600 positions remained unfilled.<sup>63</sup> As to VBA, the opinion emphasized that VA was unable to explain why its adjudication process took so long:

During the district court proceedings in this case, senior VA officials were questioned about the extraordinary delays in the VBA's claims adjudication appeal system. None of those officials, however, was able to provide the court with a sufficient justification for the delays incurred. Bradley Mayes, the Director of Compensation and Pension Services at the VBA, testified at a deposition that the VBA had not "made a concerted effort to figure out what [wa]s causing" the lengthy delays in its resolution of the appeals of veterans claims for service-connected death and disability compensation. And at trial, James Terry, the Chairman of the Board of Veterans' Appeals, was unable to explain the lengthy delays inherent in the appeals process before the Board.<sup>64</sup>

Thus, the Ninth Circuit concluded that "[m]uch of the delay appears to arise from gross inefficiency, not resource constraints."<sup>65</sup> It later reiterated, "If resource constraints are an issue, the VA has not asserted as much."<sup>66</sup>

Based upon these facts, the Ninth Circuit concluded that the relevant portions of VHA and VBA violated the due process rights of the affected veterans due to the delays involved.<sup>67</sup> The opinion rejected the district court's holding that the remedies sought by the plaintiffs were beyond its power "and would call for a complete overhaul of the VA system, something clearly outside of this Court's jurisdiction."<sup>68</sup> Instead, the majority remanded the case to the district court to hold hearings and make findings as to what procedural changes were necessary to remedy the problems causing the due process violations.<sup>69</sup> It explicitly suggested that the district court consider appointing a special master to assist it in deciding upon the necessary structural reforms.<sup>70</sup>

Before turning to the doctrinal issues presented with the *VCS* remedy, it is important to consider the enormity of the task that the Ninth Circuit

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62. *Id.* at 877.

63. *Id.* at 877–78.

64. *Id.* at 859 (alteration in original).

65. *Id.* at 885.

66. *Id.*

67. The specifics of the holding are discussed in additional detail in Part V.A, *infra*.

68. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1091–92 (N.D. Cal. 2008).

69. *VCS*, 644 F.3d at 886–87.

70. *Id.* at 878, 887.

remanded to the district court. VHA is by far the largest health care provider in the United States, if not the world.<sup>71</sup> It has nearly 250,000 employees<sup>72</sup> and operates 153 Medical Centers, 232 Vet Centers, 768 Community Based Outpatient Clinics, 134 Community Living Centers, 6 Independent Output Clinics, and 50 Residential Rehabilitation Centers serving nearly 6,000,000 unique patients annually.<sup>73</sup> As for VBA, the preparation of appeals in veterans benefits claims for decision by the BVA in Washington, D.C., is handled by nearly 15,000 adjudicators located in 57 regional offices<sup>74</sup> across the country and in the Philippines.<sup>75</sup> VA projects that those regional offices will receive over 1.3 million claims for disability benefits in fiscal year 2012.<sup>76</sup> Similarly, the BVA projects that 170,000 initial decisions by those offices on benefits claims will be disputed in fiscal year 2011.<sup>77</sup> Even if a judge wanted to avoid becoming entangled in VA's far-flung operations, VA's central office in Washington, D.C., alone has 10,000 employees to "provide policy, administrative, information technology, and management support to the programs."<sup>78</sup> Even though many aspects of VA operations were not found to violate due process, the changes necessary to reform the broken pieces will certainly reverberate widely through the system and may well have serious unforeseen

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71. VA FY2010 PERFORMANCE REPORT, *supra* note 16, at I-20. Despite the problems listed in the opinion, VHA's quality generally ranks very high. See U.S. DEP'T OF VETERANS AFFAIRS, VETERANS HEALTH ADMIN., OFFICE OF QUALITY & SAFETY, 2009 VHA FACILITY QUALITY AND SAFETY REPORT 7 (2009), <http://www1.va.gov/health/docs/HospitalReportCard2009.pdf> ("Where direct comparisons are available, the performance of VHA equals or exceeds that reported by commercial health plans, Medicare or Medicaid, in several instances, by a considerable margin.").

72. VA FY2010 PERFORMANCE REPORT, *supra* note 16, at I-27.

73. *Id.* at I-23 to -24.

74. *Id.* at I-23, I-27.

75. Because the Philippines was a United States territory during World War II, Filipinos who are disabled due to injuries or diseases related to their World War II service are entitled to benefits, along with spouses and certain children of Filipino soldiers who have died from service-connected causes. 38 U.S.C. § 107 (2006).

76. U.S. DEP'T OF VETERANS AFFAIRS, FY 2012 BUDGET SUBMISSION, VOL. I, at 2B-2 (2011), [http://www.va.gov/budget/docs/summary/Fy2012\\_Volume\\_I-Summary\\_Volume.pdf](http://www.va.gov/budget/docs/summary/Fy2012_Volume_I-Summary_Volume.pdf). These predictions not only double the number of disability claims received in 2006, but also fail to capture the increasing number of individual disabilities being claimed per application. See Ridgway, *Why So Many Remands?*, *supra* note 60, at 145-48 (explaining that VA treats multiple claims by a single applicant as a single "issue" in the evaluation process, thereby obscuring the number of individual disabilities for which benefits are being sought).

77. BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN FOR FISCAL YEAR 2010, at 21 (2011), [hereinafter 2010 CHAIRMAN REPORT], [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2010AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2010AR.pdf).

78. VA FY2010 PERFORMANCE REPORT, *supra* note 16, at I-27.



consequences.

## II. JUDICIAL REVIEW OF FEDERAL BENEFITS CLAIMS

The due process violations in *VCS* are merely one facet of the recently acknowledged and much larger “threshold problem that undermines regulatory government: ineffective efforts to hold agencies accountable for failure to accomplish their statutory missions.”<sup>79</sup> In the specific context of federal benefits claims, judicial reluctance to become entangled in such systems has a long history.

### A. *Veterans Claims and Judicial Review of Benefits Prior to the Welfare State*

The first federal benefits program was established in the very first session of Congress to provide compensation to veterans of the Revolutionary War.<sup>80</sup> More than a decade before *Marbury v. Madison*,<sup>81</sup> the Supreme Court declared the statute establishing the first veterans benefits adjudication system unconstitutional, removing the federal courts from any role in adjudicating such claims.<sup>82</sup> Although the essential problem with that statute was a separation of powers issue,<sup>83</sup> it is notable that, shortly after its ruling, the Court sent a “memorial” to Congress complaining that the tasks assigned to the Judiciary were “too burdensome” for “the small number of judges.”<sup>84</sup> Accordingly, it was apparent to the Court, even in its earliest days, that heavy involvement in benefits programs would require a large allocation of judicial resources.

To be clear, the Judiciary was not alone in its concern about the potential effects of having the program run by the courts. For its part, Congress was reluctant to cede final decisionmaking authority to the courts

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79. Shapiro & Steinzor, *supra* note 40, at 1742 (advocating the use of the Internet to develop “rigorous and concise ‘positive metrics’ that would give public notice when health and safety agencies are successful in achieving their statutory missions and when they have failed to do so”).

80. Act of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95; see JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 4 (1978).

81. 5 U.S. (1 Cranch) 137 (1803).

82. *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792). In fact, *Marbury* cites *Hayburn’s Case* as precedent for the proposition that the courts can declare federal laws unconstitutional. *Marbury*, 5 U.S. at 171 (“It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional . . .”).

83. See Ridgway, *Splendid Isolation Revisited*, *supra* note 22, at 143–45.

84. U.S. COURT OF VETERANS APPEALS, *VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM* 42 n.152 (1992).

and allocated decisions on veterans claims to the Secretary of War rather than accept judicial decisions as binding.<sup>85</sup> Thus, America's first major benefits program established a baseline of judicial noninvolvement.

This pattern was reinforced after the Civil War. Just prior to the conflict the U.S. Court of Claims was established, and disappointed veterans attempted to seek review of their claims in that court after the war.<sup>86</sup> However, the Supreme Court concluded that such claims could not be pursued because "[n]o pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion."<sup>87</sup> This case-or-controversy approach was a radical shift from the Revolutionary War-era dispute concerning final authority and appeared to close off the courts on Article III grounds even if Congress were inclined to grant subject matter jurisdiction. Indeed, Congress was not so inclined. Instead, private bills to establish pensions for veterans whose claims had been denied became a huge focus of client service. Such bills were passed by the thousands in the decades after the Civil War.<sup>88</sup>

### *B. Judicial Review of Agency Delays in Modern Federal Benefits Claims*

Even as the idea of federal benefits as property rights gained ground in the twentieth century, there has been a strong tendency to limit judicial involvement in the process. In 1933, when Franklin Roosevelt proposed the Economy Act, which gave him the power to establish the modern veterans benefits system, he included a provision explicitly stripping courts of any power to review the system.<sup>89</sup> To the extent that courts became involved in some review of other benefits systems, the Supreme Court has discouraged district courts from intervening to solve problems of mere delay in decisionmaking in a number of ways.<sup>90</sup> The key aspects of the Court's jurisprudence can be broken down into five parts, two statutory and three constitutional.

The first statutory part is that the Court has failed to provide any meaningful interpretation of the Administrative Procedure Act's (APA's)<sup>91</sup>

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85. See Ridgway, *Splendid Isolation Revisited*, *supra* note 22, at 144–45.

86. *Id.* at 161–63.

87. *United States v. Teller*, 107 U.S. 64, 68 (1883).

88. See Ridgway, *Splendid Isolation Revisited*, *supra* note 22, at 163.

89. *Id.* at 179–80.

90. Simply due to the size of the system, much of the Court's relevant case law comes from Social Security cases. However, there have been key decisions in other areas, and the overall picture has been one of clear hostility to judicial intervention into claim backlog problems at federal agencies.

91. 5 U.S.C. §§ 551–559, 701–706 (2006).

timeliness requirements. The APA commands agencies to complete matters in a “reasonable time”<sup>92</sup> and authorizes courts to intervene when agency action is “unreasonably delayed.”<sup>93</sup> However, the Court has declined to provide any guidance as to the application of these provisions, which has resulted in lower court jurisprudence that is “ad hoc, incoherent, and difficult to apply consistently.”<sup>94</sup> The net result has generally amounted to “an individual-rights framework without any of the constitutional bite.”<sup>95</sup>

Second, as to agencies’ organic statutes, the Court has indicated that only the clearest statutory time limits are enforceable. In *Heckler v. Day*,<sup>96</sup> the Court rejected a judicially imposed deadline for adjudication appeals of Social Security disability decisions. It held that judicially created deadlines based upon a statutory requirement to act within a reasonable amount of time were inappropriate, even when the agency was not disputing that the delays involved were unreasonable under the statute.<sup>97</sup> The Court concluded that “Congress, fully aware of the serious delays in resolution of disability claims, has declined to impose deadlines on the administrative process.”<sup>98</sup> Therefore, such deadlines were contrary to Congress’s intent and intruded upon the discretion delegated to the Secretary of Health and Human Services to establish procedures for adjudicating claims.<sup>99</sup> In essence, the Court concluded that the separation of powers doctrine required courts to leave problems of delay to the political branches, except in those situations in which the law expressly created a clear time limit that Congress intended the courts to enforce.<sup>100</sup>

Third, on the constitutional front, the Court has routinely emphasized that it has never accepted the argument that applicants for benefits have a property interest that is protected by constitutional due process. In 1960, in *Flemming v. Nestor*,<sup>101</sup> the Court concluded that a member of the Communist

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92. 5 U.S.C. § 555(b).

93. *Id.* § 706(1).

94. Sant’Ambrogio, *supra* note 41, at 1388; *see also id.* at 1411–13 (analyzing *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), and cases applying its analysis).

95. Sant’Ambrogio, *supra* note 41, at 1388.

96. 467 U.S. 104 (1984).

97. *Id.* at 110–11.

98. *Id.* at 111.

99. *Id.* at 118–19.

100. Even in areas of administrative law in which Congress had created explicit deadlines, courts often excuse noncompliance, and the track record of such deadlines is mixed. *See* Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923 (2008).

101. 363 U.S. 603 (1960).

Party who was being deported to his country of origin did not have a protected property interest in any Social Security benefits that he had otherwise accrued due to his employment in the United States.<sup>102</sup> The Court rejected the argument that such benefits were the equivalent of a contractual right and stated, “To engraft upon the Social Security system a concept of ‘accrued property rights’ would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands.”<sup>103</sup>

Although the Court held in 1970, in *Goldberg v. Kelly*,<sup>104</sup> that current recipients of benefits have a protected property interest in maintaining an award, it has never extended that holding to applicants for benefits. Two years later, in *Board of Regents of State Colleges v. Roth*,<sup>105</sup> the Court articulated a relatively narrow definition of property for due process purposes. *Roth* involved an untenured faculty member at a state university whose contract was not renewed.<sup>106</sup> In concluding that the professor had no property right that would support his due process argument for a hearing, the Court stated:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.<sup>107</sup>

During the 1980s, the Court twice reminded the lower courts that it had never recognized that applicants for a benefit have a protected property interest: once in the context of veterans disability claims<sup>108</sup> and again in the context of emergency loans administered by the Farmers Home Administration.<sup>109</sup>

Fourth, even when there is a clearly protected property interest in a benefit previously conferred, the Court held in *Cleveland Board of Education v.*

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102. *Id.* at 605–08.

103. *Id.* at 610; *see also* *Lavine v. Milne*, 424 U.S. 577, 584 n.9 (1976) (“Welfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support.”).

104. 397 U.S. 254 (1970).

105. 408 U.S. 564 (1972).

106. *See id.* at 566.

107. *Id.* at 577.

108. *See* *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985) (noting that the district court had correctly observed that the Court had never recognized such a property interest).

109. *See* *Lyng v. Payne*, 476 U.S. 926, 942 (1986) (“We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment.”).

*Loudermill*<sup>110</sup> that delay alone in decisionmaking will not ordinarily be sufficient to constitute a due process violation. Rather, there must be additional information that makes the delay constitutionally unreasonable. In particular, the Court rejected the bald allegation that a nine-month delay in providing a hearing after a government employee was terminated violated due process. In its analysis in *Loudermill*, the Court focused on the fact that

the complaint merely recites the course of proceedings and concludes that the denial of a “speedy resolution” violated due process. This reveals nothing about the delay except that it stemmed in part from the thoroughness of the procedures. A 9-month adjudication is not, of course, unconstitutionally lengthy *per se*. Yet *Loudermill* offers no indication that his wait was unreasonably prolonged other than the fact that it took nine months. The chronology of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation.<sup>111</sup>

This language expressly indicated that delay caused by the “thoroughness of the procedures” involved would not violate due process and clearly placed the burden on plaintiffs to prove that the alleged delay could not be justified.

Fifth and finally, the Supreme Court closed the door to indirect intervention in delay problems by holding that monetary damages are not available from officials who may be responsible for improperly denying, discontinuing, or delaying benefits in violation of due process. Despite its previous holding that a monetary damages action could be brought directly under Fifth Amendment due process,<sup>112</sup> in *Schweiker v. Chilicky*<sup>113</sup> the Court refused to apply that holding to benefits claims. The plaintiffs in *Schweiker* alleged that senior officials in Arizona’s Social Security offices had systematically ignored controlling legal authority and clear evidence in numerous cases while applying quotas to terminate a predetermined numbers of recipients so as to reduce program costs.<sup>114</sup> Despite the allegations of egregiously unlawful conduct, the Court concluded that “Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program,” and that its choice not to provide a damages remedy as part of the

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110. 470 U.S. 532 (1985).

111. *Id.* at 547 (citation omitted).

112. *See Davis v. Passman*, 442 U.S. 228, 242–49 (1979) (holding that a congressional staffer could pursue an allegation of discrimination against a congressman through a cause of action implied by due process).

113. 487 U.S. 412 (1988).

114. *See id.* at 418–19.

comprehensive benefits scheme must be respected.<sup>115</sup>

The history of veterans benefits and the language of the Supreme Court's modern case law express a clear reluctance by the Court to allow the Judiciary to become entangled in benefits programs. Key cases come from the Social Security disability arena and focus on the robust political attention and congressional oversight that program receives.<sup>116</sup> There is also the undercurrent of concern dating back to the 1883 *United States v. Teller* case<sup>117</sup> about how much protection can be afforded to benefits that Congress is free to alter or eliminate. Thus, the philosophy restricting judicial review of agency delays has a distinct flavor of the separation of powers concerns common elsewhere in administrative law.<sup>118</sup>

This attitude has been internalized by the lower federal courts. Although the circuit courts of appeals have largely concluded in recent decades that applicants for Social Security and other benefits do have a protected property interest,<sup>119</sup> the pointed doubts expressed by the Supreme Court have naturally encouraged the lower courts and public interest litigants to be cautious in pushing the development of due process rights in this area and to focus their arguments on issues more compelling than mere delay.<sup>120</sup> In one pre-*Loudermill* case, the Third Circuit held that a four-year delay in processing a claim violated due process and rejected as "patently frivolous" the agency's argument that the delays in that case were

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115. *Id.* at 428–29.

116. Congress's involvement in the design of the veterans disability system was also a key in holding that due process does not prevent Congress from excluding attorneys from the veterans benefits system. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 323–35 (1985).

117. 107 U.S. 64, 68 (1883). *See supra* notes 86–88 and accompanying text.

118. *See infra* Parts III.C–E.

119. *See Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (veterans disability compensation); *Kapps v. Wing*, 404 F.3d 105, 112 (2d Cir. 2005) (home heating assistance); *Hamby v. Neel*, 368 F.3d 549, 559 (6th Cir. 2004) (Medicaid); *Stieberger v. Apfel*, 134 F.3d 37, 38 (2d Cir. 1997) (Social Security); *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 588 n.7 (9th Cir. 1992) (veterans disability compensation); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990) (Social Security); *Daniels v. Woodbury Cnty.*, 742 F.2d 1128, 1132 (8th Cir. 1984) (state welfare benefits); *Parker v. Califano*, 644 F.2d 1199, 1203 (6th Cir. 1981) (Social Security); *Shrader v. Harris*, 631 F.2d 297, 301 (4th Cir. 1980) (Social Security); *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 489–90 (3d Cir. 1980) (disabled child's annuity).

120. *See Cushman*, 576 F.3d at 1293–94 (alteration of evidence in the claims file); *Kapps*, 404 F.3d at 111 (right to a hearing and to notice of program eligibility requirements); *Hamby*, 368 F.3d at 556 (adequate notice and a meaningful hearing); *Stieberger*, 134 F.3d at 38 (adequate notice); *Derwinski*, 994 F.2d at 585 (right to assistance of counsel); *Gonzalez*, 914 F.2d at 1203 (notice of appellate rights); *Daniels*, 742 F.2d at 1131 (arbitrary decisionmaking and notice); *Parker*, 644 F.2d at 1203 (notice and opportunity to be heard); *Shrader*, 631 F.2d at 301 (adequacy of notice provided to a mentally ill claimant).

justified by necessary procedures.<sup>121</sup> However, cases since *Loudermill* have rejected arguments that specific delays violate due process.<sup>122</sup> Indeed, the Second Circuit has expressly rejected the argument that even a ten-year delay in reaching a final decision on a Social Security disability claim could justify awarding benefits in the absence of substantial evidence that the claimant was a qualified applicant.<sup>123</sup>

The attitude of courts toward delay in benefits programs has become one of general acceptance even in the face of steady increases. In one frequently cited case, the Seventh Circuit held that because “administrative efficiency is not a subject particularly suited to judicial evaluation, the courts should be reluctant to intervene in the administrative adjudication process.”<sup>124</sup> Further, “we are not justified in sanctioning the imposition of unrealistic and arbitrary time limitations on an agency which for good faith and unarbitrary reasons has amply demonstrated its present inability to comply.”<sup>125</sup>

In another case, the Second Circuit affirmed the dismissal of a due process claim while commenting, “delay is a natural concomitant of our administrative bureaucracy. Neither the six-month delay created by the additional fair hearing, nor the estimated total of 19 months from claim initiation to completion of ALJ review are remarkable in the Medicare, Social Security and employment benefits systems.”<sup>126</sup> Accordingly, the due process holding in *VCS* represents a significant departure from the federal courts’ traditional attitude toward delay in benefits programs or, at least, an indicator that the courts’ tolerance of agency dysfunction is not without limits.<sup>127</sup>

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121. See *Kelly*, 625 F.2d at 490–91 (condemning an agency’s rationalizations for processing delays).

122. See *Littlefield v. Heckler*, 824 F.2d 242, 247 (3d Cir. 1987) (holding that a nine-month delay in issuing a Social Security appellate decision did not violate due process); *Givens v. U.S. R.R. Ret. Bd.*, 720 F.2d 196, 201 (D.C. Cir. 1983) (holding that a nineteen-month delay in processing a claim for railroad retirement benefits did not violate due process where there was no evidence of deliberate or strategic delay); *Frock v. U.S. R.R. Ret. Bd.*, 685 F.2d 1041, 1047 n.13 (7th Cir. 1982) (holding that a two-year delay did not violate due process).

123. See *Bush v. Shalala*, 94 F.3d 40, 46 (2d Cir. 1996) (holding that delay alone is an insufficient ground upon which to reverse the agency’s denial of benefits).

124. *Wright v. Califano*, 587 F.2d 345, 353–56 (7th Cir. 1978).

125. *Id.*

126. *Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir. 1989).

127. It is not surprising that this departure would occur in the veterans benefits arena. Although the history of the veterans benefits system is often overlooked because it was not subject to judicial review until the Veterans Judicial Review Act of 1988, veterans benefits have traditionally been at the vanguard of the development of the welfare state because veterans arouse public sympathy and have a strong moral claim to compensation for their

### III. RELATED AREAS OF ADMINISTRATIVE LAW

The line of cases addressed in Part II is part of a larger theme in administrative law that clearly counsels against significant judicial intervention into agency operations. This Part examines how this theme has developed in the Supreme Court's jurisprudence and how it has been interpreted by administrative law theorists.

#### A. *The Early Twentieth Century*

The role of the courts in the ongoing waltz of administrative law has evolved over time.<sup>128</sup> Although administrative law has a rich history tracing to the earliest days of the country,<sup>129</sup> most influential case law from the Supreme Court traces to the New Deal. Since the beginning of the twentieth century, progressives had been urging an expansion of the administrative state as a way to allow scientific expertise to replace politics in the creation of public policy.<sup>130</sup> During that pre-New Deal period, appellate—rather than trial-like—review became enshrined as the dominant framework for the Judiciary's relationship with agencies.<sup>131</sup> The Great Depression and the ensuing New Deal provided the opening necessary to attempt this progressive transformation, which occurred after courts were already predisposed to deferential review of agency actions.<sup>132</sup>

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injuries. See generally THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1995); GILBERT Y. STEINER, *THE STATE OF WELFARE* (1971).

128. See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 *YALE L.J.* 1256, 1337 (2006) (“[A]dministrative law [is] a waltz, a three-step pattern repeated over and over again. First, something happens in the world. Second, public policymakers identify that happening as a problem, or an opportunity, and initiate new forms of governmental action to take advantage of or to remedy the new situation. Third, these new forms of action generate anxieties about the direction and control of public power.”).

129. This history has been explored in Jerry Mashaw's epic four-part series. See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *YALE L.J.* 1362 (2010); Jerry L. Mashaw, *Administration and “The Democracy”: Administrative Law from Jackson to Lincoln, 1829–1861*, 117 *YALE L.J.* 1568 (2008); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 *YALE L.J.* 1636 (2007); Mashaw, *supra* note 128.

130. See Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 *DUKE L.J.* 1565, 1566–67 (2011).

131. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 *COLUM. L. REV.* 939, 943–44 (2011).

132. See Jeffrey E. Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 *HARV. J. ON LEGIS.* 291, 298 (2001) (“In fact, agency creation and expansion of existing agency authority have tended to occur during periods of national crisis or favorable political conditions, when progressive presidents enjoyed majorities in both



Modern attitudes toward judicial control of agency operations began with the nondelegation doctrine. As expressed in *J.W. Hampton, Jr., & Co. v. United States*,<sup>133</sup> this principle requires legislation to articulate “an intelligible principle to which the person or body authorized . . . is directed to conform.”<sup>134</sup> In practice, the application of the doctrine was limited to two cases decided in 1935: *Panama Refining Co. v. Ryan*<sup>135</sup> and *A.L.A. Schechter Poultry Corp. v. United States*.<sup>136</sup> In *Panama Refining*, the Supreme Court invalidated the section of the National Industrial Recovery Act (NIRA) delegating to the President the power to prohibit shipment of “hot oil” in interstate commerce in order “to eliminate unfair competitive practices” and “to conserve natural resources.”<sup>137</sup> The Court concluded that “Congress left the matter to the President without standard or rule, to be dealt with as he pleased.”<sup>138</sup> Similarly, *A.L.A. Schechter Poultry* invalidated another provision of the Act, which delegated to the President the power to approve detailed codes to govern all business subject to federal authority, because the absence of definite standards amounted to delegation of “unfettered discretion to make whatever laws [the President] thinks may be needed or advisable.”<sup>139</sup> In these two cases, the Supreme Court used the intelligible-principle standard to require clear instructions from Congress, with relatively little room for agency discretion.

Though limited in number, the nondelegation cases have continued to reverberate in the Supreme Court’s jurisprudence.<sup>140</sup> The essential

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houses of Congress.”).

133. 276 U.S. 394 (1928).

134. *Id.* at 409. Chief Justice Taft’s analysis actually began by citing “[t]he well-known maxim ‘*Delegata potestas non potest delegari*’” (no delegated powers may be further delegated), to justify the conclusion that the legislative power delegated to Congress by the Constitution could not be further delegated. *Id.* at 405–06. This concept traces to John Locke’s social contract theory. See JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 79, para. 141 (Prometheus Books 1986) (1690). See generally Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 *CORNELL L.Q.* 168 (1928).

135. 293 U.S. 388 (1935).

136. 295 U.S. 495 (1935).

137. *Pan. Refining Co.*, 293 U.S. at 418.

138. *Id.*

139. *A.L.A. Schechter Poultry*, 295 U.S. at 537–38.

140. One particularly sharp example taken from the criminal law context is Justice Scalia’s recent dissent in *Sykes v. United States*:

We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is

principle of these cases was that ultimate control rested with Congress, which possessed little ability to share it. In such a regime, the responsibility of closely controlling agency operations is left to Congress, which must provide great detail as to what an agency can do. Limited judicial tinkering with agency operations was implicit because of the detailed level of command and control required of Congress.

### B. *Judicial Review of Agency Adjudication Actions*

As the nondelegation doctrine quickly crumbled in practice,<sup>141</sup> if not rhetoric, agencies tended to use enforcement adjudications as the primary vehicle for establishing policy.<sup>142</sup> The Supreme Court's seminal case on the proper judicial role in this era was its 1943 decision in *SEC v. Chenery Corp. (Chenery I)*.<sup>143</sup> In *Chenery I*, the Securities and Exchange Commission (SEC) had modified a stock plan proposed as part of a corporate restructuring to prevent the current management of the company from taking advantage of options made available to other preferred stockholders.<sup>144</sup> After determining that the SEC's analysis was flawed, the Court refused to consider whether the outcome might otherwise be supported:

If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court

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attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt. I do not think it would be a radical step—indeed, I think it would be highly responsible—to limit [the Armed Career Criminal Act] to the named violent crimes. Congress can quickly add what it wishes. Because the majority prefers to let vagueness reign, I respectfully dissent.

131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

141. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 548–49 (3d ed. 2005); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 25–46 (1993); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 *YALE L.J.* 1399, 1400–01 (2000).

142. See Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 *U. KAN. L. REV.* 473, 496–97, 500–02 (2003) (noting the evolution of administrative agencies from formal to informal adjudication, and the concomitant loss of procedural due process rights).

143. 318 U.S. 80 (1943).

144. *Id.* at 82–85.

cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.<sup>145</sup>

When the case returned to the Court four years later, it reiterated that a reviewing court

must judge the propriety of [agency] action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.<sup>146</sup>

Thus, once the nondelegation rule began to crumble in practice, courts were barred from digging deeply into issues and imagining how best to solve problems. Rather, courts were restricted to determining whether agencies' preferred solutions to a problem satisfied basic requirements.

Not only were adjudicative actions subject to limited review, eventually the Court made clear that an agency's choice not to initiate an adjudication was also an issue for courts to avoid. In *Heckler v. Chaney*,<sup>147</sup> the Court held that there is presumption of unreviewability of agency decisions not to undertake enforcement action.<sup>148</sup> The Court rejected the holding of the Court of Appeals for the D.C. Circuit that an agency could be "required 'to fulfill its statutory function.'"<sup>149</sup>

*Chaney* emphasized history and a reluctance to entangle courts in agency operations:

This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency

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145. *Id.* at 88.

146. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947).

147. 470 U.S. 821 (1985).

148. *Id.* at 834. Prior to *Chaney*, some review was allowed under *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Cass Sunstein has suggested that *Chaney* unnecessarily discarded the workable standards of *Volpe*. Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 658–60 (1985).

149. *Chaney*, 470 U.S. at 823 (quoting *Chaney v. Heckler*, 718 F.2d 1174, 1191 (D.C. Cir. 1983)).

resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.<sup>150</sup>

The opinion also emphasized that judicial review is not a pragmatic question "that amount[s] to an assessment of whether the interests at stake are important enough to justify intervention in the agencies' decisionmaking."<sup>151</sup> Rather, the "danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance. That decision is in the first instance for Congress."<sup>152</sup>

Thus, *Chaney* asserts four reasons of the major rationales for avoiding judicial entanglement that recur in the Court's jurisprudence on agency operations: (1) deference to agency decisions on public policy, (2) deference to agency allocation of resources, (3) the unsuitability of courts to make the types of decisions committed to agencies, and (4) a reliance on Congress and the political process to police problems with agency inaction. Unsurprisingly, these reasons strongly parallel the Court's jurisprudence on delay and other systemic problems with benefits claims. As a result, it is fair to consider the theoretical arguments that are made in this broader context when looking at the concerns that should shape the remedy in *VCS* and similar cases.

### C. *Judicial Review of Agency Rulemaking*

Before turning to the major theoretical arguments, the final type of agency action should be considered. In the 1960s and 1970s, rulemaking became a critical, if not the dominant, aspect of agency policymaking.<sup>153</sup> This shift has brought about some forms of robust judicial scrutiny in

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150. *Id.* at 831–32 (citations omitted).

151. *Id.* at 834.

152. *Id.*

153. See Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243 (1987) (attributing the shift from adjudication actions to rulemaking to the enactment of a new generation of "social regulation" statutes by Congress in the late 1960s and early 1970s).

discrete contexts, such as the “hard look” doctrine.<sup>154</sup> However, even though agencies may have shifted focus from discrete enforcement to general rulemaking, the Supreme Court has kept the Judiciary on a relatively tight leash in terms of the breadth of its review of agency actions.

One component of the restrictions is the Court’s case law on standing. In *Lujan v. National Wildlife Federation*,<sup>155</sup> the Court rejected a challenge by environmental groups to a Bureau of Land Management (BLM) program for determining when public lands could be opened up for additional uses, such as mining.<sup>156</sup> The Court concluded that the organizations could not challenge the agency’s general approach to making those kinds of determinations; rather, only final BLM decisions as to specific lands could be challenged, and only then when a member could identify an immediate harm or threat of harm.<sup>157</sup> Responding to the environmental groups’ allegation that violations of governing statutory requirements were “rampant,” Justice Scalia’s majority opinion replied: “Perhaps so. But respondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.”<sup>158</sup> The Court made clear that the power of the Judiciary under the APA is limited and that Congress must provide for additional remedies applicable to a specific agency before a court can delve deeply into systemic issues.

Absent such a provision, however, a regulation is not ordinarily considered the type of agency action “ripe” for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens to harm him.<sup>159</sup>

The Court emphasized that this is “the traditional, and remains the normal, mode of operation of the courts.”<sup>160</sup>

Beyond standing, the Court has also taken a narrow view of the types of actions authorized by the APA. In *Norton v. Southern Utah Wilderness Alliance*

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154. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Action Mean?*, 63 ADMIN. L. REV. 77, 77–78 (2011) (analyzing studies of outcomes of review of agency actions applying various doctrines); Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419 (2009) (discussing the development and the current status of the “hard look” doctrine).

155. 497 U.S. 871 (1990).

156. *Id.* at 875, 900.

157. *Id.* at 891–93.

158. *Id.* at 891 (emphasis omitted).

159. *Id.*

160. *Id.* at 894.

(*SUWA*),<sup>161</sup> plaintiff environmental groups sought to use the APA to compel BLM to protect areas designated at “wildness study areas” from off-road vehicle use by forcing the agency to prohibit the use of such vehicles in those areas, conduct intensive monitoring of such use, and take a hard look at new information alleged to require reconsideration of a previously issued environmental impact statement relevant to the land. The Court unanimously agreed that the APA did not authorize any judicial remedy, and dismissed the appellants’ claims.

*SUWA* reiterated “that the only agency action that can be compelled under the APA is action legally required. This limitation appears in § 706(1)’s authorization for courts to ‘compel agency action unlawfully withheld.’”<sup>162</sup> As to the precise interpretation of this provision, *SUWA* took a historical view:

In this regard the APA carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus under the All Writs Act, now codified at 28 U.S.C. § 1651(a). The mandamus remedy was normally limited to enforcement of a specific, unequivocal command, the ordering of a precise, definite act . . . about which [an official] had no discretion whatever.<sup>163</sup>

“General deficiencies in compliance, unlike the failure to issue a ruling . . . lack the specificity requisite for agency action.”<sup>164</sup>

The Court held that BLM’s 100-plus-page land use plan was “a statement of priorities; it guides and constrains actions, but does not . . . prescribe them.”<sup>165</sup> It noted that “allowing general enforcement of plan terms would lead to pervasive interference with BLM’s own ordering of priorities.”<sup>166</sup> Finally, it recognized the likely effect on agency behavior. A favorable ruling in the present case “would ultimately operate to the detriment of sound environmental management. Its predictable consequence would be much vaguer plans from BLM in the future—making coordination with other agencies more difficult, and depriving the public of important information concerning the agency’s long-range intentions.”<sup>167</sup>

Ultimately, *SUWA* recognized a clear aversion to judicial micro-management of agencies:

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161. 542 U.S. 55 (2004).

162. *Id.* at 63 (quoting 5 U.S.C. § 706(1) (2006)) (emphases omitted).

163. *Id.* (alterations in original) (citations omitted) (internal quotation marks omitted).

164. *Id.* at 66.

165. *Id.* at 71.

166. *Id.*

167. *Id.* at 72.

The principal purpose of the APA limitations we have discussed—and of the traditional limitations upon mandamus from which they were derived—is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.<sup>168</sup>

This emphatic language in *SUWA* interpreting the APA was reinforced in *Summers v. Earth Island Institute*<sup>169</sup> in the context of Article III’s “case or controversy” requirement. In *Earth Island*, the district court had issued a nationwide injunction against the application of certain Forest Service regulations exempting small fire-rehabilitation and timber-salvage projects from the normal notice, comment, and appeal process applicable to larger projects, even though the parties had already reached a settlement as to the specific project that had instigated the suit.<sup>170</sup> The Supreme Court held that the district court had erred in issuing an injunction “in the absence of a live dispute over a concrete application of those regulations.”<sup>171</sup> The Court explained,

In limiting the judicial power to “Cases” and “Controversies,” Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. This limitation “is founded in concern about the proper—and properly limited—role of the courts in a democratic society.”<sup>172</sup>

Accordingly, the essential message of *Earth Island* was the same as *Lujan* and *SUWA*, regardless of the precise presentation of the issue.<sup>173</sup>

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168. *Id.* at 66–67.

169. 129 S. Ct. 1142, 1148 (2009) (stating that, except when acting to redress actual or imminent harm, courts have no place reviewing the actions of Congress or the Executive Branch).

170. *Id.* at 1147–48.

171. *Id.* at 1147.

172. *Id.* at 1148 (citations omitted) (quoting *Warth v. Seldin*, 422 U.S. 490 (1975)).

173. Of course, it cannot be overlooked that *Lujan*, *SUWA*, and *Earth Island* have two things in common. All three cases involved independent groups trying to shape environmental policy, and all three opinions were written by Justice Scalia. Thus, it is reasonable to wonder what might happen in a different context with a different justice

D. *Judicial Discomfort with the Administrative State*

Before turning to theoretical interpretations of these cases, it must be noted that some justices have expressed discomfort with the growing power of the administrative state relative to the strength of the checks on their operation that the Court has blessed. There is a sense that by narrowing judicial review to discrete actions, too much activity is shielded from the forces of moderation. Indeed, before the dust had begun to settle on the New Deal, Justice Jackson commented that “[t]he rise of administrative bodies probably has been the most significant legal trend of the last century . . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories.”<sup>174</sup> Although his opinion was focused on the agency’s role in determining the substance of the law, his concern about the need to check agency power is generally applicable.

A more significant case contemplating review of agency action is *INS v. Chadha*,<sup>175</sup> in which the Court invalidated Congress’s attempt to oversee agency decisions by reserving a legislative veto. The respondent in *Chadha* was an alien whose deportation had been suspended by the Attorney General.<sup>176</sup> Pursuant to a section of the Immigration and Nationality Act,<sup>177</sup> the House of Representatives passed a resolution vetoing the suspension, and the alien then challenged the constitutionality of the legislative veto provision.<sup>178</sup> The Court agreed with the alien respondent that Congress could not reserve the ability to conduct a case-by-case

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writing the opinion. One such case is *Massachusetts v. EPA*, 549 U.S. 497 (2007), which was written by Justice Stevens. In that case, several environmental groups, as well as state and local governments, petitioned the Environmental Protection Agency (EPA) to issue a rule regulating greenhouse gases as pollutants. *Id.* at 510, 514. Despite *Lujan* and *Earth Island*, the Court concluded that there was a justiciable case or controversy and that the petitioners had standing. *Id.* at 516–26. However, the context of *Massachusetts v. EPA* was substantially different because the petition for rulemaking was filed under a provision of the Clean Air Act expressly allowing for such actions. *See* 42 U.S.C. § 7607(b)(1) (2006). Therefore, any separation of powers concern was greatly reduced. Moreover, the opinion focused on the standing of states under the Act, and concluded that Massachusetts had satisfied “the most demanding standards of the adversarial process.” 549 U.S. at 521; *see also* *FEC v. Akins*, 524 U.S. 11, 25 (1998) (rejecting the argument that informational harm to voters from a federal agency’s nonenforcement of election law was too generalized to support standing because such harm was shared by all voters). Thus, the posture and language of *Massachusetts v. EPA* do not suggest a significant retreat from the broader principles against private actions laid out in other cases.

174. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

175. 462 U.S. 919 (1983).

176. *Id.* at 923–25.

177. 8 U.S.C. § 1254(c)(2) (1982) (repealed 1996).

178. *Chadha*, 462 U.S. at 944–55.



intervention from a general administrative regime created by statute.<sup>179</sup>

A notable aspect of the decision was that it acknowledged that the bicameralism and presentment requirements would make it difficult to undo specific agency actions, but emphasized that the Constitution's checks and balances were intended to protect actions committed to one branch from routine interference by another, even by agreement:

[The single-house legislative veto provision at issue] doubtless has been in many respects a convenient shortcut; the "sharing" with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.<sup>180</sup>

In so stating, the Court rejected the practical concerns of Justice White's dissent, which was explicitly motivated by lingering nondelegation concerns,<sup>181</sup> and argued that the realities of modern administrative law were making a mockery of the idea that Congress was exercising any meaningful control over most policymaking.

For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term.<sup>182</sup>

In his view, Congress ought to be able to retain a check on the behavior of this emerging fourth branch of government, which exercises power that is often more legislative than executive.<sup>183</sup>

The competing positions in *Chadha* illustrate the problem that the Court faced. The reality of administrative growth demands controls on agency behavior, but that same growth makes it difficult to define controls capable of managing agencies without crashing through constitutional barriers.

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179. *Id.* at 952–59.

180. *Id.* at 958–59.

181. *Id.* at 985 (White, J., dissenting).

182. *Id.* at 985–86. There is ample support for Justice White's concern. See SANDLER & SCHOENBROD, *supra* note 9, at 22–23 (charting the growth of federal regulatory statutes); J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 772, 775 (2003) (charting the growth in *Federal Register* pages from 1,936 to 2,000 and the growth in *Code of Federal Regulations* pages from 1,970 to 1,995).

183. *Chadha*, 462 U.S. at 986–87 (“If Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check on legislative power for itself.”).

Although the *Chadha* majority was unwilling to implicitly acknowledge agencies as a fourth branch in need of separate checks on its behavior, the concern for tempering agency behavior continued to grow, particularly in the academic literature discussed below. Even Justice Scalia—author of the environmental trio discussed above—has expressed some misgivings at the level of deference being accorded agencies<sup>184</sup> in addition to the delegation concerns he expressed in *Sykes v. United States*.<sup>185</sup>

*E. Theoretical Arguments Concerning the Judicial Role in Managing Agencies*

Of course, Supreme Court case law will be of tremendous interest to judges looking for guidance in how to approach the problem of managing improvement in agency operations. However, there is a large body of scholarly work that also offers an important perspective on understanding the court–agency relationship.

*1. Theories of the Constitutional Relationships in Administrative Law*

Traditionally, constitutional administrative law has focused on accountability to the exclusion of virtually any other concern, including effectiveness.<sup>186</sup> The goal of these models was to define the general relationship, under the Constitution, between agencies and the defined branches in order to develop an intuition about how each actor should be involved in any given problem. Due to this focus on accountability, a number of models evolved that did not displace each other but rather cross-pollinated and spread to cover the wide variety of ecological niches in the administrative landscape.<sup>187</sup>

The first major model of the administrative state was the “transmission belt” model, which was named by Richard Stewart.<sup>188</sup> This model envisioned agencies as implementing clear legislative instructions and was

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184. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring) (questioning whether the Court was correct in its decision in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), to extend increased deference to an agency’s interpretations of its own regulations).

185. 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting). See *supra* note 140 (noting Scalia’s criticism of “[f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation”).

186. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63 (2003).

187. See *id.* at 469; Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1284 (1984); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2254 (2001).

188. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

consistent with the Supreme Court's nondelegation ideal.<sup>189</sup> In this model, Congress was required to exercise close control over agency operations because power could not be delegated without specific directives.<sup>190</sup>

The "transmission belt" model was inadequate to accommodate the progressive ideals of the New Deal, however, so another model arose to provide an alternative narrative of agency control. In the "expertise" model, internal agency experts exercised control because they had the education and discipline to apply science and economics to delegated problems.<sup>191</sup> Both the superior skills of the agency experts and their insulation from the occasionally selfish and irrational political processes justified this transfer of control.<sup>192</sup>

Although the expertise model obtained Supreme Court validation for the New Deal, it was also quickly criticized as imperfect. In practice, the behavior of agency experts was less than ideal.<sup>193</sup> The first cure for imperfect bureaucrats was formal procedural restrictions to minimize the opportunities for bias and conflicts to shade their decisions. The APA was passed in 1946 as the New Deal waned. The APA and its acceptance by the courts were significant because it implicitly acknowledged that the ability of Congress to broadly transfer control of issues had been settled, and the emerging issue was how to control agencies themselves.<sup>194</sup>

Unfortunately, the APA was insufficient to prevent arbitrary agency behavior, and the expertise model continued to lose credibility.<sup>195</sup> By the 1970s, there was a growing consensus that agency behavior needed to be subject to greater external controls. At the time, the balance of agency behavior was shifting toward rulemaking, which opened the door to interest group involvement.<sup>196</sup> The solution was the "interest group" model, which

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189. *Id.*

190. *Id.* at 1673.

191. *Id.* at 1678. As noted above, the "expertise" model did not simply displace the "transmission belt" model. Rather, Stewart referred to the pair collectively as the "traditional" model. *Id.* at 1671–81.

192. See Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 90 n.34 (1994) (noting that an important issue for New Deal progressives in creating expert agencies was to insulate them from politics, and collecting sources).

193. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1264 (1986) (describing the 1938 comments of Roscoe Pound, chairman of a special American Bar Association committee on administrative law).

194. Bressman, *supra* note 186, at 482.

195. *Id.* at 473–74.

196. *Id.* at 475–78. Bressman attributes this development to the unstated influence of the majoritarian paradigm popularized by Alexander Bickel. See *id.* at 478–85.

demanded robust procedures for public participation in agency action.<sup>197</sup> The essential weakness of this model was quickly exposed, however. In practice, strong public participation rules can provide the opportunity for agencies to be captured by those groups with the most significant interests in the agency's behavior and the resources to exploit participation rules.<sup>198</sup>

The weaknesses in the interest group model were addressed by the "presidential control" model.<sup>199</sup> Historically, this model was driven by presidents, beginning with Ronald Reagan, asserting personal control and responsibility for agency behavior as a central feature of their governing platform.<sup>200</sup> The essence of this theory is that the national electorate provides the President with a majoritarian authority that is less vulnerable to interest group capture. In turn, robust presidential control of agencies, through mechanisms such as executive orders and the Office of Management and Budget, then provides the necessary majoritarian control to make agency behavior legitimate.<sup>201</sup>

Inevitably, the presidential control model has also been subject to much criticism. Some scholars are doubtful that presidential administrations are significantly more immune to special interest capture.<sup>202</sup> Others question how much real control an administration can exercise in practice.<sup>203</sup> Still others question whether presidential elections fairly reflect public choices about issues faced by agencies.<sup>204</sup> The debate is far from settled.<sup>205</sup>

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197. *Id.* at 475–78.

198. *See id.* at 485; Stewart, *supra* note 188, at 1712 ("The viability in practice of such a pluralist theory of legitimacy is challenged at the outset by the predominant contemporary critique of the administrative process: that agencies are biased in favor of regulated and client groups, and are generally unresponsive to unorganized interests." (footnote omitted)); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010) (explaining how rules requiring agencies to consider and address public comments favor well-funded interests that can overload an agency with submissions).

199. *See* Bressman, *supra* note 186, at 485–91.

200. Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 180 (1997); Kagan, *supra* note 187, at 2250.

201. Bressman, *supra* note 186, at 485–91.

202. Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 231–32 (1998).

203. David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2204 (2010).

204. Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 992–1007 (1997); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197 (1995); *cf.* Kagan, *supra* note 187, at 2337 ("To the extent that presidential supervision of agencies remains hidden from public scrutiny, the President will have greater freedom to play to parochial interests. . . . It is when presidential control of administrative action is most visible that it most will reflect presidential reliance on and responsiveness to broad public sentiment.").

205. *Id.*

One approach to the problems of the majoritarian models has been to circle back around to the agencies themselves and treat them as fiduciaries or trustees.<sup>206</sup> In this model, agencies again assume primary control over their operations subject to duties of care, loyalty, and transparency.<sup>207</sup> The net result is something of a synthesis of the expertise model with majoritarian concerns. Agencies are entrusted to use their discretion to determine proper actions, subject to residual control by democratic institutions and judicial supervision of their trustee obligations.<sup>208</sup>

Regardless of the specific model, modern administrative law struggles to balance core values in policymaking and core competencies in designing detailed and effective mechanisms for handling complex problems.<sup>209</sup> Much of the struggle is between the ideal and the real. In theory, expert agencies could design and implement solutions that take advantage of the best available research and rise above petty political parochialism. In practice, the difficult modern problems allocated to agencies often have indeterminate answers that make the preferences of decisionmakers

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205. See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 882 (2003) (concluding that an empirical analysis of presidential review demonstrates little more than “the real world is inconveniently messy; none of its details proves all that much”).

206. See Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 359–65 (2009); Sant’Ambrogio, *supra* note 41.

207. Criddle, *supra* note 206, at 122.

208. See Mantel, *supra* note 206, at 365 (“Because no bureaucratic organization can be self-policing, agencies should be monitored by those empowered to remedy an agency’s breach of the public trust.”). The interest in the trustee analogy is not limited to administrative law, and recent work indicates that it may be useful in addressing other problems. See generally David L. Ponet & Ethan J. Leib, *Fiduciary Law’s Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249 (2011); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: The Minimal Other-Regarding Obligations* (June 11, 2011) (unpublished working paper), available at <http://ssrn.com/abstract=1863228>.

209. James O. Freedman observed in 1978 that there is a persistent crisis of legitimacy in administrative law that defies each generation’s solution to the perceived problem. FREEDMAN, *supra* note 80, at 6–12. Decades later, his observation remains true. See, e.g., JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 1 (1983) (describing administrative law theory as a “history of failed ideas”); Bressman, *supra* note 186, at 462 (“From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy.”); Criddle, *supra* note 206, at 119 (arguing that the erosion of “the administrative state’s conceptional foundations” has “precipitat[ed] a ‘crisis of legitimacy’ in administrative law” (quoting Peter H. Schuck, *Introduction*, in FOUNDATIONS OF ADMINISTRATIVE LAW 4 (Peter H. Schuck ed., 1994)); Cynthia R. Farina, *supra* note 204, at 987 (1997) (“Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars.”).

relevant. Agencies do not operate in an ideal manner due to tremendous complexity of the systems involved and public choice issues that make it difficult to give each interested party a fair opportunity to participate. Effective oversight is difficult because the political branches have strategic incentives that are often inconsistent with ideal policies, but judicial review also raises serious majoritarian concerns. Thus, invasive judicial intervention into the operation of federal agencies is a minefield of important but competing concerns.

## 2. *Theoretical Approaches to Systemic Agency Problems, Including Delay*

Unfortunately, the section of the minefield of most concern to remedying problems such as those faced in *VCS* has been explored very little. Nonetheless, the area is beginning to receive some attention. For example, Lisa Bressman argues that current models focus on accountability at the expense of potentially arbitrary results.<sup>210</sup> She correctly observes that arbitrariness is constitutionally distinct from issues of control.<sup>211</sup> However, she primarily concluded that such problems, which are normally relegated to “ordinary” administrative law, need to be considered on par with the constitutional concerns discussed above, and that the problem of arbitrariness suggests that majoritarian concerns have been overemphasized in recent theory.<sup>212</sup>

Concrete guidance for judicial intervention into administrative delay is rare.<sup>213</sup> The existence of the problem of delay was recently observed by Sidney Shapiro and Richard Murphy, who commented: “For those who prefer an activist regulatory state, perhaps the most significant limitation of judicial review as a mechanism of accountability is judicial reluctance to police the failure of an agency to act.”<sup>214</sup> Unfortunately, Shapiro and Murphy did not offer guidance but sympathized with “the reluctance of courts to police agency inaction” and noted that “[a]ddressing the problem falls back on the political system, which may or may not act.”<sup>215</sup>

A notable exception is the recent work of Michael Sant’Ambrogio. Sant’Ambrogio observes that the modest work in the area of delay tends to

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210. Bressman, *supra* note 186, at 462–64.

211. *Id.* at 468.

212. *Id.* at 553–56.

213. Sant’Ambrogio, *supra* note 41, at 1387 (“Although few would dispute that agency delays have long been a significant problem for the administrative state, they have garnered remarkably little attention . . .”).

214. Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can’t Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 26 (2009).

215. *Id.* at 28.

treat the problem as a subset of the problem of inaction.<sup>216</sup> However, both Sant’Ambrogio and the works he cites focus on strategic delay or inaction by an agency with other priorities.<sup>217</sup> Sant’Ambrogio argues that courts should use cost–benefit analysis to determine whether agency delays were justified.<sup>218</sup> However, this recommendation is moot once it has been determined that the delays involved cannot be justified because they violate due process. Although Sant’Ambrogio advocates for applying cost–benefit analysis to delays in claims adjudication, he offers judicial findings of unreasonable delay as mere leverage that beneficiaries could use in lobbying Congress.<sup>219</sup>

#### F. *Summary of Guidance from Administrative Law*

For the judge trying to craft solutions for agency problems like those in *VCS*, administrative law jurisprudence and scholarship offer no easy answers, but rather a series of cautionary concerns that seriously constrain remedial options. To summarize this Part, administrative law counsels the judge: (1) not to make any policy choices that are properly committed to the agency or the political process; (2) to respect the agency’s expertise in dealing with the complexities of its own operations and those of the substantive law involved; (3) to avoid usurping the authority of the other branches in allocating limited resources; and (4) to rely on Congress as the primary source of solutions to politically and financially sensitive problems. The foundation of these commands is a pervasive sense that the public policy issues committed to agency discretion should be subject to some type of majoritarian control rather than judicial fiat.

### IV. THE ARC OF INSTITUTIONAL REFORM LITIGATION

If judges considering a remedial problem like that presented by *VCS* were to read all the opinions discussed in Parts I and II, they may well conclude their options were quite limited. However, if they were to step through the looking glass into the world of equitable remedies for constitutional violations, then their perspective would be very different. This Part looks at the area of structural reform in four sections. First, it reviews the Supreme Court’s school desegregation cases and the broad formulation of courts’ equitable powers developed in those cases. Second, it briefly discusses the common pattern that structural reform litigation has

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216. Sant’Ambrogio, *supra* note 41, at 1387 n.20 (collecting sources that discuss the relationship between inaction and delay).

217. *Id.* at 1387–88.

218. *Id.* at 1435–36.

219. *Id.* at 1446–47.

developed through those cases and others. Third, it turns to the area of prison reform litigation and how the trials and tribulations of that area show that structural reform litigation is not destined to succeed based upon good intentions alone. Finally, this Part looks at some of the theoretical concerns and practical criticisms that have been raised about structural reform litigation, which help illuminate what an effective and constitutionally sensitive remedy should look like.

A. *Desegregation and the Rise of Comprehensive Equitable Relief*

Equitable injunctions to prevent constitutional violations date to at least the Supreme Court's 1824 decision in *Osborn v. Bank of the United States*.<sup>220</sup> In *Osborn*, the Court forbade the auditor of the state of Ohio from attempting to collect an unconstitutional state tax from the bank.<sup>221</sup> Following this holding, the story of modern structural reform litigation began in 1908 with *Ex parte Young*,<sup>222</sup> which held that a government official acting in violation of the Constitution is not protected by his office and, therefore, may be enjoined by a court from such unlawful behavior.<sup>223</sup> At that time, equitable relief was blossoming in the federal courts due to its restrictive availability in state courts.<sup>224</sup> The focus of these cases was on limiting state encroachment on the freedom of contract,<sup>225</sup> and even though this era of equitable relief was curbed long before *Brown v. Board of Education (Brown I)*,<sup>226</sup> it laid the foundations for the robust remedies that would later be needed.<sup>227</sup>

The decision in *Brown I* overruling the separate-but-equal doctrine was undoubtedly a landmark case. Its actual impact, however, was determined by the Court's willingness to bless controversial remedies designed to

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220. 22 U.S. (9 Wheat.) 738 (1824); see Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 688 (2009).

221. 22 U.S. (9 Wheat.) at 844.

222. 209 U.S. 123 (1908); see *Hutto v. Finney*, 437 U.S. 678, 690 (1978) (characterizing the holding in *Ex parte Young* as a "landmark decision"); Berzon, *supra* note 220, at 689 (referring to *Ex parte Young* as "the best-known early example of a direct constitutional cause of action in equity"); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1395 (2007) (crediting *Ex parte Young* for "shunt[ing] aside the traditional presumption against equitable relief"). For a detailed discussion of the case, see John Harrison, *Ex parte Young*, 60 STAN. L. REV. 989 (2008).

223. 209 U.S. at 159–60.

224. Jeffries & Rutherglen, *supra* note 222, at 1396–97.

225. Labor injunctions to block strikes were a common feature of this era. John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1129 (1996).

226. 347 U.S. 483 (1954).

227. Jeffries & Rutherglen, *supra* note 222, at 1396–97.



enforce its substantive ruling. A year later, the Court announced in *Brown v. Board of Education (Brown II)*<sup>228</sup> that district courts enforcing *Brown I* should exercise broad equitable authority.<sup>229</sup> The tone of *Brown II* was firm but open. It indicated that district courts should work with local jurisdictions making good faith efforts to desegregate, but emphasized that “constitutional principles cannot be allowed to yield simply because of disagreement with them.”<sup>230</sup>

Predictably, the district courts soon confirmed “that injunctions are not self-executing; a court’s order to eliminate conditions that violate the Constitution rarely results in compliance with the law. The struggle for defendant’s acceptance and institutionalization of constitutional and statutory norms takes place through the remedial process.”<sup>231</sup> One of the first arguments the Court had dismissed was the problem of cost. In 1963, in *Watson v. City of Memphis*,<sup>232</sup> the Court rejected resource limitations as a defense against an equitable order remedying a constitutional violation. In *Watson*, the city challenged the district court’s judgment with an argument that it would be too expensive to desegregate the municipal parks. The Court observed that the provision of constitutional rights could not depend on whether “it is less expensive to deny them than to afford them.”<sup>233</sup> The Court was clearly suspicious that additional resources would be slow in materializing when the local government was not particularly interested in allocating funds to desegregation. It emphasized, “The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.”<sup>234</sup>

Five years later, in 1968, the Supreme Court stressed that deference to the proper democratic authorities is not a requirement when crafting a remedy. In *Green v. County School Board*,<sup>235</sup> the nominal issue was whether a specific “freedom of choice” plan adopted by the local school board was an adequate remedy. The Court noted the decade of delay by the school board and held, “The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to

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228. 349 U.S. 294 (1955).

229. *Id.* at 300.

230. *Id.* John Yoo argues that the essential innovation of *Brown II* was that it departed from the previous case permitting limited negative injunctions and “expanded the definition of the equity power to include the imposition of affirmative obligations upon states, and the ongoing judicial involvement and supervision of the remedy.” Yoo, *supra* note 225, at 1130.

231. Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 807 n.3 (1990).

232. 373 U.S. 526 (1963).

233. *Id.* at 537.

234. *Id.* at 533.

235. 391 U.S. 430 (1968).

work now.”<sup>236</sup> The Court described how ineffective the local government’s plan had been<sup>237</sup> and rejected any argument that further deference to it was required. In conclusion, the Court emphasized that the specific plan was “only a means to a constitutionally required end . . . . If the means prove effective, it is acceptable, but if it fails . . . other means must be used to achieve this end.”<sup>238</sup> Thus, it falls to courts to impose a workable plan where the government does not.

In 1969, the Court affirmed the ability of district courts to impose mandatory mathematical ratios as a remedy even though the constitutional standard involved does not require such rigidity.<sup>239</sup> Two years later, in *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>240</sup> the Court approved further use of mathematical ratios along with the imposition of a detailed integration plan. A key fact in *Swann* was the school board’s failure to propose an acceptable remedy.<sup>241</sup> As a result, the somewhat cautious and patient tone of *Brown II* was replaced with a declaration: “Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”<sup>242</sup> Nonetheless, the Court continued to characterize the remedial question as one of balancing interests.<sup>243</sup>

The school desegregation cases began to plateau in 1974 with *Milliken v. Bradley (Milliken I)*.<sup>244</sup> In *Milliken I*, the Court disapproved of a redistricting scheme that involved bussing students between an urban school district that had been found guilty of de jure segregation and an innocent suburban school district. The essential language used by the Court to emphasize the relationship between the violation and the equitable remedy was the same as in past opinions, but this time the remedy was found to exceed the scope justified by the violation.<sup>245</sup> However, four justices dissented and would have found the remedy acceptable.<sup>246</sup>

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236. *Id.* at 439 (emphasis omitted).

237. *Id.* at 440–42.

238. *Id.* at 440 (quoting *Bowman v. Cnty. Sch. Bd.*, 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring)).

239. *United States v. Montgomery Cnty. Bd. of Educ.*, 395 U.S. 225 (1969).

240. 402 U.S. 1 (1971).

241. *Id.* at 16.

242. *Id.* at 15.

243. *Id.* at 16 (“The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.”).

244. 418 U.S. 717 (1974); see Jeffries & Rutherglen, *supra* note 222, at 1409 (describing *Milliken I* as when the “expansionist tendencies came to a halt”).

245. *Milliken I*, 418 U.S. at 744–45.

246. *Id.* at 806–07 (Marshall, J., dissenting) (“The nature of a violation determines the scope of the remedy simply because the function of any remedy is to cure the violation to

*Milliken I* was not the beginning of a hard reversal. Structural reform litigation continued to receive the Court's blessing in some circumstances, especially in desegregation cases. In 1977, the Court approved an aggressive equitable order in *Milliken v. Bradley (Milliken II)*.<sup>247</sup> In *Milliken II*, the district's court's new plan included not only forced integration but also extensive "remedial and compensatory" educational programs to address past discrimination in the Detroit school system.<sup>248</sup> In addition, the district court ordered the state of Michigan to pay half the costs of the remedial plan.<sup>249</sup> On review, the Court held that "the interests of state and local authorities in managing their own affairs, consistent with the Constitution" had to be balanced against "the nature and scope of the constitutional violation" and the ability of the proposed remedy "as nearly as possible to restore the victims . . . to the position they would have occupied in the absence of" the violation.<sup>250</sup> In applying this test, the Court upheld the district court's exercise of its equitable powers and rejected the argument that the costs imposed violated the Eleventh Amendment because they amounted to an award of monetary damages against the state, as well as the argument that they violated Tenth Amendment federalism concerns.<sup>251</sup> In essence, the Court refused to analogize an otherwise proper, prospective remedy for a constitutional violation to any type of forbidden judicial action.

The evolution of desegregation remedies came to a close with another two-part case. In 1990, in *Missouri v. Jenkins (Jenkins I)*,<sup>252</sup> the Court held that a district judge's equitable authority extended to ordering a local government unit to raise taxes in order to fund the remedial plan imposed by the Court. In *Jenkins I*, the district court was faced with the problem of securing \$88 million to pay for its remedial plan. It enjoined a provision of state law that would have transferred \$4 million from Kansas City to other jurisdictions and ordered that voters be presented with a referendum on

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which it is addressed. . . . [A] remedy which effectively cures the violation is what is required. No more is necessary, but we can tolerate no less." (citations omitted).

247. 433 U.S. 267 (1977).

248. *Id.* at 273–75.

249. *Id.* at 277.

250. *Id.* at 280–81 (internal quotation marks omitted).

251. *Id.* at 290–91. The Court's Eleventh Amendment ruling in particular was a departure from its holding three years earlier in *Edelman v. Jordan*, 415 U.S. 651 (1974), that the Eleventh Amendment barred an award of retroactive benefits payments that had been improperly withheld by a state. *Id.* at 677–78. The essential distinction between *Milliken II* and *Edelman* is that money used to reform state programs is not actually awarded to the plaintiffs.

252. 495 U.S. 33 (1990).

raising local taxes.<sup>253</sup> When further funds were needed, the district court ordered a doubling of the local property taxes and directed the school district to issue \$150 million in bonds.<sup>254</sup> Although the Court held that the district court should not have directly ordered a tax increase, it agreed that the district court could have required the school district “to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the operation of state laws that would have prevented [the school district] from exercising this power.”<sup>255</sup> Despite this language, *Jenkins I* was not so much a full-throated endorsement of such remedies as a 5–4 decision that begrudgingly recognized that in some cases bypassing opposition to raising additional funds was an unavoidable necessity.

Indeed, five years later with a different composition, the Court concluded that the judge went too far in increasing teacher salaries and requiring the creation of a lavish “magnet school” in an inner city area for the purpose of attracting suburban students.<sup>256</sup> It expressed concern that “[t]he District Court’s pursuit of the goal of ‘desegregative attractiveness’ results in so many imponderables and is so far removed from the task of eliminating the racial identifiability of the schools within the [school district] that we believe it is beyond the admittedly broad discretion of the District Court.”<sup>257</sup> The key concern was that the district court’s rationale was “not susceptible to any objective limitation.”<sup>258</sup> Accordingly, the Court indicated that remedial orders should identify the “incremental effect” of the constitutional violations and the “specific goals” necessary to address them.<sup>259</sup>

*Jenkins II* has been described as key to ending the expansion of equitable remedies in structural reform litigation by “end[ing] any presumption in favor of structural relief, at least in the absence of a clear showing that lesser remedies were inadequate.”<sup>260</sup> Nonetheless, structural reform litigation had already spread to judicial review of other state and local government agencies, and the equitable authority of the federal courts was firmly entrenched.

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253. *Id.* at 39.

254. *Id.* at 41–42.

255. *Id.* at 51. The Court noted that its conclusion was supported by a long line of cases holding “that federal courts could issue the writ of mandamus to compel local governmental bodies to levy taxes adequate to satisfy their debt obligations.” *Id.* at 55–56 (citing eight cases from 1861 to 1909).

256. *Missouri v. Jenkins (Jenkins II)*, 515 U.S. 70 (1995).

257. *Id.* at 100.

258. *Id.* at 98.

259. *Id.* at 101.

260. Jeffries & Rutherglen, *supra* note 222, at 1410.

*B. The Modern Structural Litigation Playbook*

By the time of *Jenkins II*, the typical patterns of structural reform litigation had been established. “The characteristic relief sought in such cases is to reorganize the defendant institution so that it will routinely deal with the plaintiff class in a way that does not deprive them of the rights at issue.”<sup>261</sup> Even though the particulars vary, the progression of such a case is likely to follow a well-worn path:

The decree, or rather the series of decrees, will begin by prohibiting specific actions or conditions in violation of plaintiff’s rights and setting out a standard of proper performance of the defendant agency’s functions. Both from deference to state or local government responsibilities and from practical considerations, the initial decree may leave the defendants wide discretion to select the specific methods for meeting their substantive obligations. As defendants fail to comply because of recalcitrance, incompetence, or a combination of the two, the court will increasingly direct the detail of their performance through subsequent orders. These modifications of the original decree frequently come in the guise of civil contempt sanctions for noncompliance with prior orders.<sup>262</sup>

In short, institutions are given a limited opportunity to fix problems themselves, and if they fail to do so, then the will would determine the specific actions that must be taken. If these actions are not performed voluntarily, then the court could produce compliance through a number of means.

The traditional equitable tools are contempt, sequestration, displacement, and dissolution. Contempt and sequestration are coercive tools. Theoretically, a contempt order could involve imprisonment of an official who is the nominal defendant in the case, but it is not clear that it has ever been done in modern structural reform litigation.<sup>263</sup> Usually, it involves per diem fines against the official that are actually paid by the agency and applied toward the costs of the remedy.<sup>264</sup> The other coercive option is sequestration, in which the court orders a third party to withhold money that would otherwise be paid to the agency until it cooperates.<sup>265</sup> If coercion is ineffective or undesirable, the court can displace the leadership

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261. James M. Hirschhorn, *Where the Money Is: Remedies to Finance Compliance With Strict Structural Injunctions*, 82 MICH. L. REV. 1815, 1817–18 (1984).

262. *Id.* at 1820–21.

263. *Id.* at 1841.

264. *Id.* at 1826–27.

265. *Id.* at 1846–48. For example, in *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), the Seventh Circuit affirmed an order suspending federal revenue-sharing payments to the city until it agreed to end racial discrimination in its police force. *Id.* at 442.

and appoint a receiver to run the agency.<sup>266</sup> Finally, in some cases, the court can order that the institution be closed altogether and let the state and local authorities scramble to pick up the pieces.<sup>267</sup>

Whether or not the court assumes direct control over the agency, a court must sometimes also use these tools to obtain additional funding from outside the agency. This is frequently required and sometimes resisted.<sup>268</sup> Many different strategies have been used by courts facing such problems, depending on the precise nature of the entities involved and the specific circumstances of the case. In a few cases, there may be direct avenues for the court to issue orders effectively appropriating money from the state or local treasury.<sup>269</sup> However, the ability of the court to employ its equitable powers on funding sources outside the agency frequently depends upon the inherent relationship between the agency and funding, as well as the relevant behavior of the funding authority.<sup>270</sup> “Whether the legislature successfully resists or ultimately provides the funds, the process of indirect financial pressure through the executive branch defendants is time consuming and full of friction because it consists in large part of bluff and counter-bluff.”<sup>271</sup>

Ultimately, some structural reform cases have foundered simply because the officials complied with an order to seek additional funds in good faith but were rebuffed.<sup>272</sup> “Trial court judges who undertook structural relief in some high-profile cases threw up their hands in apparent exhaustion or despair, dissolving injunctions purportedly because all practicable vindication of the plaintiffs’ rights had been achieved, even though little progress was detectable.”<sup>273</sup>

Rather than give up altogether in the face of intractable problems and

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266. Hirschhorn, *supra* note 261, at 1833–35.

267. *Id.* at 1849–51. As Hirschhorn notes, this “nuclear” option is a “weak device” in many types of cases. *Id.*

268. *See id.* at 1851 (finding a conflict between courts that order relief and legislators who refuse to provide funding due to potential political backlash); *see also* Barbara Kritchevsky, *Is There a Cost Defense? Budgetary Constraints as a Defense in Civil Rights Litigation*, 35 RUTGERS L.J. 483 (2004) (arguing that budgetary constraints do not justify abandoning constitutional duties); Jack B. Weinstein, *The Effect of Austerity on Institutional Litigation*, 6 LAW & HUM. BEHAV. 145 (1982) (arguing that drastic, sweeping reform might be necessary in a troubled economy). Of course, some agencies have their own funding authority, over which a court can exercise control by coercion or displacement.

269. Hirschhorn, *supra* note 261, at 1872–73.

270. For a discussion of when third parties can be the object of an equitable relief order, *see id.* at 1851.

271. *Id.* (footnote omitted).

272. *See id.* at 1838.

273. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1018 (2004).

unattainable funding increases, some courts have settled into long-term supervision of “participatory self-revision” over attempting to exercise command-and-control authority.<sup>274</sup> This approach has been called an “experimentalist”<sup>275</sup> approach or the “catalyst”<sup>276</sup> approach. In essence, “the remedy institutionalizes a process of ongoing learning and reconstruction” rather than seeking “a one-time readjustment to fixed criteria.”<sup>277</sup> However, because “[b]oth declarations of goals and performance norms are treated as provisional and subject to continuous revision with stakeholder participation,”<sup>278</sup> this type of passive management lacks any assurance that constitutional violations would actually be remedied,<sup>279</sup> especially if the problem were rooted in insufficient funding beyond the agency’s control. Moreover, such remedies impeded the progress toward a political solution. The effect of such remedies is “to increase uncertainty about both the parties’ interests and the costs of refusing to agree,” which makes it “more likely pluralist bargaining will fail” because the stakeholders have differing evaluations of the interests involved.<sup>280</sup>

Of course, many institutional reform cases blend elements of both command-and-control style orders and collaborative efforts with the stakeholders. As demonstrated by *Plata* below, however, in many cases there is simply no guarantee that successful managerial changes are possible through any blend of active or passive judicial involvement.<sup>281</sup>

### C. *The Prison Reform Cases and the Plata Problem*

#### 1. *Equitable Relief in Prison Cases Prior to Plata*

After the Supreme Court began blessing broad exercises of judicial

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274. *Id.* at 1020.

275. *Id.* at 1019.

276. Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 856–59 (1990).

277. Sabel & Simon, *supra* note 273, at 1019–20.

278. *Id.*

279. Despite their advocacy of such remedies, Sabel and Simon admit that “[n]o definite assessment of the efficacy of this ‘experimentalist’ approach is possible yet.” *Id.* at 1100; *see also id.* at 1028 (describing the breakdown of the remedial process in *Vaughn G. v. Mayor of Baltimore*, No. MJG-84-1911, 2004 WL 3467057 (D. Md. 2004), due to the unworkable complexity of the remedial order that “hampered both enforcement and renegotiation efforts”).

280. *Id.* at 1099.

281. Aside from prisons, reform of mental health institutions is another area in which “no case has come close to fulfilling the hopes of those who brought it, and the public mental health system remains plagued by disastrous failings.” *Id.* at 1034.

power in the school desegregation cases, groups began trying to invoke the equitable powers of the federal courts to reform other institutions, especially prisons, welfare agencies, public housing authorities, and mental hospitals.<sup>282</sup> A complete history of each of these areas need not be covered here, but the history of prison-reform litigation is particularly important for a number of reasons, not the least of which is that it culminates in *Plata*. Not only does *Plata* represent the latest foray by the Supreme Court into structural reform litigation, but the sad history of failure in that case will be difficult for the judge handling *VCS* to ignore because *Plata* came from and was remanded to the same District of Northern California courthouse in San Francisco.<sup>283</sup>

The lower federal courts became active in prison condition cases in the 1960s.<sup>284</sup> For example, before being elevated to the Supreme Court, then-Judge Blackmun ruled that the use of whipping to discipline prisoners in the Arkansas system violated the Eighth Amendment.<sup>285</sup> However, widespread use of such litigation began after the Supreme Court's landmark 1976 decision in *Estelle v. Gamble*,<sup>286</sup> which held that "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton

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282. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1266.

283. The most recent remedial decision in *Plata* (and the consolidated case of *Coleman v. Schwarzenegger* from the Eastern District of California) was made by a special panel pursuant to the Prison Litigation Reform Act (PLRA) consisting of Ninth Circuit Judge Stephen Reinhardt, Northern District of California Senior District Judge Thelton E. Henderson, and Eastern District of California District Senior Judge Lawrence K. Karlton. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK,JFM P, C01-1351 TEH, 2010 WL 99000 (E.D. Cal. & N.D. Cal. Jan. 12, 2010). Prior to the formation of the panel, Judge Henderson handled both the merits and remedial aspects of *Plata*. See Catherine Megan Bradley, *Old Remedies Are New Again: Deliberate Indifference and the Receivership in Plata v. Schwarzenegger*, 62 N.Y.U. ANN. SURV. AM. L. 703, 717-19 (2007) (describing the steps Judge Henderson took before putting the California prison health system into receivership). *VCS* was decided at the district level by Senior Judge Samuel Conti, who is based in San Francisco with Henderson. Henderson and Conti have been on the court together for more than thirty years. See *Senior District Judge Samuel Conti*, U.S. DIST. COURT FOR THE N. DIST. OF CAL., <http://www.cand.uscourts.gov/sc> (last visited Feb. 2, 2012) (stating that Judge Conti was appointed to the court in 1970); *Senior Judge Thelton E. Henderson*, U.S. DIST. COURT FOR THE N. DIST. OF CAL., <http://www.cand.uscourts.gov/teh> (last visited Feb. 2, 2012) (stating that Judge Henderson was appointed to the court in 1980). Moreover, the Ninth Circuit's opinion in *VCS* was authored by Judge Reinhardt.

284. See Horowitz, *supra* note 282, at 1266; see also Ira P. Robbins & Michael B. Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 894 (1977).

285. *Jackson v. Bishop*, 404 F.2d 571, 580-81 (8th Cir. 1968).

286. 429 U.S. 97 (1976).



affliction of pain” necessary to support an Eighth Amendment claim.<sup>287</sup>

Two years after *Estelle* (and a year after *Milliken II*), the Court in *Hutto v. Finney*<sup>288</sup> cited the desegregation line of cases in approving a district court’s injunction under the Eighth Amendment limiting isolation confinements to a maximum of thirty days and imposing various other conditions to cure a host of problems.<sup>289</sup> Justices Rehnquist and White dissented on the ground that the thirty-day limit was “a prophylactic rule” that “in no way relates to any condition found offensive to the Constitution.”<sup>290</sup> However, the majority held that it was valid as a remedy for one of the “interdependen[t] . . . conditions producing the [constitutional] violation.”<sup>291</sup>

After *Hutto*, judicial intervention in prison systems became rampant:

As of January 1993, forty states plus the District of Columbia, Puerto Rico, and the Virgin Islands were under court order to reduce overcrowding and/or eliminate unconstitutional conditions of confinement. Twenty-five percent of all jails in the United States were under court order to reduce crowding in 1990, and thirty percent were under court order to improve conditions of confinement. In 1989, seven percent of the nation’s 422 facilities detaining ten percent of all incarcerated youngsters were operating under consent decrees.<sup>292</sup>

District court remedies became highly intrusive, including “specifying the exact amount of space that each prisoner must be given or capping prison population levels.”<sup>293</sup>

In response, the Supreme Court began to put on the brakes. “[T]he Court’s consistent message [was] to enlarge deference to prison administrator’s decisions, restrict the growth of existing inmate rights, and certainly reject virtually all claims to significant new rights . . . .”<sup>294</sup> For its part, in 1994, Congress stepped in with the Prison Litigation Reform Act (PLRA).<sup>295</sup> One of the many components of the PLRA imposed limitations

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287. *Id.* at 104 (citation omitted) (internal quotation marks omitted).

288. 437 U.S. 678 (1978).

289. *Id.* at 684–85.

290. *Id.* at 712 (Rehnquist, J., dissenting).

291. *Id.* at 688 (majority opinion). The Court also made the unusual holding that “the exercise of discretion in this case is entitled to special deference because of the trial judge’s years of experience with the problem at hand and his recognition of the limits on a federal court’s authority in a case of this kind.” *Id.*

292. Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 641–42 (1993) (footnotes omitted).

293. Bradley, *supra* note 283, at 708.

294. Fred Cohen, *The Limits of the Judicial Reform of Prisons: What Works; What Does Not*, 40 CRIM. L. BULL. 421, 441 (2004).

295. Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified at

on the ability of courts to provide remedies in prison litigation cases.<sup>296</sup> The essence of the restrictions is captured in the initial section, which provides:

The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.<sup>297</sup>

Various subsequent provisions impose controls on the use of preliminary injunctive relief,<sup>298</sup> prisoner release orders,<sup>299</sup> and special masters,<sup>300</sup> among other tools.

## 2. Brown v. Plata

Although these efforts by the Court and Congress may have blunted the evolution of prisoner reform litigation,<sup>301</sup> structural reform litigation certainly continued to occur.<sup>302</sup> One of these suits was *Plata*.<sup>303</sup> Just days after Judge Reinholdt issued the majority opinion in *VCS*, the Supreme Court affirmed his remedial order as part of the special panel in *Plata*. In

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11 U.S.C. § 523 (2006); 18 U.S.C. §§ 3624, 3626 (2006); 28 U.S.C. §§ 1346, 1915, 1915A (2006); 42 U.S.C. § 1997–1997(h) (2006)). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996. Pub. L. No. 104-134, 110 Stat. 1321. The PLRA was not the first time Congress reacted against rising use of equitable relief by federal courts against states. See PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 965–79 (2d ed. 1973) (discussing an early twentieth century statute requiring a three-judge district court in any case seeking to enjoin enforcement of a state statute); Yoo, *supra* note 225, at 1129 (discussing how the 1932 Norris-LaGuardia Act “prohibited the courts from issuing injunctions in labor disputes altogether”).

296. 18 U.S.C. § 3626. For a detailed discussion of many of the other provisions of the PLRA and their effects, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

297. 18 U.S.C. § 3626(a)(1)(A).

298. *Id.* § 3626(a)(2).

299. *Id.* § 3626(a)(3).

300. *Id.* § 3626(f).

301. See Jeffries & Rutherglen, *supra* note 222, at 1388 (discussing the recent legislative and judicial trend away from structural reform injunctions); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 554, 565 (2006).

302. See Schlanger, *supra* note 301, at 554–55 (arguing against “the conventional wisdom” that the era of structural reform litigation is over); Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 147 (2003) (asserting that structural reform litigation is “alive and well” based upon cited cases).

303. 131 S. Ct. 1910 (2011).

*Plata*, the Supreme Court considered the chronic dysfunction of the California prison system. It involved two consolidated cases, in which it was determined that the prison system was violating the Eighth Amendment by failing to provide minimally adequate mental and physical health services. The underlying case, *Coleman v. Wilson*,<sup>304</sup> was originally filed in 1990 and resulted in a special master being appointed in 1995 after a thirty-nine-day trial.<sup>305</sup> Six years later, after *Plata* was filed in 2001, the state conceded the violation and stipulated to a remedial injunction. Nonetheless, the state failed to comply with the injunction, and four years later, the district court appointed a receiver in 2005. After another three years of ongoing violations, in 2008, the plaintiffs in both cases moved to convene a three-judge district court to order reductions in the prison population pursuant to the PLRA. After taking extensive evidence and making extensive findings, in 2010, the panel ordered California to reduce its prison population from nearly 200% of the design capacity to 137.5% in four stages over two years.<sup>306</sup> The panel specifically ordered the state to prepare for prisoner releases in the likely event that new construction and out-of-state transfers would not remedy the problem.<sup>307</sup> Altogether, this remedy was ordered twenty years after the litigation was initiated.

The precise issue presented to the Supreme Court in *Plata* was whether the panel's order complied with the PLRA. The central issues in the PLRA analysis, however, were whether less intrusive remedies had been given adequate opportunities to work in the fifteen years since the remedial process had begun and whether any other remedy could succeed in curing the constitutional violation. Thus, the analysis required by the statute (and the Court's prior case law on narrowly tailored equitable remedies) thrust the Supreme Court squarely into the debate over the ability of district courts to manage large agencies whose dysfunctional operations cause constitutional violations.

To address this issue, the Court's opinion began by detailing the appalling conditions that had persisted in the California prison system for years.<sup>308</sup> The statistics cited were suitably shocking. "The State's prisons had operated at around 200% of design capacity for at least 11 years" to

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304. 912 F. Supp. 1282 (E.D. Cal. 1995).

305. *Plata*, 131 S. Ct. at 1926.

306. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2010 WL 99000, at \*3 (E.D. Cal. & N.D. Cal. Jan. 12, 2010).

307. *Id.* at \*4.

308. 131 S. Ct. at 1923–26 (explaining that (1) prisoners lived in extremely overcrowded conditions, (2) prisoners suffering from serious mental illnesses did not receive adequate care, and (3) prisoners suffering from physical illnesses received severely deficient care).

the severe detriment of the prisoners' health.<sup>309</sup> "California's prisons were designed to meet the medical needs of a population at 100% of design capacity and so have only half the clinical space needed to treat the current population."<sup>310</sup> Even worse,

[a]t the time of trial, vacancy rates for medical and mental health staff ranged as high as 20% for surgeons, 25% for physicians, 39% for nurse practitioners, and 54.1% for psychiatrists. [Moreover, t]hese percentages are based on the number of positions budgeted by the State . . . [which] understate the severity of the crisis because the State has not budgeted sufficient staff to meet demand.<sup>311</sup>

As a result of these shortages, "extreme departures from the standard of [medical] care were 'widespread.'"<sup>312</sup> In particular, the trial court found that it "is an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the [California prisons'] medical delivery system."<sup>313</sup> Some of the examples provided by the Court included:

A prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with "constant and extreme" chest pain died after an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a "failure of [doctors] to work up for cancer in a young man with 17 months of testicular pain."<sup>314</sup>

Perhaps more shocking than the conditions themselves was the fact that they worsened even as the litigation brought intense attention from the state. As of the Supreme Court's 2011 decision, the California prison system had been subject to a total sixteen years of judicial oversight<sup>315</sup> as

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309. *Id.* at 1923–24. The Court elaborated, "Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers." *Id.* at 1924. In case the statistics and descriptions were somehow insufficient to communicate the severity of the conditions, the Court took the highly unusual step of including an appendix of pictures so that readers would not need to use their imaginations to appreciate the extreme overcrowding. *Id.* at 1949–50.

310. *Id.* at 1925.

311. *Id.* at 1932 (citation omitted).

312. *Id.* at 1925 (quoting Dr. Ronald Shansky, former medical director of the Illinois state prison system). As a result of this lack of resources, "in one prison, up to 50 sick inmates may be held together in a 12- by 20-foot cage for up to five hours awaiting treatment." *Id.* "Wait times for mental health care range as high as 12 months." *Id.* at 1924. "Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets." *Id.*

313. *Id.* at 1927 (alteration in original).

314. *Id.* at 1925.

315. *Id.* at 1939.

well as a state of emergency declared in 2006 by the governor.<sup>316</sup> Far from being ignored, the woes of the California prison system were openly acknowledged by top prison officials<sup>317</sup> and had been studied by multiple independent commissions and outside experts, who unanimously concluded that the California prison system was unsafe for both inmates and staff.<sup>318</sup> Furthermore, “the *Coleman* Special Master had issued over 70 orders directed at achieving a remedy through construction, hiring, and procedural reforms.”<sup>319</sup>

Based upon the conditions and the impotence of California and the special master in remedying them, the Supreme Court held in *Plata* that if “government fails to fulfill [its] obligation [to provide adequate medical care to prisoners], the courts have a responsibility to remedy the resulting Eighth Amendment violation.”<sup>320</sup> Although acknowledging the need to be sensitive to state interests and “the need for deference to experienced and expert prison administrators,” the opinion held that “[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.”<sup>321</sup> In addressing the role of the courts, *Plata* stated: “Having engaged in remedial efforts for 5 years in *Plata* and 12 in *Coleman*, the District Courts were not required to wait to see whether their more recent efforts would yield equal disappointment.”<sup>322</sup>

Despite this initially broad characterization of judicial authority, the Court later tempered this language by suggesting,

When a court attempts to remedy an entrenched constitutional violation through reform of a complex institution, such as this statewide prison system, it may be necessary in the ordinary course to issue multiple orders directing and adjusting ongoing remedial efforts. Each new order must be given a reasonable time to succeed, but reasonableness must be assessed in light of the entire history of the court’s remedial efforts.<sup>323</sup>

Later, the opinion concluded with an admonishment that “[p]roper respect for the State and for its governmental processes require[s] that the three-

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316. Cal. Governor State of Emergency Proclamation No. 4278 (Oct. 4, 2006), *available at* <http://gov.ca.gov/news.php?id=4278>.

317. *Plata*, 131 S. Ct. at 1924 n.1 (citing the testimony of Matthew Cate, head of the California prison system, and Robin Dezember, chief deputy secretary of Correctional Healthcare Services).

318. *Id.* at 1924.

319. *Id.* at 1931.

320. *Id.* at 1928.

321. *Id.* at 1928–29.

322. *Id.* at 1931.

323. *Id.*

judge court exercise its jurisdiction to accord the State considerable latitude to find mechanisms and make plans to correct the violations in a prompt and effective way consistent with public safety.”<sup>324</sup>

The net result of *Plata* is mixed signals to lower courts. On the one hand, the Court appeared to reaffirm the power of district courts to take whatever measures are necessary to remedy a clear constitutional violation. On the other hand, the words of caution seem out of place in a case where the violations at issue are so egregious and longstanding. In some ways, *Plata* forces judges to face the question of how much failure is enough to provoke such sufficient despair that the full force of the Judiciary can finally be brought to bear on a problem. The answer, at least in *Plata*, was that sixteen years of failure and hundreds of dead prisoners was enough failure to raise the level of involvement even if the state was still to be offered “considerable latitude.”

Not only was *Plata* less than a complete green light, it was also a closely divided decision. It produced two dissents that reflect many of the concerns that have accumulated in the area. In his dissent on behalf of himself and Justice Thomas, Justice Scalia focused on the concern that the equitable relief provided in *Plata* “takes federal courts wildly beyond their institutional capacity.”<sup>325</sup> First, Scalia argued that judicial micromanagement of large institutions was inappropriate as a remedy for systemic issues when only some subset of the plaintiff class experienced an actual violation of their constitutional rights.<sup>326</sup> More importantly, in Scalia’s view, “structural injunctions are radically different from the injunctions traditionally issued by courts of equity,” which require only clear and simple acts to be performed.<sup>327</sup> He argued that by “turning judges into long-term administrators of complex social institutions,” structural reform remedies “require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials.”<sup>328</sup> This is problematic because it requires judges “to make very broad empirical predictions necessarily based in large part upon policy views—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.”<sup>329</sup>

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324. *Id.* at 1946.

325. *Id.* at 1951 (Scalia, J., dissenting).

326. *Id.* at 1951–53.

327. *Id.* at 1953. Scalia provided two examples of orders that would be valid in his view. A court could order that the temperature in a prison be raised if it was intolerably cold and could order exercise time be provided if prisoners were being denied such time. *Id.* at 1958.

328. *Id.* at 1953.

329. *Id.* at 1954. Later, Scalia reaffirmed that “the dressing-up of policy judgments as factual findings is not an error peculiar to this case. It is an unavoidable concomitant of

Writing for himself and Chief Justice Roberts, Justice Alito stated bluntly: “The Constitution does not give federal judges the authority to run state penal systems.”<sup>330</sup> However, his main concerns were somewhat different from those of Justice Scalia. First, Alito argued that the factual basis of the order was flawed because the panel did not account for rapidly changing conditions within the system.<sup>331</sup> Next, Alito argued that the panel order had not established that a prisoner release was the least-intrusive means necessary to remedy the constitutional violation.<sup>332</sup> Unlike Scalia’s focus on the limits of the judiciary, Alito’s focus was more centered on the traditional freedom of the states to balance public safety and financial concerns and “to make these decisions as they choose.”<sup>333</sup> In his view, the profound uncertainty surrounding the necessity and the consequences of the remedy ordered counseled for less deference to the trial court and greater judicial restraint.<sup>334</sup>

However the concerns are weighed or framed, there is no denying that structural reform remedies may put courts in very difficult positions where the legitimacy of their actions will be tested. Moreover, regardless of the outcome, *Plata* is a tragic example that judicial remedies for serious constitutional violations are not destined to succeed by virtue of good intentions alone.

#### D. Critiques of Structural Reform Litigation

*Plata* and the prison cases demonstrate the central theoretical concerns that have been raised about structural reform litigation. Part of the motivation for curbing structural reform litigation was majoritarian. During the heyday of such litigation, Owen Fiss theorized that “[t]he structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements. The injunction is the means by which these reconstructive directives are transmitted.”<sup>335</sup> However, this imperialist view was countered by Paul Mishkin’s concern that “the way to achieve desirable goals—and the only way to do so lastingly—is through the

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institutional-reform litigation.” *Id.* at 1955.

330. *Id.* at 1959 (Alito, J., dissenting).

331. *Id.* at 1960–62.

332. *Id.* at 1962–65.

333. *Id.* at 1959.

334. *Id.* at 1966.

335. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

democratic political process which must remain the core of our polity.”<sup>336</sup> More recently, scholars have accepted that this concern was a major factor in the decline of structural-reform litigation.<sup>337</sup> Even as the tide of such cases has receded, there have been complaints that judges “often ha[ve] shown minimal regard for the limits of the federal courts’ inherent powers.”<sup>338</sup>

Nevertheless, “[r]eceiverships allow administrative agencies to fail at politically unpopular tasks without serious consequences,” while politicians grandstand about overreaching.<sup>339</sup> Despite the desirability of political solutions, “[l]egislators’ desire to spend money on things that will get them re-elected may mean they disregard unpopular constitutional obligations.”<sup>340</sup> Accordingly, the debate about such litigation has much of the same ideal vs. real-world dynamic that has animated the agency-control debates in administrative law,<sup>341</sup> and serious cases have been made both for and against active judicial involvement through such litigation.<sup>342</sup>

Beyond core constitutional concerns, a number of practical issues have also been raised. First, there is a concern that structural reform is controlled less by the judge in a case than by the plaintiffs, who often have

336. Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 976 (1978).

337. Gilles, *supra* note 302, at 161 (“[T]he structural reform injunction has disappeared from the contemporary sociolegal landscape because of the essentially political fear of judicial activism.”).

338. Yoo, *supra* note 225, at 1122.

339. Bradley, *supra* note 283, at 705; *see also* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 37 (1993) (“Elected officials in the United States encourage or tacitly support judicial policymaking both as a means of avoiding political responsibility for making tough decisions and as a means of pursuing controversial policy goals that they cannot publicly advance through open legislative and electoral politics.”); Sabel & Simon, *supra* note 273, at 1093 (noting that pervasive judicial interventions “give political cover” to those officials who should be taking responsibility for solving problems).

340. Bradley, *supra* note 283, at 724.

341. *See supra* note 209 and accompanying text.

342. *Compare* MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *supra* note 335; Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999); and Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1406 (1991), *with* DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); SANDLER & SCHOENBROD, *supra* note 9; William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); and Yoo, *supra* note 225.



an agenda beyond simply remedying the constitutional violation at issue.<sup>343</sup> A related concern is that agencies try to exploit litigation for their own ends.<sup>344</sup> As one prison official was quoted as saying, “We ‘cussed’ the federal courts all the way to the bank.”<sup>345</sup> Indeed, plaintiffs and agencies sometimes are aligned in using structural litigation reform in a joint battle with the legislature for more resources.<sup>346</sup> Furthermore, in large agencies such litigation often hurts beneficiaries that are excluded from the class that is the subject of the litigation.<sup>347</sup> Aside from these strategic concerns is the problem that receiverships do not produce precedent and, therefore, fail to set standards even when successful.<sup>348</sup>

Ultimately, the most important critique may be that “the Supreme Court has provided little guidance to the lower courts to figure out how to think about the scope of the violation [in a structural reform litigation case] and how to match that to a remedy.”<sup>349</sup> Rather, the Court tends to assert that “[t]here is no universal answer to complex problems . . . [and] there is obviously no one plan that will do the job in every case.”<sup>350</sup> The Court’s overarching standard is that the scope of the violation determines the scope of the remedy, which should be narrowly tailored.<sup>351</sup> The Court’s caution in defining this standard, however, has resulted in a lack of guidance that can be usefully applied to difficult questions within a novel case.

The combination of the lack of precedent and the lack of guidance has

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343. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 647 (noting that procedural redesign has allowed for little judicial scrutiny of lawyers’ procedural choices and, therefore, control of litigation has moved from appellate courts to trial courts and from trial courts to lawyers).

344. See Horowitz, *supra* note 282, at 1294–95 (“Nominal defendants are sometimes happy to be sued and happier still to lose.”).

345. Schlanger, *supra* note 301, at 563.

346. See Horowitz, *supra* note 282, at 1294 (“This is one reason why so many consent decrees are entered in institutional reform cases”).

347. See, e.g., SANDLER & SCHOENBROD, *supra* note 9, at 91 (noting that one critic of special education litigation affecting the New York City school system quipped, “Kids who don’t have court orders in their hands are dead meat.”). Sandler and Schoenbrod also quote one education expert who described the situation as, “What you had was a road that was falling apart, and right alongside, they were building a superhighway called special education, which provided no end of money.” *Id.*

348. Bradley, *supra* note 283, at 738–42.

349. Susan Poser, *What’s a Judge to Do? Remediating the Remedy in Institutional Reform Litigation*, 102 MICH. L. REV. 1307, 1321 (2004) (reviewing ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003)).

350. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439 (1968).

351. See Robert E. Buckholz, Jr. et al., Special Project, *Appellate Review of Trial Court Remedies, The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 854 (1978).

made it difficult for the structural litigation playbook to evolve to meet modern challenges. This has been compounded by a misperception in the academy that “judicially mandated structural reform injunctions appear to be vestiges of a bygone era.”<sup>352</sup> The unfortunate result is that the important conversation about how to think about equitable relief in new contexts has not yet taken place.

## V. THE FUTURE OF JUDICIAL REMEDIES FOR DELAYS IN ADJUDICATION OF FEDERAL CLAIMS

As courts embark on the difficult new task of managing structural reform litigation in cases like *VCS*, the failures of *Plata* make it reasonable to question whether the traditional playbook is likely to work. This Part argues that there are good reasons to believe that the traditional script—in which the courts dictate detailed changes and programs that must be adopted—is unlikely to work in reforming large federal benefits agencies, and suggests an alternative approach. The first section revisits *VCS* to examine the problems remanded to the district court. The next section argues that the differences between the desegregation cases and modern structural reform litigation indicate that the premises of the playbook do not apply to many modern situations, including the reform of federal benefits agencies. Finally, a revision to the playbook is recommended that is both more likely to be effective in cases like *VCS* and also better at addressing all the constitutional sensitivities involved.

### A. Veterans for Common Sense *Revisited*

*VCS* provides a concrete example for contemplating the problem of reforming federal benefits agencies. Before turning to the remedy, however, it is useful to examine another aspect of the opinion. Despite the separation of powers sensitivities at issue, the majority opinion could hardly be more condemning of the other branches. In the introduction, the opinion declares that “VA’s unchecked incompetence has gone on long enough.”<sup>353</sup> The court spread the blame even further by stating, “We would have preferred Congress or the President to have remedied the VA’s egregious problems,” but concluding that “those government institutions are [un]willing to do their job.”<sup>354</sup> Based upon the Supreme Court’s case law, it is reasonable to believe that the majority felt compelled to be

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352. Gilles, *supra* note 302, at 144.

353. *VCS*, 644 F.3d 845, 851 (9th Cir. 2011), *reh’g en banc granted*, 663 F.3d 1033 (9th Cir. 2011).

354. *Id.* at 850–51.

hypercritical of the other branches to justify the intervention it was ordering. By firing both barrels at VA and Congress, however, it risked poisoning a relationship that is already going to be strained by the uncomfortable measures likely to be necessary to remedy the problems plaguing VA.<sup>355</sup>

Nonetheless, the problems must be solved. The first step is identifying exactly what must be done so that appropriate targets and timelines can be crafted. Beginning with VHA, to remedy the delays in mental health evaluations and services, the plaintiffs sought: (1) procedures for appealing a decision to wait-list a claimant seeking mental health care, (2) more transparent clinical appeals procedures, and (3) expedited access to care for veterans with acute PTSD.<sup>356</sup> The Ninth Circuit remanded the matter for the district court to fashion a remedy that would address “existing due process violations in three core areas”:

- (1) individuals placed on VHA waiting lists for mental health care [should] have the opportunity to appeal the decision in a timely manner and to explain their need for earlier treatment to a qualified individual;
- (2) individuals determined to be in need of mental health care [should] receive that treatment in a timely manner; and
- (3) individuals with urgent mental health problems, particularly those at imminent risk of suicide, [should] receive immediate mental health care.<sup>357</sup>

Essentially, each of these concerns can be remedied by having more mental health professionals available to perform these tasks. Given that the evidence showed VHA had been authorized to hire hundreds of additional professionals,<sup>358</sup> there is real hope that VHA can resolve these issues without substantial court involvement. However, if these additional

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355. The criticism also failed to acknowledge: (1) the substantial increase in funding that has been provided to VA in recent budgets, *compare* U.S. DEP'T OF VETERANS AFFAIRS, FY 2012 BUDGET SUBMISSION, VOL. I, at 1A-1 (2011), [http://www.va.gov/budget/docs/summary/Fy2012\\_Volume\\_I-Summary\\_Volume.pdf](http://www.va.gov/budget/docs/summary/Fy2012_Volume_I-Summary_Volume.pdf) (requesting \$132.2 billion), *with* U.S. DEP'T OF VETERANS AFFAIRS, FY2008 BUDGET SUBMISSION, Vol. IV, at 1-3 (2007), [http://www.va.gov/budget/docs/summary/archive/FY-2008\\_VA-BudgetSubmission.zip](http://www.va.gov/budget/docs/summary/archive/FY-2008_VA-BudgetSubmission.zip) (requesting approximately \$86.7 billion); (2) the numerous congressional hearings addressing VA's problems with claims processing, *see Senate Hearing Transcripts*, VETERANS L. LIB., [http://www.veteranslawlibrary.com/Senate\\_Hearings.html](http://www.veteranslawlibrary.com/Senate_Hearings.html) (last visited Feb. 1, 2012); *House Hearing Transcripts*, VETERANS L. LIB., [http://www.veteranslawlibrary.com/House\\_Hearings.html](http://www.veteranslawlibrary.com/House_Hearings.html) (last visited Feb. 1, 2012) (both listing dozens of relevant oversight hearings from 2005 to present); or (3) Congress's attempts to improve the system through the Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-38, 122 Stat. 4145 (2008).

356. *VCS*, 644 F.3d at 850.

357. *Id.* at 878.

358. *See supra* note 63 and accompanying text.

resources were insufficient to generate the necessary improvement,<sup>359</sup> then the court would have to decide what further action to take.

As to VBA, the benefits system is failing to process appeals. How this is remedied depends on how narrowly the specific violation is interpreted. In its discussion, the Ninth Circuit focused on “the 573-day average delay for a Regional Officer to certify an appeal to the BVA,” an action that the court characterized as ministerial.<sup>360</sup> Accordingly, such a discrete problem would seem easily amenable to a timeline-based remedy backed up by brute-force orders to increase the manpower assigned to the problem.

However, the opinion concluded that “delays in the VA’s claims appeals process amount to deprivation of property without due process.”<sup>361</sup> The district court could reasonably interpret the Ninth Circuit’s opinion to require a reduction in the ultimate amount of time that it takes to produce a final BVA opinion. This is a much more problematic issue. There is no reason to believe that suddenly transferring 100,000 or more appeals to the BVA would do much to speed up the process.<sup>362</sup> Each BVA member is

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359. Early indicators are not promising. In September 2011, VA reported to the Senate Veterans Affairs Committee the results of a survey of VA mental health professionals commissioned in response to a July 2011 hearing. Approximately 70% of mental health care providers responded that the facility they worked at did not have adequate staffing and a similar proportion reported shortages in space. VETERANS HEALTH ADMIN., A QUERY OF VA MENTAL HEALTH PROFESSIONALS: EXECUTIVE SUMMARY AND PRELIMINARY ANALYSIS 2–3 (2011), available at <http://graphics8.nytimes.com/packages/pdf/opinion/editorial/VAMentalHealth.pdf>; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-12, VA MENTAL HEALTH: NUMBER OF VETERANS RECEIVING CARE, BARRIERS FACED, AND EFFORTS TO INCREASE ACCESS (2011).

360. *VCS*, 644 F.3d at 885. The Ninth Circuit’s opinion here curiously fails to discuss a key aspect of the relevant procedure. In 2003, the Federal Circuit invalidated the BVA’s program to develop the evidence necessary to bring finality to the claims before it and held that the BVA lacks statutory authority to consider new evidence in the first instance. See *Disabled Am. Veterans v. Sec’y of Veterans Affairs*, 327 F.3d 1339, 1346–48 (Fed. Cir. 2003). As a result, if a claimant were to *submit* new evidence after initiating an appeal, the regional office would have to issue a new decision addressing that evidence before the BVA could consider it. In many situations, the new evidence will require additional development, such as seeking additional medical or service records, or obtaining a new medical opinion addressing the new information. These procedures play a substantial part in the fact that more than half of all appeals initiated by claimants are not ultimately pursued all the way to a BVA decision. See Ridgway, *Why So Many Remands?*, *supra* note 60, at 148–49. Accordingly, the opinion’s description of certifying an appeal to the BVA as “a merely ministerial act” is an oversimplification. See *VCS*, 644 F.3d at 859.

361. *VCS*, 644 F.3d at 885.

362. It may well be harmful to many claimants. Most veterans claim numerous disabling conditions and often have multiple claims in different stages of the process. See Ridgway, *Why So Many Remands?*, *supra* note 60, at 145–47. Claims files are “historically maintained by [VA] in a single and unmanageable file containing information concerning every claim ever made by the claimant.” Kenneth M. Carpenter, *Why Paternalism in Review of*

already deciding nearly 700 appeals annually,<sup>363</sup> and these numbers wildly understate the actual number of claims being decided because decisions typically address more than a single claim and often address several.<sup>364</sup> It is highly probable that remedying the certification issue emphasized by the Ninth Circuit would merely shift the location of the backlog to a place where it will be much harder to reduce.

Deciding veterans benefits appeals faster is also a complex problem because such claims can be incredibly complicated. Unlike a Social Security disability claim, which focuses on the single question of whether the claimant is currently able to work,<sup>365</sup> a successful veterans benefits claim requires a determination that the veteran has a current disability, that there was an injury or disease in service, and that the current disability is

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*the Denial of Veterans Benefits Claims Is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL'Y 285, 294 (2004); see also VETERANS BENEFITS MANUAL § 16.1.2, at 1282 (Barton F. Stichman & Ronald B. Abrams eds., 2010 ed.) (describing the typical veteran's claims file as a "puzzle box"). If every claims file that has a claim ready for an appellate decision were transferred to the BVA in Washington, D.C., they could easily languish there and impede regional office efforts to process other pending claims. VA's troubled efforts to modernize its information technology and record-keeping systems are well documented. See PARALYZED VETERANS OF AM. ET AL., THE INDEPENDENT BUDGET FOR THE DEPARTMENT OF VETERANS AFFAIRS FISCAL YEAR 2012, at 35–37 (2011) [hereinafter FY2012 PVA BUDGET], [http://www.independentbudget.org/2012/IB\\_FY2012.pdf](http://www.independentbudget.org/2012/IB_FY2012.pdf) (discussing VA's ongoing efforts to develop a paperless claims process); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-663T, INFORMATION TECHNOLOGY: DEPARTMENT OF VETERANS AFFAIRS FACES ONGOING MANAGEMENT CHALLENGES (2011); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-265, ELECTRONIC HEALTH RECORDS: DOD AND VA SHOULD REMOVE BARRIERS AND IMPROVE EFFORTS TO MEET THEIR COMMON SYSTEM NEEDS (2011); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-115, INFORMATION TECHNOLOGY: VETERANS AFFAIRS CAN FURTHER IMPROVE ITS DEVELOPMENT PROCESS FOR ITS NEW EDUCATION BENEFITS SYSTEM (2010); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-579, INFORMATION TECHNOLOGY: MANAGEMENT IMPROVEMENTS ARE ESSENTIAL TO VA'S SECOND EFFORT TO REPLACE ITS OUTPATIENT SCHEDULING SYSTEM (2010); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-727T, INFORMATION SECURITY: VETERANS AFFAIRS NEEDS TO RESOLVE LONG-STANDING WEAKNESSES (2010).

363. See 2010 CHAIRMAN REPORT, *supra* note 77, at 3, 19 (stating that the BVA issued 49,127 decisions with sixty members and the equivalent of twelve acting members, which averages to 682 decisions per member).

364. See Ridgway, *Why So Many Remands?*, *supra* note 60, at 145–47 (discussing how VA's bookkeeping system dramatically understates its true workload).

365. See 42 U.S.C. § 416(i) (2006) (defining *disability* for purposes of the Social Security Administration). This is certainly not to say that Social Security disability claims do not have a noticeable amount of complexity. See, e.g., Jon C. Dubin, *Overcoming Gridlock: Campbell After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs*, 62 ADMIN. L. REV. 937 (2010).

medically related to the in-service event.<sup>366</sup> Moreover, there are numerous theories that may be used to show the medical relationship.<sup>367</sup> If a claim is granted, then the disability must be rated on a scale of 0% to 100% disabling, using a regulatory chapter of hundreds of diagnostic codes.<sup>368</sup> Finally, an effective date must be assigned, which often requires reviewing an enormous volume of unorganized pro se correspondence to determine when the veteran first informally claimed the specific benefit at issue.<sup>369</sup>

Not only is the substance complex, but the BVA must also comply with demanding procedural requirements enacted to make the process veteran-friendly. The BVA member is obligated to address not only every argument raised by the claimant, but also every issue reasonably raised by the claims file.<sup>370</sup> The decision produced must contain an adequate statement of “reasons or bases,” which the U.S. Court of Appeals for Veterans Claims has interpreted to be a very demanding requirement.<sup>371</sup>

Any remedy would be further complicated by the fact that increasing the number of cases decided by increasing the number of BVA members is not a straightforward matter. Members of the BVA must be appointed by the Secretary of Veterans Affairs and approved by the President.<sup>372</sup> The chairman of the BVA can designate individuals to serve as acting BVA members, but the BVA’s statute requires that the total membership of the BVA must always be at least 80% properly appointed members and limits individuals to a maximum of 90 days of such service at a time and a maximum of 270 days per year.<sup>373</sup>

Accordingly, there does not appear to be an easy, pain-free solution to the backlog of appeals awaiting decision.<sup>374</sup> Perhaps there are gains to be

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366. See James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 407–08 (2009).

367. See *id.* (discussing the various theories for finding a nexus between a disability and an in-service event).

368. See *id.*; see also 38 C.F.R. pt. 4 (2010).

369. See Ridgway, *VJRA Twenty Years Later*, *supra* note 24, at 283–86.

370. *Robinson v. Mansfield*, 21 Vet. App. 545, 552–54 (2008), *aff’d sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). See generally Ridgway, *Why So Many Remands?*, *supra* note 60, at 136–38 (comparing the Court of Appeals for Veterans Claims’ review under this standard with traditional appellate review); Ridgway, *VJRA Twenty Years Later*, *supra* note 24, at 273–75 (explaining the historical reasons behind the development of this standard).

371. Ridgway, *Why So Many Remands?*, *supra* note 60, at 136–38.

372. 38 U.S.C. § 7101A(a)(1) (2006).

373. *Id.* § 7101(c)(1)(A), (C)–(D). The BVA fully utilized this authority in fiscal year 2010. See 2010 CHAIRMAN REPORT, *supra* note 77, at 19 (noting that acting members contributed the equivalent of 12.2 full-time members).

374. See, e.g., Victoria Hadfield Moshiaswili & Aaron Hadfield Moshiaswili, *Rearranging Deck Chairs on the Titanic: Lessons from the History of VA’s Growing Disability Claims Backlog* (Oct. 31, 2011) (unpublished article), available at

made through management innovations, but there is little evidence to support this. Assuming such gains are possible, it is not clear why the court would be in a better position than VA to find them, especially given that Congress has already been investigating the problem with little apparent result.<sup>375</sup> It is quite possible that real progress can only be achieved with a substantial increase in the amount of resources devoted to deciding appeals.<sup>376</sup> Of course, procedural changes and increased resources are not mutually exclusive. However, even the question of how much of the remedy should involve procedural changes versus increased resources does not have a clear answer or even a clear path to finding an objectively reasonable answer.

Nonetheless, the traditional structural reform litigation playbook directs the district court to wade deeply into the operations of VA in an attempt to resolve these issues. The judge (or a proxy) is expected to become intimately familiar with all the moving parts involved in the relevant agency operations, to tinker with a wide variety of initiatives for years, and to be patient with the agency while it requests additional resources. Only after many years—if not a decade or more—of failure should the court begin taking steps that might be considered draconian. Even then, if the court were to choose to place significant portions of VA under the control of a receiver, it is not at all clear how that would result in improved operations if the years of prior efforts had not been successful.

This bleak picture is not a foregone conclusion, however, and whether the remedial efforts in *VCS* turn out like the intervention in *Plata* remains to be seen, but there is certainly reason to be concerned. A central feature of the remedial effort in *Plata* was that the “stipulated relief in *Plata* contain[ed] virtually no substantive commands.”<sup>377</sup> Instead, the court

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<http://ssrn.com/abstract=1952070> (arguing that VA’s claims processing system is in need of major structural change).

375. See, e.g., *Review of Veterans’ Disability Compensation: What Changes Are Needed to Improve the Appeals Process?*; *Hearing Before the S. Comm. on Veterans’ Affairs*, 111th Cong. (2009); *Board of Veterans’ Appeals Adjudication Process and the Appeals Management Center: Hearing Before the Subcomm. on Disability Assistance and Mem’l Affairs of the H. Comm. on Veterans’ Affairs*, 110th Cong. (2007); *Battling the Backlog: Challenges Facing the VA Claims Adjudication and Appeal Process: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. (2005); *The Board of Veterans’ Appeals and Appeals Management Center: Hearing Before the H. Comm. on Veterans’ Affairs*, 109th Cong. (2005).

376. The leading consortium of veterans groups has noted that BVA’s budget has not increased proportionally to its workload in recent years and has recommended a significant increase in resources for it. See PVA FY2012 BUDGET, *supra* note 361, at 41–43 (“Funding for the Board of Veterans’ Appeals must rise at a rate commensurate with its increasing workload so it is properly staffed to decide veterans’ cases in an accurate and timely manner.”).

377. Sabel & Simon, *supra* note 273, at 1039.

engaged in the collaborative tinkering approach, which has become the new standard, while conditions continued to deteriorate. The unfortunate history of that case thus begs the question of whether there might be a better approach.

*B. Reexamining the Origins of the Structural Reform Litigation Playbook*

Fortunately, there are good reasons to think that there is indeed a better path. The current playbook developed during a different era, and there is little reason to believe that the underlying causes of current problems will be adequately addressed by a remedy approach largely developed to handle different issues.

As discussed above, modern structural reform litigation was developed to remedy desegregation, but it has since spread beyond those confines. The essential problem in the desegregation cases was a lack of willpower. The steps needed to end discrimination were not obscure, but required judicial intervention to be realized. The early prison cases were similar. For example, there was an explicit finding of bad faith on the part of the prison officials in *Hutto* that was not challenged.<sup>378</sup> Moreover, ending the worst abuses, such as floggings, inadequate nutrition, and excessive use of solitary confinement, merely required a direct order to that effect. Even the earliest cases, in which courts took action to increase funding, involved little debate about the appropriateness of the steps that needed to be funded. In contrast, in modern structural reform cases, “it is remarkable how rarely the practices that the plaintiffs attack seem to have been the result of an exercise of authority by anyone,” and agency officials frequently welcome judicial intervention in solving intractable problems.<sup>379</sup>

Furthermore, federalism—rather than separation of powers—tended to be the dominant concern in the early structural reform cases.<sup>380</sup> Federalism was a relatively easy issue to dismiss due to the ultimate supremacy of the

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378. *Hutto v. Finney*, 437 U.S. 678, 689 (1978).

379. Sabel & Simon, *supra* note 273, at 1092.

380. *But see Jenkins II*, 515 U.S. 70, 132–33 (1995) (Thomas, J., concurring) (“There is no difference between courts running school systems or prisons and courts running Executive Branch agencies.”); Yoo, *supra* note 225, at 1123–24 (arguing that structural reform litigation remedies are illegitimate because “separation of powers principles require that the answer come from the political branches”). However, separation of powers is an issue that has troubled state courts handling structural reform litigation initiated under state constitutional provisions. *See, e.g.*, Dana E. Prescott, *Consent Decrees, the Enlightenment, and the “Modern” Social Contract: A Case Study from Bates, Olmstead, and Maine’s Separation of Powers Doctrine*, 59 ME. L. REV. 75 (2007) (discussing how the Maine courts wrestled with the issue in reforming a major state mental hospital).



Constitution.<sup>381</sup> However, courts simply cannot fall back on supremacy to issue orders to Congress that might be acceptable if they were dealing with a state legislature or local government.

In short, the original playbook, based upon detailed managerial orders, made sense when effective solutions to the problems were obvious or could be reasonably ascertained by the court or a special master with a modest amount of effort.<sup>382</sup> In such situations, detailed orders and receiverships were good tools because they allowed the court to exercise the will that the agency or funding authority lacked. Exercising this will was not problematic when the institutions involved were state or local and the ultimate authority of the courts rested on the supremacy clause.

Structural litigation reform became more troubling as the specific actions ordered by the courts became less certain to remedy the constitutional violation at issue. Creating inner-city magnet schools and mandating square footage requirements, while beneficial to the students and prisoners affected, were not *clearly* necessary to vindicate their constitutional rights. It was entirely possible these changes would not alter the key facts supporting the findings of a constitutional violation. It was this uncertainty that made the actions of the courts questionable, rather than the specific actions required by the order. As a result, the Supreme Court's evolving application of the basic equitable relief test became ever more slanted toward placing the burden on the court to demonstrate that the relief ordered was necessary to achieve a clearly valid goal.

As demonstrated by *Plata*, this playbook has struggled in cases in which effective solutions are difficult to determine *ex ante* even when the underlying violations are clear and egregious. When there is great uncertainty as to what management changes are needed or whether management is even the issue, it has a number of pernicious effects. First, the remedies chosen by the court are less likely to work simply because there is no compelling reason why the court's management will be more effective in a complex and uncertain environment. This will both prolong the court's involvement and breed resentment. Second, this experiment with court management may delay meaningful involvement by the political branches and allow them to avoid responsibility for their contributions to

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381. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 63 (1978) (“[T]he states are bound by federal law, including the Bill of Rights, and the ultimate power to determine the consistency of the state laws with these superior federal norms is allocated to a federal court, the Supreme Court of the United States.”).

382. See JENNIFER L. HOCHSCHILD, *THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION* 95–145 (1984) (arguing that school desegregation has succeeded when courts swiftly mandated specific changes and has foundered when cases have become bogged down in stakeholder participation problems).

the problems while they criticize the courts. Third, the court will often feel compelled to adopt suggestions from the parties, either individually or jointly, due to the limits on its own institutional competence. At the very least, this gives the appearance that the litigation has been captured, which can undermine its legitimacy and lead to further resistance from the political branches. The net result is outcomes like *Plata*, in which severe constitutional problems persist and grow worse year after year before courts finally force the political branches to confront the problems that they should have remedied themselves.

### C. *An Alternative Strategy for Structural Reform Remedies*

#### 1. *Defining a Timeline-Based Approach*

The sad saga of *Plata* begs the question of whether the playbook should be updated to handle emerging problems, such as the delay and dysfunction reaching epidemic proportions among federal benefits agencies. An alternative is suggested by *Plata*'s silver lining. The Supreme Court's opinion noted that measurable progress toward reducing overcrowding in California's prisons was already being made in the months between the panel's remedy order and the Supreme Court's decision affirming the order.<sup>383</sup> Although the conditional mass-release order is obviously undesirable, that blunt remedy does have the virtue of having produced progress on the overcrowding issue. More importantly, it is progress directed by the political branches, which should be the ones ultimately responsible for making the difficult policy choices that come with running a massive prison system in a constitutionally appropriate manner.

Similar blunt remedies would likely succeed in provoking political action in other contexts as well. The essence of the strategy is to identify the most direct route to satisfying the requirements of the Constitution regardless of the collateral consequences, and order the agency to take that route if it cannot make satisfactory progress by other means. This means avoiding attempts by the court to dictate management changes and either transferring resources from elsewhere within the agency to the problem area or reducing the agency's need for resources by lowering its overall level of activity.<sup>384</sup> Such orders will create a sense of urgency that may lead

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383. See *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (noting that "the State has reduced the population by at least 9,000 persons during the pendency of this appeal").

384. In the context of agency refusal to engage in rulemaking, Eric Biber has made a similar argument that judicial deference to agency resource allocation decisions does not require courts to stand by when agencies disobey a clear command by Congress to the agency to take action. See generally Eric Biber, *The Importance of Resource Allocation in*

to internal or political solutions, but will remedy the violation within a reasonable time nonetheless. This differs from the current “experimentalist” approach, which backs up such timelines with punitive sanctions designed to induce compliance with detailed management orders.<sup>385</sup> It creates many of the same incentives, but instead of establishing a default penalty,<sup>386</sup> which may not result in progress toward an ultimate solution, it establishes a default *remedy* that will result in progress even if it is not the most desirable solution to the problem.

The essential difference is that, instead of searching for a way to change the system to improve efficiency, the court takes the challenged system as it is (which the agency may be changing on its own) and focuses on moving resources to address its problems until it can perform its mission adequately. The premise of this remedy is that even a highly inefficient system can perform its mission given enough resources. It is not the responsibility of the court to decide whether the system could be more efficient but simply to ensure performance. The role of finding greater efficiencies belongs to the agency leadership and the political branches. If they can succeed in finding solutions within the stated timelines, then they can avoid having the court squeeze discretionary functions to improve those functions that are constitutionally required. If they cannot, then the judicial remedy will ensure the constitutional violation was cured nonetheless.

To see how this would work in practice, we can turn to yet another federal bureaucracy that has struggled in recent years. The Intelligence Reform and Terrorism Prevention Act of 2004<sup>387</sup> increased international travel security requirements by requiring American citizens to have passports for many types of international travel that were previously exempt from that requirement.<sup>388</sup> As a result of the new requirements, by early summer 2007, the Department of State was facing a backlog of two to three million applications, with long delays threatening the travel plans of even those who had applied several months in advance.<sup>389</sup> In response to congressional concerns, the Department of State undertook a massive program of redirecting available resources to solve the problem:

State instituted mandatory overtime for all government and contract staff

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*Administrative Law*, 60 ADMIN. L. REV. 1 (2008) (urging this interpretation of the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

385. See Sabel & Simon, *supra* note 273, at 1067.

386. *Id.*

387. Pub. L. No. 108-458, 118 Stat. 3638 (2004).

388. 8 U.S.C. § 1185(b) (2006).

389. See *Passport Delays: Affecting Security and Disrupting Free Travel and Trade: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. 4 (2007) (statement of Rep. Ros-Lehtinen).

and suspended all noncritical training and travel for passport staff during the surge. State hired additional contract staff for its passport agencies to perform nonadjudication functions. State also issued a directive that contractor staff be used as acceptance agents to free up passport specialist staff to adjudicate passport applications, and called upon department employees—including Foreign Service officers, Presidential Management Fellows, retirees, and others—to supplement the department’s corps of passport specialists by adjudicating passports in Washington and at passport agencies around the United States. State also obtained an exemption from the Office of Personnel Management to the hiring cap for civil service annuitants, so that it could rehire experienced and well-trained retired adjudicators while it continued to recruit and train new passport specialists. In addition, the department dispatched teams of passport specialists to high-volume passport agencies to assist with walk-in applicants and process pending passport applications. These teams also provided customer support, including locating and expediting applications of customers with urgent travel needs. Finally, consular officers at nine overseas posts also remotely adjudicated passports, using electronic files.<sup>390</sup>

This aggressive program worked, and by October 2007 the immediate crisis had passed, even though the agency was still in need of a long-term strategy.<sup>391</sup> Although this remedy was not the result of a judicial order, it serves as a clear example of how a court could structure a blunt remedy to produce results under an existing system, while the agency and political branches take responsibility for any potential reinvention of the process.

One of the virtues of this remedy is that it appeals to the concern about judicial competence expressed by Justice Scalia in *Plata* and others.<sup>392</sup> The orders involved would be simple and outcome-oriented. As a result, they would be more consistent with traditional equitable orders and avoid decisions not well suited to the judicial role. In doing so, the court would be focusing the exercise of its authority on actions in which the judicial role is most effective and legitimate.<sup>393</sup>

This type of remedy also reduces the problem of strategic capture of the litigation by the parties. If the court were to focus its inquiry on the precise

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390. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-891, STATE DEPARTMENT: COMPREHENSIVE STRATEGY NEEDED TO IMPROVE PASSPORT OPERATIONS 25–26 (2008) (footnotes omitted), <http://www.gao.gov/new.items/d08891.pdf>.

391. *Id.* at 3–4.

392. See Yoo, *supra* note 225, at 1137–38 (arguing that “courts are structurally worse off than other arms of government at developing an intellectually coherent solution to social problems,” and citing empirical studies in support).

393. See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003) (arguing that courts succeed in adapting to complex new litigation problems in “public law” actions when they focus on their traditional role and tools rather than straying into areas beyond their institutional competence).

goals necessary to remedy the constitutional violation, then litigants would be constrained from seeking judicial endorsement of questionable orders that may shape agency behavior to the litigants' liking while purporting to improve management. Agencies may well use such orders to extract more resources from a reluctant legislature, but there will be less danger that those resources will be utilized for purposes other than remedying the problem at issue.

These types of remedies are also beneficial to the development of constitutional law itself. By focusing on what goals must be achieved to no longer be in violation of the Constitution rather than exactly how any given agency should operate, the resulting case law will ultimately provide more *ex ante* guidance as to the Constitution's requirements. This focus will remove uncertainty from litigation and help prevent violations from occurring in the first place.<sup>394</sup>

There is still room for tailoring and moderation when applying a blunt remedy. Judicial judgment will certainly need to be exercised in determining the overall pace of the progress required to avoid the default remedy and how rapidly the blunt remedy will be implemented as deadlines pass without sufficient progress. Depending upon the court's evaluation of the severity of the problem and the apparent likelihood of progress without intervention, the court may wish to make the schedule more or less aggressive. Regardless of how high the Sword of Damocles is hung and how thin the rope, however, it is important that, absent extraordinary circumstances, courts follow through with the blunt remedies when timelines are missed. Such remedies can only motivate action by the agency and the political branches if they are taken seriously.<sup>395</sup>

## 2. *A Three-Part Balancing Test for Equitable Remedies in Structural Reform Cases*

Although such blunt remedies may score high on effectiveness, that factor alone cannot justify them, as it must be balanced against other concerns. Identifying those concerns is not straightforward, however, because the Supreme Court has not provided clear guidance on how to gauge the appropriateness of a remedy in structural reform litigation.

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394. Arguably, there is some benefit from the uncertainty because clarity may encourage agencies to operate just above the threshold of unconstitutionality.

395. In essence, the court is engaged in a game of "chicken," and its best strategy to minimize the chance of having to impose an undesirable remedy, therefore, is to convince the agency and the political branches to act first through a credible threat to follow through with the undesirable remedy if they do not do so. See, e.g., David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331, 368-72 (2001) (describing the "chicken" game and the theoretical work done exploring the potential strategies involved).

However, to balance the concerns that are repeatedly raised in the case law discussed above, the appropriateness of a remedy should be regarded as a three-factor test.

First, how likely is it that the ordered remedy will cure the constitutional violation? The more certain a remedy is to work, the more appropriate it is. This explains why the desegregation cases are the source of the most expansive examples of equitable remedies imposed by the courts. Although the Supreme Court was always careful to state that the Constitution does not require specific mathematical ratios, the statistics demonstrating segregation and the effect of blunt remedies, such as busing, were easy to grasp. In comparison, the potential solutions to the Eighth Amendment cases became much fuzzier, much faster. *Cruel* and *unusual* are subjective terms, which led to confusion in many cases as to the precise nature of the violation and the effectiveness of the remedies involved.

Second, how much does the remedy move beyond the traditional role of the courts to intrude into the spheres of the other branches? The greater the structural constitutional concerns raised, the greater the justification required to support it. The concern for unnecessary usurpation of democratic processes—touched upon by Alito’s dissent in *Plata*—has been the central force opposing expansive equitable remedies, and there is no doubt that this factor must be weighed in each case.

Finally, how strong are the incentives of the agency and the political branches to avoid remedying the problem? In other words, both the Court’s case law and constitutional values suggest that we should not focus on absolute limits in structural litigation reform but rather gauge remedies based upon the relative competencies, responsibilities, and incentives of the involved parties. This factor is not clearly expressed in the case law but is necessary to tailor courts’ equitable powers correctly. Without it, there is an incorrect tendency to think of the line limiting the power of courts as fixed. This should not be the case. Rather, the essence of equity has always been that the power of the court should be tailored to the given situation and the specific behavior of the parties in particular. Again, the desegregation cases are a useful example. The Supreme Court’s early cases were decided against a backdrop of “massive resistance” by local authorities,<sup>396</sup> and there was a definite sense that the Supreme Court believed the authorities’ unclean hands justified greater intervention by the courts. As the objections raised to remedial efforts shifted to more genuine concerns, however, the Court required more careful consideration of the objections being raised. As detailed further below,<sup>397</sup> courts need not be

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396. Sabel & Simon, *supra* note 273, at 1022.

397. See *infra* notes 432–433 and accompanying text.

coy when they suspect the agency or the political branch has strategic incentives that conflict with remedying the constitutional violation. Instead of making explosive findings of obstruction, courts can be more diplomatic and use the strategic incentives of the parties as a factor justifying a remedy, regardless of whether there is clear evidence of such behavior in the case at hand.<sup>398</sup>

The essential idea here is one put forth by David Rubenstein. As to administrative law generally, Rubenstein argues the role of each of the branches should not be considered static but would be better conceived as a dynamic question based upon not only the inherent powers of each branch, but also on each branch's logistical ability to control the specific action at issue.<sup>399</sup> In other words, in difficult cases, power should be allocated to whichever institution is in the best position to produce a constitutionally legitimate outcome. Rubenstein's concept of "relative checks" also makes sense in evaluating equitable remedies. The structural incentives of the agency and the political branches should be an important consideration in fashioning a remedy. When those parties have incentives at odds with their constitutional duties and the court occupies a unique position to act as a check against such temptations, the court is justified in going further than in cases in which there are no public choice problems at issue.<sup>400</sup>

This balancing test cannot be conducted in a vacuum, but rather should be used to compare alternatives. In cases in which institutions are failing at their missions, there are rarely any easy answers. Every option will require the striking of some balance between potential effectiveness and separation of powers concerns. Accordingly, remedy options cannot be discarded simply for being problematic or unpalatable in the abstract. Rather, courts must pick their poison and live up to *Marbury*'s promise that every right has a remedy.

#### D. *The New Playbook as Applied to Federal Benefits Agencies*

Whether the blunt, timeline-based approach should be broadly adopted as the first alternative in structural reform litigation is beyond the scope of

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398. Sabel and Simon have already identified one of the advantages of the current experimentalist approach as being that "it directs assessment of the defendant institution's performance failures away from the motivations of the individuals who occupy its senior offices." Sabel & Simon, *supra* note 273, at 1096. This approach extends the blame-avoidance approach to analyzing the performance of the political branches.

399. Rubenstein, *supra* note 203, at 2213–14.

400. In Sabel and Simon's formulation, "immunity to political correction" is one of two *prima facie* elements of the problem that justifies judicial intervention. Sabel & Simon, *supra* note 273, at 1064 (stating that the other element is the underlying institutional failure resulting in a constitutional violation).

this Article. However, this section argues that it is a better remedy than the traditional playbook in the realm of remedying due process violations by federal benefits agencies.

Indeed, this timeline-based approach is much more likely to be effective than judicial micromanagement when it comes to improving claims processing. These types of management restructuring problems are exactly the kind of cases in which the institutional competence of the courts has been seriously questioned.<sup>401</sup> There is a rich literature describing the difficulties in understanding and improving agency operations.<sup>402</sup> There is simply no compelling reason why judges would be capable of solving complex problems of agency operations that frustrate even career managers.

By comparison, the timeline-based approach described above is much more likely to produce measurable results in a reasonable amount of time. As demonstrated by the Department of State's experience discussed above, a backlog in claims processing is exactly the type of problem that is susceptible to remedy through a surge in manpower that, while not necessarily the most efficient use of agency resources, is more easily reversed when the crisis is past. Some simpler tasks may be accomplished through short-term contract labor, while more complex tasks can be tackled by reassignment of experienced employees. Such experienced employees may be familiar with the relevant tasks from past assignments, but are still likely to be easier to retrain if not. Even if they do not have particularized

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401. See, e.g., SANDLER & SCHOENBROD, *supra* note 9, at 142 (arguing that judges cannot resolve the policy problems that lead to structural reform litigation because “what they have to offer is not what policy making requires”); Yoo, *supra* note 225, at 1137–39 (arguing that “[i]n terms of institutional competence, legislatures and bureaucracies appeared much better suited” to weighing the costs and benefits involved in institutional reform).

402. See, e.g., J.B. Ruhl & Robert L. Fischman, *Adaptive Management in the Courts*, 95 MINN. L. REV. 424 (2010) (discussing the successes, failures, and future of adaptive management in improving agency operations); J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996) (discussing how complexity theory explains how laws produce nonlinear effects that make predicting outcomes difficult); Shapiro & Steinzor, *supra* note 40 (discussing how the Government Performance and Results Act of 1993 failed to improve agency operations and proposing positive metrics as an alternative); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422 (2011) (describing the difficulty of designing systems that provide legal institutions with the information necessary to perform their missions). Some of the specific management challenges facing VA have been documented. See Ridgway, *VJRA Twenty Years Later*, *supra* note 24 (describing the problems of the VA adjudication system and how it struggles to balance complexity and informality); Ridgway, *Why So Many Remands?*, *supra* note 60, at 145–47 (discussing how VA's use of an inaccurate definition of *claim* results in a substantial underreporting of the burden faced by the agency).



experience and their assignment to claims processing is temporary, the whole system may benefit when such employees return to their primary assignments with a better understanding of how their work relates to the agency's mission of delivering on constitutionally protected promises.

The timeline-based approach also moves courts toward their traditional role of limited involvement in systemic problems based upon discrete orders. Rather than prolonged and open-ended involvement of the type that has been criticized by both conservative justices, such as Scalia in his dissent in *Plata*,<sup>403</sup> and scholars, such as John Yoo,<sup>404</sup> the court's involvement would be based upon well-defined injunctions focused on objective requirements as required by *Jenkins II*. Moreover, this approach would be consistent with the concurrent theme in administrative law that also counsels courts to keep their interventions into big-picture administrative-organizational issues to a minimum.

Such an approach also respects the separation of powers doctrine by eliminating the types of judicial management of agency operations that raise serious concerns. In the experimentalist approach, courts inevitably become involved in management decisions far beyond those that are strictly necessary to remedy the underlying issues.<sup>405</sup> There may even be a concern that choices about how the mandatory functions at issue are handled may have larger consequences.<sup>406</sup> By comparison, when a blunt, timeline-based remedy is used, the court is not pretending to know better than the other branches how an agency should be run. It avoids judicially imposed procedures that may be inefficient, cause unintended consequences, and interfere with agencies' ability to adapt to future changes. Rather, the political branches are encouraged to solve the problem themselves through management reforms, procedural changes, increased resource allocation, or any other acceptable method. If they do so, the judicial intervention into agency operations would be completely avoided and any changes would be legitimized by the democratic nature of the process.<sup>407</sup> If they fail to do so, the court's solution would be insulated from charges of overreaching.<sup>408</sup>

To the extent that the blunt remedies that might be triggered would still

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403. See *supra* notes 325–330 and accompanying text.

404. See Yoo, *supra* note 225.

405. Sabel & Simon, *supra* note 273, at 1067.

406. See Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011) (considering how judicial rulings in specific cases often have unanticipated long-term effects on how power is distributed among different types of decisionmakers within an agency).

407. See Sabel & Simon, *supra* note 273, at 1091 (discussing situations in which legislatures have responded to structural reform litigation with successful reforms).

408. This is not to say that the solution will be immune to such charges.

invade the province of the political branches, this invasion is likely to be justified by the branches' culpability in causing the constitutional problems. The widespread nature of the problems faced by these disparate federal benefits agencies suggests that their problems have a common contributing cause. The obvious answer is neither new nor surprising. The focus of politicians—both legislators and executives—is inevitably drawn to the next election, which tends to be about what they have done lately for their constituents.<sup>409</sup> Splashy new programs attract a lot more attention than necessary maintenance on past programs, and so established programs may be easily neglected.<sup>410</sup> Unfortunately, neither the new nor the old programs are free. This incentive to constantly create new initiatives and programs creates a vicious cycle in which the expanding number of programs experience ever more serious problems as they compete for limited resources and attention from Congress and the President.<sup>411</sup> This problem can be further exacerbated in situations in which the current office holders do not share the ideology or priorities of the enacting coalition.<sup>412</sup> Indeed, the experience of structural reform litigation at the state level has been that even after a constitutional violation has been found, there is a “lack of political will to provide enough resources—i.e., money—to permit the institution to function properly.”<sup>413</sup>

This pathology is often enabled by the senior leadership of the agencies themselves. Cabinet heads and senior officials often assert that they can fix problems without requiring major new expenditures. However, public choice theory and the problems described above indicate that such pronouncements are simply not trustworthy.<sup>414</sup> Political appointees are

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409. See Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

410. Sant'Ambrogio, *supra* note 41, at 1393; see also *supra* note 339 and accompanying text.

411. In this regard, it is noteworthy that the size of the BVA has remained essentially static over two decades, even as the burden on it has increased enormously. Compare 2010 CHAIRMAN REPORT, *supra* note 77, at 3 (stating that the Board had sixty members in fiscal year 2010), with BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN FOR FISCAL YEAR 1991, at 1 (1992) (noting that the BVA had fifty-seven members with six more in the process of being appointed).

412. Sant'Ambrogio, *supra* note 41, at 1419–20.

413. Hirschhorn, *supra* note 261, at 1819.

414. To continue to use the veterans system as an example, the leading consortium of veterans organizations has criticized the Administration's budget for fiscal years 2012 and 2013 for including savings to be generated by “management improvements,” which it described as “a popular gimmick used by previous Administrations used to generate spurious savings and thus offset the growing cost to deliver VA care.” PARALYZED VETERANS OF AM. ET AL., THE INDEPENDENT BUDGET FOR THE DEPARTMENT OF VETERANS AFFAIRS: CRITICAL ISSUES REPORT FOR FISCAL YEAR 2013, at 6 (2011) [hereinafter FY2013 PVA

likely to feel strong pressure to free up money for the latest presidential priorities and to deny they lack the resources to do their jobs. Those pressures are likely to filter down to career managers at agencies who can reasonably assume that advancement requires suppressing complaints about inadequate resources. This is not to say that agency officials are lying when they deny resource issues to Congress, the courts, and the media. The system necessarily favors advancement for those who perceive problems as caused by issues other than resource limitations.<sup>415</sup> It is reasonable to hypothesize that the Supreme Court's hands-off attitude toward issues of agency delay discussed below also makes things worse; not correcting any individual problem gives it the opportunity to fester.

Indeed, there is a growing recognition that “agencies cannot possibly achieve many of the mandates for which they are responsible with the resources provided by the White House and Congress.”<sup>416</sup> This is not to say that management of these agencies is not a problem, as it certainly can be.<sup>417</sup> However, any court attempting to remedy systemic due process violations at a major federal agency must confront the fact that insufficient resources may very well be a major factor contributing to the problem. A confrontation of some type with Congress over the issue of resources is not desirable, as there is an extensive line of cases rejecting resource limits as a basis for state and local governmental entities not remedying constitutional violations.<sup>418</sup> The essential rationale of *Watson v. City of Memphis*, discussed above,<sup>419</sup> applies to the federal system as well. Budget difficulties do not

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BUDGET], [http://www.independentbudget.org/2013/CI\\_2013.pdf](http://www.independentbudget.org/2013/CI_2013.pdf). The report continued by observing that in the past such “savings were never realized.” *Id.*

415. This is not even an inherently undesirable trait, as the political system should encourage efficient use of agency resources. The concern arises when the pressure pushes the system beyond efficiency to pathological underfunding.

416. Shapiro & Murphy, *supra* note 214, at 26.

417. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-40, SOCIAL SECURITY DISABILITY: BETTER PLANNING, MANAGEMENT, AND EVALUATION COULD HELP ADDRESS BACKLOGS 3–4 (2007), <http://www.gao.gov/new.items/d0840.pdf> (“[M]anagement weaknesses as evidenced by a number of initiatives that were not successfully implemented have limited SSA’s ability to remedy the backlog. Several initiatives introduced by SSA in the last 10 years to improve processing times and eliminate backlogged claims have, because of their complexity and poor execution, actually added to the problem. For example, the ‘Hearings Process Improvement’ initiative implemented in fiscal year 2000 significantly increased the days it took to adjudicate a hearings claim and exacerbated the backlog after the agency had substantially reduced it.”); Ridgway, *VJRA Twenty Years Later*, *supra* note 24, at 289–93 (discussing VA’s struggles to adapt its claims process to the changes resulting from the institution of judicial review).

418. See Kritchevsky, *supra* note 268, at 515 n.160 (citing more than two dozen federal cases).

419. See *supra* notes 232–234.

excuse violations of constitutional rights at any level.

Although the Judiciary may not be able to directly order more resources from Congress to run benefit programs, there is nothing intrinsically wrong with the courts making the political branches confront the difficult funding choices that they have strong strategic incentives to ignore. A helpful comparison is available. Scott Baker and Kimberly Krawiec have proposed a new approach to the problem of statutory interpretation. They note that there is a rich literature in contract law that addresses the problem of incomplete contracts by looking at the reason for the problem.<sup>420</sup> The essence of their proposal is that public choice theory indicates that courts should use vagueness to declare a statute unconstitutional when it appears that Congress strategically left the law vague in order to avoid a politically difficult decision.<sup>421</sup> They argue that, theoretically, courts should invoke the nondelegation doctrine when doing so<sup>422</sup> because they would not be violating the separation of powers doctrine, but rather acting as a check against Congress's temptation to abuse its legislating authority.

The same logic can be applied to the power of the purse and related actions needed to properly support federal agencies. Tough budget decisions are the province of the political branches and should not be second-guessed by courts based upon differing values. However, it is proper for courts to act as a check against Congress's abuse of this power by ordering it to keep the promises it makes that are so well defined so as to create property rights. Of course, countless political promises are unenforceable, and the exercise of this check by the courts cautions against over-classification of statutes as creating property rights.<sup>423</sup> For those

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420. Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 663–64 (2004).

421. *Id.* at 664.

422. *Id.*

423. For example, in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), the Supreme Court determined that there is no protected property right in a court order of protection. *Id.* Such a result was justified because of the impracticality of enforcing all such orders or providing compensation to the victims of every violated order. Although beyond the scope of this Article, one of the core problems in structural reform litigation generally is the lack of definition as to many of the constitutional rights being protected. To the extent that such cases are based upon “a violation of some broad norm—the right to an adequate education [or] the right to access to justice,” Sabel & Simon, *supra* note 273, at 1056, it is inevitable that there will be major difficulties in finding precise and objective remedies under *Jenkins II* that correspond well to the subjective and indeterminate rights being vindicated. It is this problem that undermines the “rights essentialism” approach of Daryl Levinson, which regards finding remedies as merely a derivative issue rather than a necessary component in defining constitutional protections. Compare Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (asserting that remedies inherently reflect different values than constitutional rights), with Yoo, *supra* note 225 (discussing the possibility

promises that do rise to the level of property rights, however, the Constitution provides protections that the Judiciary can administer without trespassing on the prerogatives of the political branches.<sup>424</sup> Having the Judiciary take an increased role in holding Congress accountable would not be an unjustified expansion of judicial power, but simply a new form of the traditional role of courts in checking the political branches, which must adapt to “an era of vastly changed and expanded government activities.”<sup>425</sup>

This is not to say that courts can or should have the power to force Congress to tax and spend. As has been recognized in *Flemming* and many other cases, Congress has the option to modify or eliminate statutorily created benefits. Although some issues will arise on the margin when Congress reacts this way, there is nothing constitutionally wrong with mooting a chronic due process problem by eliminating the benefit at issue.

Instead, courts can—and should—focus Congress’s attention on the severity of the disconnect between its promises and reality. If promises were made that rise to the level of creating a property interest, then they must be kept. Otherwise, it would erode the sociological legitimacy of government. Thus, it is entirely appropriate for courts exercising their equitable powers to remedy constitutional violations to do so in a manner that confronts Congress with difficult choices that it would prefer to avoid. This remedy can be approached from two directions: shutting down the program so that Congress would be forced to intervene to restart it, or redirecting agency resources toward the problem so the political branches’ ability to use the agency for patronage is curtailed until the problem is fixed. As mentioned above, the most extreme remedy invoked in structural reform litigation is simply to shut down the offending institution.<sup>426</sup> Theoretically, courts could reduce or eliminate benefits available under programs that are underfunded. However, this approach would work only when the functions of the shuttered institution could be shifted to other bodies and would be otherwise fraught with obvious problems.<sup>427</sup>

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of courts vindicating constitutional rights through broad structural remedies).

424. This is not to say that such remedies will be immune from charges of judicial bias. It is not hard to imagine a judge being accused of imposing a hyperaggressive timetable with the secret hope of biasing the political response toward cutting the program at issue. Alternatively, a judge who imposes an overly cautious timetable could be accused of coddling the agency and trying to protect a favored program from tough choices. If either instance were clear, then the remedy could be found to be an abuse of discretion.

425. Sabel & Simon, *supra* note 273, at 1091. Although Sabel and Simon argue that this need for expanded checks justifies the expansion of remedies in structural litigation cases, this Article takes the somewhat different view that such a role can be achieved by the judiciary using simpler and more traditional approaches to equitable remedies.

426. See *supra* note 267 and accompanying text.

427. One less obvious problem is that such a remedy might amount to a judicial taking

Accordingly, the more palatable (but not easy) approach would be to continually ratchet up the shifting of resources within an agency to address the constitutional problem until the constitutional violation was cured or the disruption to secondary functions became so intolerable that a political solution was found.<sup>428</sup> In particular, a court might consider the somewhat extreme measure of enjoining an agency from devoting any resources to new initiatives by the President and Congress until the constitutional violation were fixed.<sup>429</sup> Such an order would be within the court's equitable powers as a form of sequestration.<sup>430</sup> This would create pressure on the political branches to decide whether and how to keep the promises that have been made and avoid having the Judiciary make the difficult and often unpopular decisions that governing often requires.<sup>431</sup> Regardless of whether the promise were kept, modified, or withdrawn, at least the result would be legitimate because there would be no disconnect between the promise and reality, and the political branches would have the final say in how the gap were closed.

This reveals one final advantage of timeline-based remedies. These remedies would avoid requiring courts to assign blame and make politically

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of the type Justice Scalia discussed in the portion of his majority opinion in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* that failed to attract a fifth vote. 130 S. Ct. 2592, 2601 (2010) (“Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.”).

428. To continue using VA as an example, a substantial minority of its budget is for discretionary functions. See *U.S. Department of Veterans Affairs Budget Request for Fiscal Year 2012: Hearing Before the H. Comm. on Veterans' Affairs*, 112th Cong. 11 (2011) (testimony of Secretary Eric K. Shinseki requesting \$62 billion in discretionary funds and \$70 billion in mandatory funding for VA for fiscal year 2012). Nearly 90% of these discretionary funds are used to provide health care to veterans. PARALYZED VETERANS OF AM. ET AL., *THE INDEPENDENT BUDGET FOR THE DEPARTMENT OF VETERANS AFFAIRS: CRITICAL ISSUES REPORT FOR FISCAL YEAR 2013*, at 5 (2011), [http://www.independentbudget.org/2013/CI\\_2013.pdf](http://www.independentbudget.org/2013/CI_2013.pdf). Accordingly, redirection of a substantial portion of VA's discretionary budget would likely reduce the health care available to veterans through VHA.

429. Of course, initiatives directed at fixing the problem would be an exception. VA's most recent performance report lists sixteen major initiatives, many of which are designed to address issues contributing to the problems at issue in *VCS*. VA FY2010 PERFORMANCE REPORT, *supra* note 16, at I-65 to -79.

430. See *supra* note 265 and accompanying text.

431. Aside from public choice grounds, pushing Congress toward confronting difficult resource allocation problems can also be justified on deliberative democracy grounds. As political fiduciaries, the duty of good faith requires politicians to engage in a continuing dialogue about how changing circumstances affect the continuing validity of past choices, and it is, therefore, fair for the judiciary to initiate this conversation when the political branches have strategic incentives to ignore such problems. Ponet & Leib, *supra* note 208, at 1261.

charged determinations of causation.<sup>432</sup> In particular, they would also avoid requiring courts to determine whether agency dysfunction was caused by management issues or inadequate resources.<sup>433</sup> Rather, the court could provide the political branches the opportunity to define and solve the problem however they saw fit. Should that fail, the court could narrowly focus on shifting resources toward blunt solutions that minimize policy choices by the Judiciary and continue to provide the preferred actors with the opportunity to implement better solutions.

Ultimately, the timeline-based remedy proposals here do not presuppose a cause of the constitutional violation. Rather, the proposals are based upon the much simpler proposition that delays in claims processing by federal agencies *can* be solved by the blunt application of additional resources, even though the political branches *might* be able to solve them through other means. The Constitution requires that they *must* be solved, and courts should therefore apply the available remedy that has the best chance of being effective while also minimizing separation of powers concerns. For agencies charged with managing claims for federal benefits, the timeline-based approach described above fits the bill.

#### CONCLUSION

Modern structural reform litigation was developed in an era when the central problem was that some state and local officials were not interested in living up to their constitutional duties. It was the role of “hero judges” at this time to coerce these officials into doing the right thing and, if necessary, displace them altogether and impose the required changes. However, those problems of willful disobedience have given way to a new set of problems in which constitutional violations stem from a thicket of administrative complexity and legislative neglect. In this new era, the playbook followed by the judges of the desegregation era is breaking down and requires rethinking.

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432. The Supreme Court in *Plata* seemed to intentionally avoid assigning specific responsibility for the constitutional violations at issue: “In addition to overcrowding, the failure of California’s prisons to provide adequate medical and mental health care may be ascribed to chronic and worsening budget shortfalls, a lack of political will in favor of reform, inadequate facilities, and systemic administrative failures.” *Brown v. Plata*, 131 S. Ct. 1910, 1936 (2011).

433. Such determinations may not even be possible. As noted above, the complexity of agency operations makes it difficult, if not impossible, to predict in advance how changes will affect the system. Similarly, even substantially imperfect systems can function even if there may be more efficient ways of operating. Given the need to satisfy the requirements of the Constitution, it is necessary to provide sufficient resources to allow the system to function as it constantly searches for potentially more efficient methods that may or may not exist.

The purpose of this Article is not to argue that the incredibly hard problems of structural reform litigation involving federal benefits agencies have an easy answer. Rather, at least in the context of those agencies, constitutional values are better served by skipping the traditional step of years of supervised failure before applying blunt, timeline-based remedies.

The reasons for experimenting with a new playbook are numerous. First, major federal benefits agencies, like VA, are so large and complex that there is little reason to believe that a judge or special master trying to micromanage one of them would be able to succeed where experienced agency managers have not. Second, blunt timeline-based remedies respect the separation of powers by leaving primary control with the agency and the political branches so that constitutional issues can still be solved through internal reforms. Third, if the blunt remedies are triggered, systemic delay and accuracy problems are exactly the kinds of issues that would likely be improved by the brute-force application of more resources to the processing of claims. Fourth, whether the due process violation is resolved before or after some level of blunt remedy is triggered, the overall timeline for judicial involvement would be minimized. Fifth, there are good reasons, grounded in public-choice theory, for believing that resource limitations are a root cause that the political branches will ignore unless forced to confront and, therefore, it is reasonable to set the litigation on an early course to confront these issues rather than let beneficiaries suffer for years or decades while politicians deflect responsibility.

Ultimately, courts need not make politically charged determinations apportioning blame between agency dysfunction and congressional underfunding. It is debatable whether such questions have a correct answer, and increased resources can improve claims processing regardless of whether there are also management improvements to be had. Both claimants and the Constitution are better served by avoiding judicial micromanagement of complex problems beyond the institutional competence of judges. Rather, it makes sense for judges to pressure agencies and politicians to find *a* solution to the constitutional violation that works, rather than spend years in a fruitless effort to find *the* solution that perfectly balances the competing concerns involved. Such a process will not only be faster and more effective but will produce outcomes that are legitimized by the political process that produces them.

The problems facing federal benefits agencies are likely to worsen as the United States is swept up in this era of global debt crises and budgetary austerity. As budgets tighten, however, politicians will have even more incentives to avoid confronting the true costs of the promises that have been made. It is not for courts to decide what promises should be made, kept, revised, or retracted. When promises become property rights, however,



courts can demand that rhetoric match reality. It is never easy or comfortable to force individuals or groups (especially powerful ones like the President and Congress) to face inconvenient truths. However, that is one of the roles assigned to the Judiciary in our system of checks and balances. The victims of constitutional violations—whether they are veterans, school children, or prisoners—deserve no less.